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## FISCAL IMPACT REPORT

**SPONSOR** Shendo **ORIGINAL DATE** 02/08/21 **LAST UPDATED** 02/20/21 **HB** \_\_\_\_\_  
**SHORT TITLE** State Indian Child Welfare Act **SB** 278/aSIRC  
**ANALYST** Bachechi

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>	See Fiscal Implications					

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates House Bill 209

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Children, Youth and Families Department (CYFD)  
 Early Childhood Education and Care Department (ECECD)  
 Administrative Office of the Courts (AOC)  
 Attorney General (NMAG)  
 Human Services Department (HSD)  
 Indian Affairs Department (IAD)  
 Law Office of the Public Defender (LOPD)

#### Synopsis of SIRC Amendment

The Senate Indian, Rural and Cultural Affairs amendment to Senate Bill 278 clarifies the intent of the legislation to give preference and priority to Native American guardians, custodians, children, and tribes. The state must make a good effort in prioritizing notification and communication with tribes in collaboration of the delivery of welfare services to Native American children. New Mexico’s SICWA creates checks and balances that ensure identification and collaboration within compliance of court jurisdiction.

The SIRC amendment makes the following technical and grammatical changes:

- The definition of “Indian Child” is amended to clarify the three eligibility requirements. It strikes “and is,” making the final eligibility requirement “the biological child of a

member of an Indian tribe” an additional option, rather than a requirement.

- Section 11 is amended to clarify that during an investigation and pending a proceeding, the Children, Youth, and Families Department (CYFD) must coordinate services with the Native American child’s tribe to prevent taking the child into custody and provide culturally relevant services to the parents. In addition, all active efforts to coordinate services shall be documented in any subsequent action resulting in the child coming into the department’s custody.
- Section 11 also includes a new subsection F that requires the court to make a written determination as to whether CYFD has made active efforts to provide services and support to preserve and reunify the family. The remaining numbering of this section is amended to reflect this change.
- Section 13 is amended to require CYFD to document in its petition the active efforts to provide remedial services and rehabilitative programs to prevent the break-up of a family and the reasons why these services were not successful if that reason is known.
- Section 13(C) is amended to require the department document active efforts in writing and demonstrate the quality and quantity of services and assistance provided to the family on the record.
- Section 13 is amended to provide a petition may include identifying *and establishing* appropriate services for the child’s parents.
- A new subsection is added to Section 13 to allow the department to include in the petition any other efforts appropriate to the Native American child’s circumstance.
- Section 16 is amended to clarify that an employee of the department may not serve as a qualified expert pursuant to this section.
- Section 18 is amended to expand the list of provisions that, if violated, may invalidate an action if challenged by a parent, custodian, or Native American child’s tribe. The list now includes the following sections:
  - 12 - Right to Intervene,
  - 15 - Child Custody Hearings-Requirements-Right to Counsel
  - 17 - Parental Rights-Voluntary Termination-Consent-Withdrawal-Fraud or Duress
  - 19 - Placement Preferences-Adoption-Placement of Indian Children-Required Training
  - 20 - Change in Placement- Placement Preference-Department Duties
  - 22 - Dispositional Judgements

### Synopsis of Original Bill

Senate Bill 278 would enact the State Indian Child Welfare Act (SICWA) as part of the Children’s Code, creating a New Mexico version of the federal Indian Child Welfare Act (“ICWA” 25 U.S.C. §§ 1901-63 *et seq.*). This bill consolidates provisions and establishes additional requirements governing child custody proceedings involving Indian children and amends or repeals other titles in the Children’s Code to align with the new act. The bill also fulfills a portion of the [Kevin S. settlement](#) by facilitating the drafting and promotion of a state ICWA law that mirrors and expands upon the federal ICWA law.

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 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

SB278 contains mandatory training provisions and may expand rights to court-appointed counsel. These provisions are likely to have impact on the operating budgets of the affected state agencies.

The bill 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. Specifically, paragraph F states AOC, in collaboration with CYFD, will develop and deliver mandatory training to all children's court judges, district court judges and all attorneys, guardians ad litem and youth attorneys who are both court-appointed or whose practice involves or represents clients in the areas of child welfare or juvenile justice. While AOC coordinates and delivers multiple trainings throughout the year,

some of which are in collaboration with CYFD, this requirement is in addition to the current budget and resources of AOC. This also adds mandatory training for judges, which may require additional time off the bench. There is no appropriation requested with this bill to account for the time and efforts required.

The right of the Native American child's parent or Indian custodian to court-appointed counsel in a child custody proceeding, as detailed in SB278, is currently contemplated and covered by AOC's court-appointed attorney program. However, SB278 may also require court-appointed counsel in a proceeding pursuant to the Delinquency Act. There is currently no mechanism for the Administrative Office of the Court's court-appointed attorney program to recruit, retain, contract with, train, and pay court-appointed counsel for parents of an accused delinquent child.

The LOPD represents children in state court under the Delinquency Act. LOPD does not believe the bill intends or authorizes that court-appointed counsel for parents of an accused delinquent child be provided through the LOPD. Statutorily, LOPD can only represent individuals themselves accused of crimes or serving a sentence after conviction. LOPD assumes the appointment process would align with existing procedures for appointing counsel to parents in abuse and neglect proceedings, or equivalent.

## **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. 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.” SB278 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**

Senate Bill 278 (“SICWA”) provides a new section to the Children’s Code titled the “State Indian Child Welfare Act,” codifying and expanding on the federal ICWA. The SICWA consists of 30 sections. Key sections are summarized below.

#### **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.

#### **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: 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 take certain affirmative steps to determine whether the child is a Native American child.

#### **Section 6: 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 to the jurisdiction of the tribal court. The tribal court may decline jurisdiction. State courts must hold a hearing and create a record of such proceedings, and must allow parents to participate in communications regarding jurisdiction to be notified of such communications.

Section 7: 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 8: 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 9: 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 10: 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.”

Section 11: 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. 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.

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.

Section 12: 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 13: 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.

Section 15: 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.

Section 16: 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. Only the Native American child's tribe may object to a qualified expert witness identified by CYFD.

Section 17: 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. 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 18: 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 6, 11 or 17 of the State Indian Child Welfare Act.

Section 19: 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 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 20: Change in Placement- Placement Preference

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 19 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.

Section 21: Maintenance of Culture in Pre-adoptive, Adoptive and Guardianship Placement

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 22: Dispositional Judgments

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 23: Return of Custody

When a final decree of adoption of an 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 24: 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 25: 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: Emergency Removal or Placement of an Indian Child

Allows the emergency removal of a Native American child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from the parents or custodian or the emergency placement of the child in a foster home or institution under the Children's Code to prevent imminent physical danger or harm to the Native American child.

Section 28: Conflict of Laws Provision

Provides that the provisions of SICWA are in addition to other requirements for child custody hearings in the Children's Code and the Kinship Guardianship Act. To the extent that the provisions of SICWA are in conflict with ICWA, the Children's Code or the Kinship Guardianship Act, the provisions of SICWA shall apply.

**Issues Identified**

1. Delinquency Act

SB278 may requires CYFD to provide notice of rights that currently do not exist. SB278, Section 11, paragraph E (2) and (3), requires CYFD to notify the parent or Indian custodian and the

Native American child's tribe in a child custody proceeding or “in a proceeding pursuant to the Delinquency Act” of (1) the right of the Native American child's parent, Indian custodian, or Native American child's tribe to petition the state court to transfer the proceeding to tribal court and (2) the right of the Native American child's parent or Indian custodian to court-appointed counsel. These rights do not currently exist in the Delinquency Act and this bill does not propose any changes to the Delinquency Act. There is no information, process, or program identified in SB278 as to who would recruit, retain, contract with, train, and pay these attorneys and whether this obligation would fall on the Administrative Office of the Court's court-appointed attorney program or the Law Office of the Public Defender's (LOPD); the LOPD represents children under the Delinquency Act.

The same issues arise with providing notice of a right to transfer a case in a proceeding pursuant to the Delinquency Act. A significant array of considerations would need to be accounted for in expanding such rights under the Delinquency Act, including the obligations and duties of the district attorney's office, victims' rights, established law governing the exclusive and concurrent jurisdiction of state, federal, and tribal courts in criminal matters, etc.

If it is the intent of this bill to expand the Delinquency Act as it pertains to Native American children, the Delinquency Act itself should be modified, and expert stakeholders should be consulted to ensure any such modifications comport with existing law and rules.

## 2. Rights of Intervention

SB278, Section 12, limits the right of intervention in a child custody proceeding to “only the Indian child's relative or a member of the Indian child's extended family, the Indian custodian of the child and the Indian child's tribe.” Additionally, it modifies the Abuse and Neglect Act to prohibit permissive intervention outlined in NMSA 1978 32A-4-27 for an Native American child, and expands those allowed intervention by right to include the Native American child's relative or a member of the Native American child's extended family. Notably, this bill allows the intervention by right of an Indian custodian, but the modification to intervention in the Abuse and Neglect Act does not.

## 3. Qualified Expert Witness

IWCA requires the testimony of a qualified expert witness at multiple stages of an abuse and neglect matter. SB278 addresses the requirement of CYFD to communicate with tribes and identify qualified expert witnesses in a timely manner, an issue that can cause significant delay. However, SB278, Section 16, paragraph D, states “only the Indian child's tribe may object to the qualified expert witness that the department has identified and may stipulate to a qualified expert witness.” There are varying ideas of what this paragraph is trying to accomplish, including providing a tribe the ability to decline to have one of its active social workers used by CYFD as a qualified expert witness. However, the language limiting the party who may object to a qualified expert could be interpreted to limit parties' counsel from objecting to any portion of the foundation or testimony of a qualified expert witness. This would be contrary to the due process rights of all parties, the rules of evidence, and an attorney's ethical obligation to zealously advocate for their client.

## 4. SICWA Rules

SB278, Section 30, states CYFD and the court shall promulgate rules to implement the

provisions of the State Indian Child Welfare Act. However, the New Mexico Rules Annotated have specific rule-making procedures overseen by the New Mexico Supreme Court (NMRA 23-106.1 - Supreme Court rule-making procedures) that provide detailed process and procedure on how rules are made. In addition, there is a Supreme Court Children's Court Rules Committee that would be tasked with this endeavor. The proposed language in SB278 falls outside the current legal mechanism for rule-making.

5. Applicability to All Open Cases

SB278 states the provisions of this act apply to all open cases prior to July 1, 2021. This retroactive application will likely have severe and grave consequences on the timeliness to permanency for many children and families in New Mexico (a quick data review of the courts Odyssey system shows there are currently 1,254 open abuse and neglect cases in New Mexico and 874 are beyond the first permanency hearing). For example, SB278 has heightened requirement of active efforts by CYFD in many areas and requires written findings of those active efforts by the court. None of the open cases will meet those requirements because those are not findings the court currently makes. Essentially, all cases would be out of compliance. This would have the most severe consequences on cases in which children have spent the most time in custody and are close to permanency. SB278 has very specific and extensive requirements for the placement of a Native American child in a home for the purpose of guardianship or adoption. Children on the precipice of permanency will have to endure extended time in foster care to allow for the development of process, procedure, forms, and holding hearings to retroactively come into compliance with SB278.

6. Cultural Compact

SB278 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. SB278 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.

7. Aggravated Circumstances

SB278 removes the ability for the court to consider aggravated circumstances in the case of a Native American child. Aggravated circumstances are defined in the Abuse and Neglect Act. A finding of aggravated circumstances can be a basis for CYFD not being required to make reasonable efforts to preserve and reunify the family and can significantly shorten the timeline in which CYFD is able to seek termination of parental rights and adoption.

8. Conflict of Laws Provision

The State Indian Child Welfare Act (SICWA) could be subject to challenge as being preempted by the federal Indian Welfare Act of 1976, 25 U.S.C.A § 1903 *et seq.* The U.S. Supreme Court has "long recognized that state laws that conflict with federal law are without effect." *Altria Grp.*,

*Inc. v. Good*, 555 U.S. 70, 75 (2008) (internal citations omitted).

The Conflict of Laws provision contained in Section 28 does not properly account for any federal preemption of the State Indian Child Welfare Act by the federal Indian Child Welfare Act of 1978. The Conflict of Laws provision in Section 28 provides that “the extent the provisions of the State Indian Child Welfare Act conflict with the provisions of any other provisions of the federal Indian Child Welfare Act of 1978...the provisions of the State Indian Child Welfare Act shall apply.” It is notable that most of the provisions of the State Indian Child Welfare Act track the language of the federal statute. However, if the federal Indian Child Welfare Act were to be in conflict with a provision of the State Indian Child Welfare Act, the state law would likely be preempted and the State Indian Child Welfare Act would not apply.

#### 9. 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 SB278, 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 that this provision violated the child’s constitutional substantive due process right to have placement in a stable and permanent home. *Id.* at 1315-16. The *In re Santos Y* court found that that, in the case of a Native American child who had a minimal relationship with his assimilated parents, the tribal and cultural interests of the statute “can serve no purpose which is sufficiently compelling to overcome the child’s fundamental right to remain in the home where he ... is love and well cared for, with people to whom the child is daily becoming more attached by bonds of affection and among whom the child feels secure to learn and grown.” *Id.* SB278 may be subject to a similar constitutional challenge.

### **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**

The companion bill to SB278 is HB209.

SB278 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

## TECHNICAL ISSUES

### 1. Definitions

This bill incorporates definitions from the federal ICWA statute but adds several definitions, including definitions for “cultural compact,” “fictive kin,” “member or membership,” and “relative.” In defining fictive kin, SB278 greatly expands on and strikes the current definition under the Abuse and Neglect Act. However, it does not perfectly align with the definition proposed by SB97 under the proposed Voluntary Placement and Family Services Act. And yet a third definition for “fictive kin” within the Children’s Code is proposed in SB257 under the Delinquency Act. That is a total of three slightly different proposed definitions for fictive kin in the Children’s Code and a proposal to strike the current definition.

### 2. “Active efforts”

Active efforts are a keystone of ICWA, and it is clear this bill is intended to expand on the federal requirements and definitions for active efforts. However, the bill contains a lack of uniformity in definitions that could lead to lack of uniformity in practice, argument, and enforcement. There are also a number of sections where language in this bill differs from the language in the federal ICWA. Conflicts in language and definitions could cause confusion in practice, especially in cases where the federal definition is broken apart and placed in different sections throughout the statute. Specifically:

- SB278 defines “active efforts” under the definitions section (Section 2, paragraph A), which is a significantly truncated version of the federal ICWA definition for active efforts.
- In Section 13, paragraph C, SB278 then expands the definition of active efforts, more closely matching the federal definition, but for that section only. Section 13, paragraph C, mirrors the federal definition in defining active efforts to permissively include “identifying, notifying, and inviting representatives of the Indian child's Tribe to participate in providing support and services to the Indian child's family,” but the bill does not include the portion of the definition that goes on to state “and in family team meetings, permanency planning, and resolution of placement issues.” SB278 does not include the federal language of “*all available* culturally appropriate family preservation strategies” and does not include the federal language that states visits should be “in the most natural setting possible.”
- The SB278, Section 13, paragraph C, active efforts definition also does not include the federal language that such efforts may include “considering alternative ways to address the needs of the Native American child's parents and, where appropriate, the family, if the optimum services do not exist or are not available.”

- SB278, Section 19, paragraph C (3), also has a section-specific definition for active efforts as it relates to placement preferences for an Native American child, stating these efforts at minimum, “shall include: contacting the Indian tribe; conducting a relative search; interviewing relatives throughout the case; continually assessing and reevaluating relatives; providing the Indian tribe with all information in regard to family members; offering relative limited license; assisting relatives through the licensing process and making the licensing process more accessible; continued contact, including visitation, providing culturally appropriate interventions; and first-line intervention.”

### 3. Reason to Know

ICWA applies to the Children’s Code when a matter involves an Native American child, or if a determination has not been made, when there is “reason to know” the child is an Native American child, as defined by ICWA. The “reason to know” standard is in the 1978 ICWA law. This language often gets watered down during conversational discussions to “reason to believe.” This standard is important in the law, and SICWA should not (and does not) contain any “reason to believe” language. However, there are multiple instances where SB278 proposes to modify the Abuse and Neglect Act to add the incorrect “reason to believe” standard. The Abuse and Neglect Act should only be modified if the correct “reason to know” standard is used. Below are the instances in SB278 with the incorrect “reason to believe” standard:

Section 36, paragraph D; page 58, line 16; NMSA 1978 32A-4-2 (D)

Section 41, paragraph F; page 83, line 4; NMSA 1978 32A-4-28 (F)

Section 42, paragraph D; page 86, line 5; NMSA 1978 32A-4-29 (F)

Nowhere in ICWA or anywhere in SB278 is the term “reason to believe” defined.

### 4. Withdrawal of Consent to Foster Care Placement

SB278, Section 17, paragraph B, allows a parent or Indian custodian to withdraw consent to “a foster care placement,” and on such withdrawal, the Native American child “shall” be returned to the parent or Indian custodian. SB278 defines a “foster care placement” to include “a voluntary agreement pursuant to the Family Services Act between a parent, guardian, or Indian custodian and the department placing the Indian child in foster care.” SB97 (Guardianship Changes), amending the Kinship Guardianship Act and (Voluntary Placement and) Family Services Act, states a parent, guardian, or Indian custodian can withdraw consent to a voluntary placement at any time and the child shall be returned within “seventy-two hours” of when the written or verbal demand was made. The timelines of these two proposals do not line up.

### 5. Department Obligation to Establish Membership

Current case law requires CYFD, as the legal guardian of children in its custody, to actively pursue membership for Native American children eligible for membership in a Native American tribe. SB278 obligates CYFD to do the same; however, it conditions this obligation on both a parent or a Native American tribe’s discretion (Section 5, Paragraph B). This provision may prevent the state from forcing tribal membership on a child when their parent(s) or tribe chooses otherwise and return this decision to the Native American family and tribe. However, it may place more discretion in the hands of a parent, in particular a non-Native American parent, than desired or expressed by the spirit of the law.

## **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>1</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.

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<sup>1</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](http://cssp.org))).