

# Supporting Native Children

A Guide for CASA/GAL Advocacy in State Courts



*Supporting Native Children:  
A Guide for CASA/GAL Advocacy in State Courts*

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**TRIBAL  
COURT**

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This guide was developed by Sarah Cline, an intern with the School of Public Policy at Oregon State University in consultation with Angela Fasana, the Court Administrator for the Confederated Tribes of the Grand Ronde Community of Oregon. Points of view or opinions in this document are those of the authors and do not necessarily represent the official position or policies of the Confederated Tribes of the Grand Ronde Community of Oregon, or Oregon State University.

Nothing contained in this guide is to be considered as the rendering of legal advice for specific cases, and readers are responsible for obtaining such advice from their own counsel. This guide and any worksheets are intended for educational and informational purposes only.

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# Introduction

If you are a CASA/GAL volunteer representing a Native American child and you lack tribal affiliation or familiarity with Tribal Nations (i.e. their history, political status, cultural values and practices) this guide is designed for you!

In reviewing the four primary CASA/GAL volunteer responsibilities—investigation, advocacy, facilitation, and monitoring—this guide explains what is unique about serving the best interests of a Native youth entering, currently experiencing, or exiting foster care. Before we begin, we should cover some basic facts and figures.



Image: Foster Family Liaison/ Cook Inlet Tribal Council

## *Native children are overrepresented in the foster care system*

- Across the U.S., Native American children are separated from their families at a rate of **2.2 times** that of the general population.
- According to the map (opposite page), Native youth are overrepresented in the foster care systems in 20 states.
- In North Dakota, South Dakota, and Nebraska **1 in 9** Indian children are in foster homes, adoptive homes, or boarding facilities. Indian children are placed in care at a rate of **20 times** the national average in these states.

## *Native children are more likely to be placed in non-Native homes*

- In South Dakota, **13%** of Native foster kids are placed in Native homes.
- Before the Indian Child Welfare Act (ICWA) in 1978, approximately **85%** of all Indian foster children and **91%** of adoptees were in non-Indian homes.

\*Data obtained from Padilla, J. and Summers, A. (2011); Sullivan, L. and Walters, A. (2011a); American Academy of Child & Adolescent Psychiatry (1975)

## Disproportionate Rates of Native American Children in Foster Care, 2011

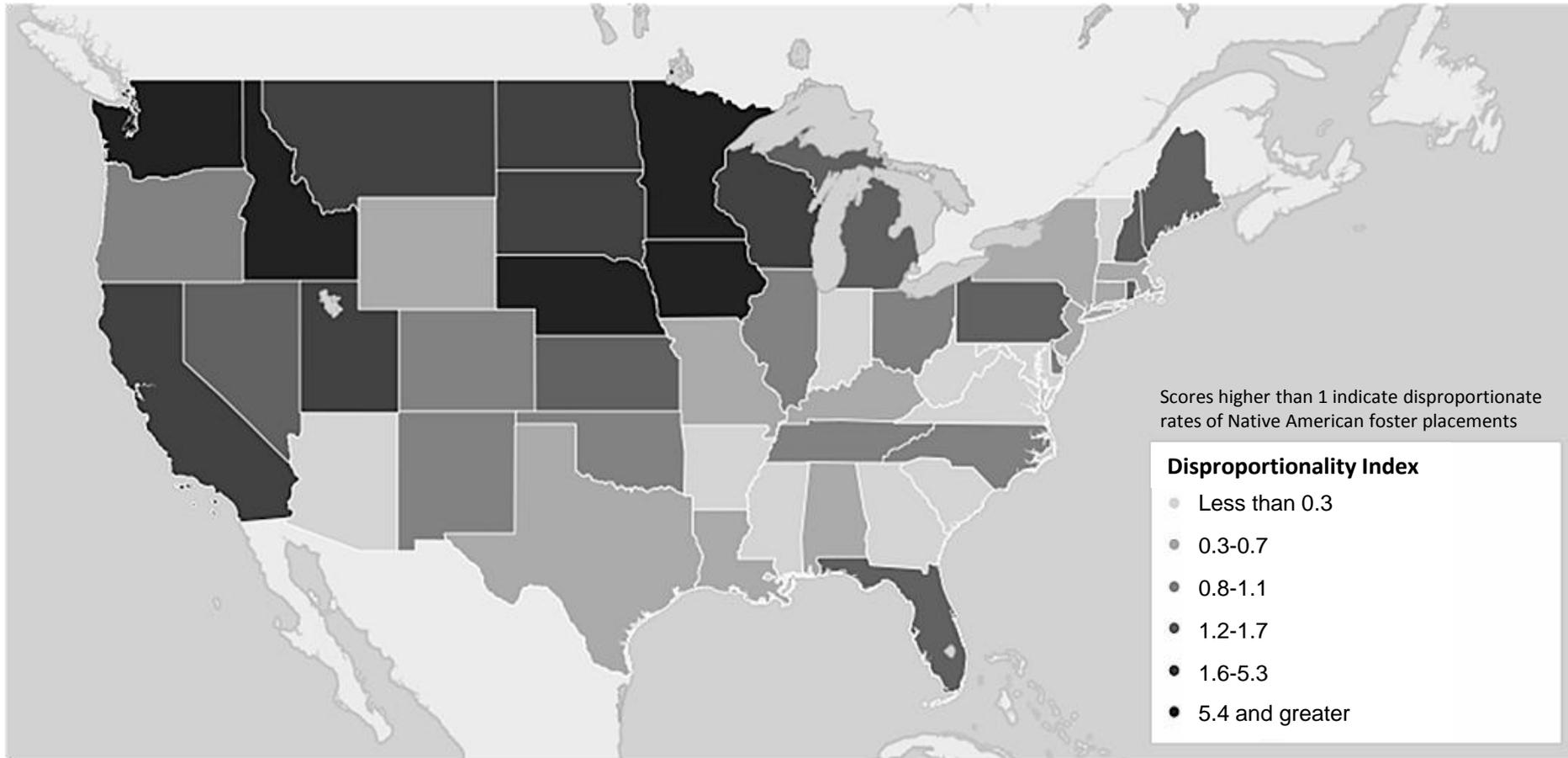


Image: Map courtesy of National Council of Juvenile and Family Court Judges (2011); Quinn Ford, Alyson Hurt, Barbara Van Woerkom and Alicia Cypress / NPR

***“Indigenous peoples have the collective right to live in freedom, peace, security, as distinct peoples, and shall not be subjected to any act of violence, including forcibly removing children of the group to another group.”***

Declaration on the Rights of Indigenous Peoples, United Nations 2007

# Effects of Removal

## *For the Child*

“We know that Indian kids in foster care settings where they are disconnected from siblings, family, and their culture are at much greater risk for behavioral and mental health problems.”

– Dr. Antony Stately, University of Washington

“Indian children who are placed in non-Indian settings suffer consequences when they come into adolescence and adulthood. They have difficulty in education, in work, in interpersonal relationships... because they don’t feel like they fit in either place.”

– Honorable Jill E. Tompkins, National American Indian Court Judges Association



## *For the Tribal Nation*

“It’s a different way of looking at it, but for our children, they don’t belong just to the mother and the father, they don’t belong just to the grandparents, they belong to the community...”

– Rose-Margaret Orrantia, South Dakota State University

“Our greatest asset as a nation is our children. We have to have those citizens there that will help us in the future define who we are as a people and develop our Tribes.”

– David L. Gover, Native American Rights Fund

## Tribal Nations have endured many attempts at assimilation

- In the 1880s-1940s, the federal government tried to dismantle Tribal Nations by breaking up their lands and communities.
- In the 1950s-60s, the federal government sought to end the existence of Tribes by terminating their sovereign status and laying claim to their lands.
- Throughout this period, Indian Boarding Schools were used to “Kill the Indian, Save the Man” – encouraging Native youth to abandon their cultures, languages, traditional names and identities. It was often said that the child welfare system picked up where boarding schools left off.

## Every Tribe is unique

- As of January 2012, there are 566 federally recognized Indian Nations and Alaska Native villages in the U.S.
- There are another 400+ Indian Nations that are non-federally recognized.
- Some Tribes were terminated by the federal government, but this does not mean that their language, culture, customs, and citizen base do not remain intact.
- Tribal Nations determine citizenship requirements as foreign nations do—and these may vary broadly. Some Tribes have specific blood quantum requirements (e.g. 1/16<sup>th</sup> is most common), require proof of ancestry (e.g. family member historically listed on Tribal rolls); some are determined by patrilineal and matrilineal descent.
- Some Tribes have significant resources (economic, social, environmental, etc.), while others do not.
- **Do not make broad assumptions; adopt a learning attitude and acknowledge ignorance of Tribal history and affairs if/when applicable.**



Image: *Medicine Wheel, White Earth*

Attend to the physical, emotional, spiritual, and mental well-being of the child you are serving.

Keep culture at the center.

# The Indian Child Welfare Act (ICWA)

## WHAT IS THE ACT?

Congress adopted ICWA with the intent of actively promoting the continued viability of Indian nations, recognizing that a Tribe deprived of its children could never have a future. ICWA affirms the sovereignty of Indian Tribes and affirms the jurisdiction the Tribes have always had to address the needs of their children. ICWA also regulates the handling of cases involving Indian children who come into contact with state courts. ICWA addresses both the removal of Indian children from their homes and communities as well as addresses the need for placement of Indian children in homes where they can retain their family and Tribal ties.

## WHEN WAS THE ACT PASSED?

Adopted in 1978, ICWA is one of the first policies adopted by the federal government in the new (and current) era of Tribal Self-Determination.

## WHY WAS THE ACT PASSED?

The major impetus for the passage of ICWA were studies and hearings conducted by Congress in the 1970s revealing that the unwarranted removal of Indian children from their homes was common. Statistics showed that **at a minimum**, 25 percent of all Indian children were either in foster homes, adoptive homes or boarding schools. Most often, the Indian children who were removed by state officials (often never to return) had not been physically abused in their homes. However, state social workers and state judges still routinely judged these families as unfit because of “neglect” or “emotional mistreatment”. The decision to permanently remove Indian children was often related to child-rearing practices that were common and accepted in Indian communities but unfamiliar to state social workers and judges.

# The Indian Child Welfare Act (ICWA)



Images: *Miss Indian Princesses / Sarah Cline; Eagle Fans / Red Path Native American Regalia*

## WHO DOES THE ACT APPLY TO?

The act applies to children enrolled or eligible for enrollment with a federally recognized Tribal Nation. Not all Indian children are protected by ICWA, only those children who possess the political status of being enrolled or eligible for enrollment in a federally recognized Indian Tribe.

## WHY MUST A CHILD BE ENROLLED OR ELIGIBLE FOR ENROLLMENT?

ICWA is not a race-based law, but a law that is based on political status. The U.S. recognizes that certain Tribes are separate political nations for the purpose of child welfare. A child that is not enrolled or eligible for membership, even though they may possess Indian heritage, does not have the political status of being a citizen of a Tribal nation. If the Act applied to all children with Indian heritage it would be a race-based law and would be unconstitutional.

# The Indian Child Welfare Act (Cont.)

## WHAT IS REQUIRED OF STATE COURT TO COMPLY WITH ICWA?

The Act has several requirements for State Court compliance. The three that are directly related to CASA volunteer work are:

### I. NOTICE

States that know or have reason to know that an Indian child is involved in a child custody proceeding must notify the identified Tribes. This notice to the Tribe is critical to jurisdiction. If it is later determined that the child is an Indian child as defined by the Act and the state did not provide notice to the Tribe, delay and jurisdictional issues may arise. As a CASA volunteer, it is imperative that you are consistently asking the court and the state child welfare agency to make a determination about whether the child is an Indian child and about whether the Tribe or Tribes have been notified.

### II. ACTIVE EFFORTS

If the state is seeking to place an Indian child in foster care, the state child welfare agency must make active efforts to provide services to prevent the breakup of the family and must demonstrate with a qualified expert witness that continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child. The standard of “Active Efforts” is a heightened standard as compared to cases involving non-Indian children.

### III. PLACEMENT

The Act sets forth placement provisions for when Indian children are placed in foster care. Absent good cause, placement of an Indian child shall be in accordance with these placement provisions: i.) A member of the Indian child’s extended family; ii.) A foster home licensed, approved, or specified by the Indian child’s Tribe; iii.) An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or iv.) An institution for children approved by an Indian Tribe or operated by an Indian organization which has a program suitable to meet the Indian child’s needs.

# Investigation

## Questions to ask

- When you are appointed to a child, **ask if the child is of Native heritage**. Make sure a final determination has been made. Continue to ask until a definitive answer is given.
- If the child is of Native heritage, **ask if the child is enrolled or eligible for enrollment in a Federally recognized Tribe**. Continue to ask state agencies to make a determination about the child's enrollment status. Remember ICWA does not apply unless the child is enrolled, or eligible for enrollment.
- If the child is enrolled or eligible for enrollment, consistently **ask if the requirements of the Indian Child Welfare Act are being followed**. Ask if the child is eligible for Tribal services through the Tribe or other Federal Indian Services such as Indian Health Services or Tribal educational services.
- **Ask if potential foster placements will support the cultural well-being of the child.**
- If in care, **ask if the child feels connected to their Tribal community** (i.e. Does the child receive monthly updates/newsletters from their Tribe? Do they participate in powwows, sweats, round dances, canoe journeys, etc.? Do they spend time with their extended Native family?)



## Sources of information

- Extended family—as potential foster placements, as couriers of family history and knowledge, and as constant ties to the Tribal community.
- Tribal Resource Directory— make contact with the administrators of Tribal programs to determine what services are available to your child (i.e. Indian Education Program, Tribal Headstart, Indian Health Services, Indian Child Welfare Program, etc.).
- National Directory of Tribal Justice Systems—The National American Indian Court Judges Association has an online directory of Tribes with ICWA contacts. The guide is available at [www.naicja.org](http://www.naicja.org)



Make a fact sheet about the child's Tribal Nation. Include information on Tribal history, cultural events, government, etc.

Feel free to use the worksheet on pages 17-18 as a guide.



# Advocacy

*Advocating for the best interests of the child in the community and the court*

## ***In the Community***

- **This type of advocacy may seem uncomfortable compared to other CASA volunteer work but remember CASA volunteer work is about pushing limits and opening doors for the children you serve.**
- **If the child has lived outside of the Tribal community for most of their life, you will need to play a more active role in building their connections to culture, customs, and history.**
- **Locate Tribal or local Native persons to serve as mentors to the child creating another set of eyes on the child.**
- **In non-Tribal communities, advocate for the child's expression of cultural values .**

# Advocacy

In court, do not be shy in calling attention to failures to engage a foster child in the life of their Tribal Nation. When a child is young, there may seem to be little value in attending powwows and cultural events, but...

***There is no time but the present to root a child in their culture.***

In your recommendations to the court, advocate for increased connections where there is a need. For example, request:

- Transportation to cultural events be coordinated by the caseworker
- Reevaluation of the delivery of culturally competent services
- Bi-monthly respite care with Tribal elders and mentors
- Enrollment in a course offered by the Tribe (i.e. language learning, beadwork, traditional foods, dancing, drumming)
- Receipt of Tribal newsletters, event calendars, program bulletins, etc.

***Speak up for the child's needs!***

Even when the child lives far away from their Tribal community, there is no excuse for neglecting their cultural identity and well-being. Make recommendations to connect the child with local and national organizations that represent Tribal interests and/or host traditional events (i.e. NDN Spark, Native American Youth Alliance).

***As a CASA volunteer, you are an advocate for the child's rights as a Tribal citizen.***



Image: Kwakuitl Eagle Staff

# Facilitation

*Facilitating the delivery of services ordered by the court for the child*

Going beyond the investigation of resources for the child and the recommendation of their use, CASA volunteers act as mediators among the parties engaged in service delivery.

*“Never assume that lawyers, caseworkers, and other child welfare service providers are aware of ICWA requirements. Educate those working on the child’s case as much as possible.”*

(Austin, 2009, p. 7)

If the child is not enrolled with their Tribe, remind the case-worker and lawyer of the benefits of Tribal citizenship—re: health care, education, housing—and seek to secure them.

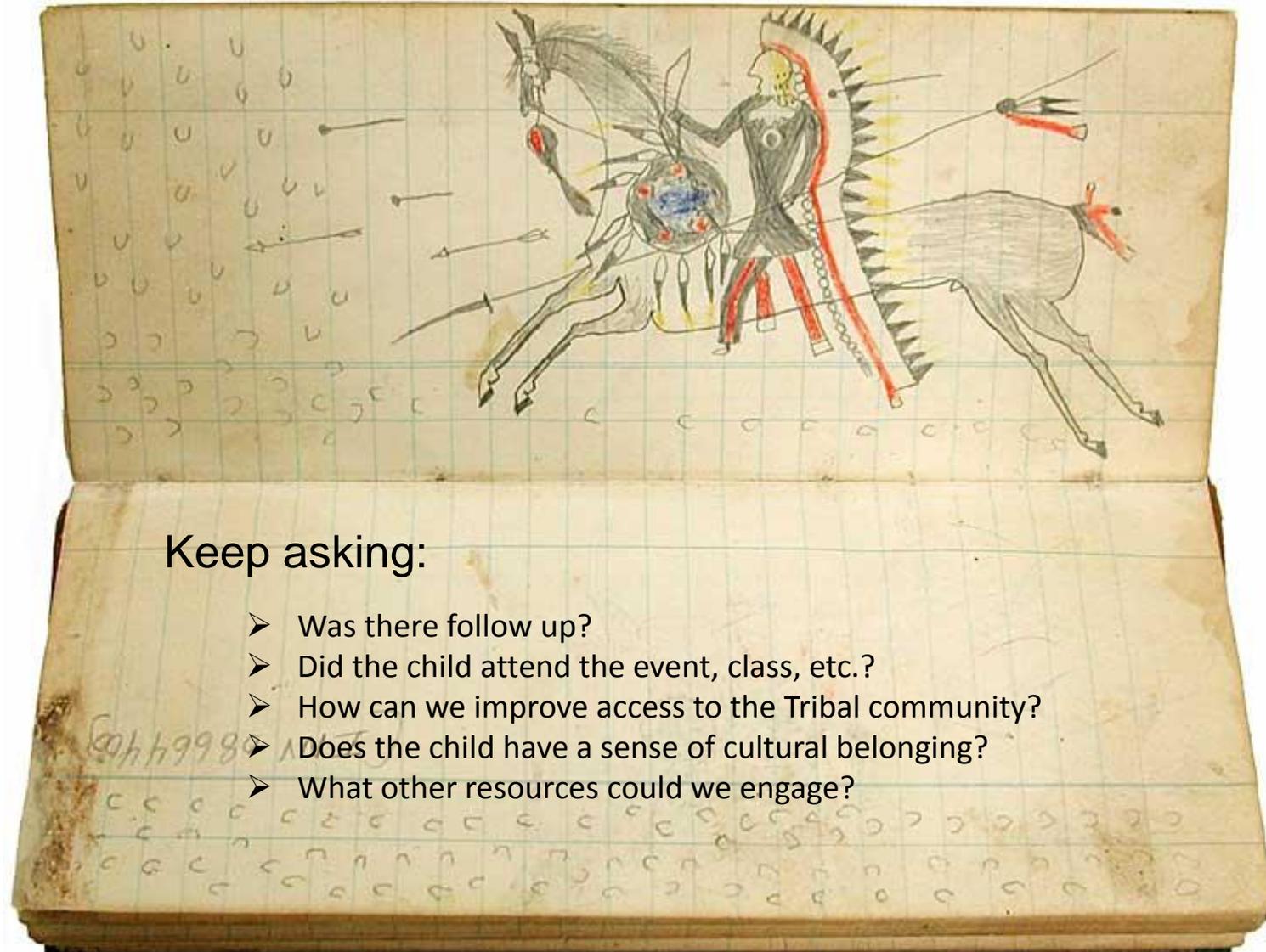
Facilitating services for the child will be much easier when you build trust with the Tribal community. To do this, remember you serve the Tribal Nation’s interests by serving the best interest of the child.



Image: Boys at the Pine Ridge (S.D.) Reservation/Aaron Huey

# Monitoring

*Monitoring compliance with orders of the court*



## Keep asking:

- Was there follow up?
- Did the child attend the event, class, etc.?
- How can we improve access to the Tribal community?
- Does the child have a sense of cultural belonging?
- What other resources could we engage?

# Frequently Asked Questions

## **The child I am serving doesn't *look* Native... How can I tell if ICWA applies?**

First, there is no Native “look.” Children of any skin color may have Native heritage and may be enrolled or eligible for enrollment with a Tribal Nation. *Always* ask if the family has or knows of American Indian or Alaska Native ancestry regardless of the child's physical appearance. Enrollment status in a federally recognized Indian Tribe, not physical appearance will determine whether ICWA applies.



## **The child I am serving is of 100% Indian descent, why might they not be eligible for enrollment and Tribal benefits?**

Just as other sovereign nations are allowed to set their own criteria for citizenship, Tribes are afforded that same right. Tribes have various criteria for membership/citizenship, such as residency requirements blood quantum, enrollment status of parents, etc. A child may be of Native descent but not meet the specific criteria for their Tribe.

## **If the Tribe doesn't involve itself in the case, shouldn't we just look for the most expedient placement—even if it's non-Indian?**

If the child has the opportunity to access Tribal benefits and have their Tribe be an additional advocate, it is better for you to be patient with the Tribe, who may be faced with many cases and limited resources.

## **Isn't it offensive to call them “Indian”?**

American Indians and Alaska Natives have different preferences when it comes to this. Simply ask what theirs is!

# Frequently Asked Questions

## **How do socioeconomic conditions factor into foster placement?**

ICWA states that the standards are to align with the prevailing cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties. This standard displaces state regulations and requirements about what constitutes an adequate placement.

## **Are there any scenarios where ICWA preferences do not hold in placing an Indian child?**

In cases involving ICWA, Bureau of Indian Affairs (BIA) Guidelines state that state courts must follow strict procedures and meet stringent requirements to justify any result contrary to ICWA preferences. The following factors are the only scenarios in which a court may deviate from ICWA requirements:

1. The unavailability of suitable homes that meet the preference criteria;
2. The extraordinary physical or emotional needs of the child as established by testimony of qualified expert witnesses; and
3. At the request of the biological parents or of a child of sufficient (older) age.



Image: Powwow / Native American Youth Alliance (2010)

# Native CASA Child Worksheet

1. Name of CASA Child's Tribal Nation(s):
2. Location of Reservation(s):
3. Pieces of Tribal history (Significant historical dates):
4. Current Leaders of Tribal government:
5. Tribal Resources (e.g. child welfare, cultural connections, education):

# Native CASA Child Worksheet (Cont.)

6. Tribal Media (i.e.. newsletter, Facebook pages, websites):
  
7. Calendar of Tribal events:
  
8. Local (and/or off-reservation) Native Resources:
  
9. Age Appropriate Native Reading Materials:



# Additional Resources & Information

## **A Practical Guide to ICWA**

<http://narf.org/icwa/index.htm>

## **American Indian Tribes & Cultures**

<http://42explore2.com/native4.htm>

## **Connecting Children to their Native American Roots**

<http://www.ayazuta.com>

## **Indian Country Child Trauma Center**

<http://icctc.org/>

## **Kid Info: The History of Native American Indians**

[http://www.kidinfo.com/American\\_History/Native\\_Americans.html](http://www.kidinfo.com/American_History/Native_Americans.html)

## **National CASA Association**

<http://www.casaforchildren.org>

## **National Child Welfare Resource for Tribes**

<http://www.nrc4tribes.org>

## **National Congress of American Indians**

<http://www.ncai.org>

## **National ICWA Resources**

<https://www.childwelfare.gov/systemwide/courts/icwa.htm>

## **National Directory of Tribal Justice Systems**

<http://www.naicja.org>

## **Native Youth Leadership Alliance**

<http://nativeyouthleadership.org>

## **Our Children are Sacred: Why ICWA Matters**

[http://www.courts.ca.gov/documents/jj\\_spr11\\_connors.pdf](http://www.courts.ca.gov/documents/jj_spr11_connors.pdf)

## **The Legacy of Native American Boarding Schools**

[amnestyusa.org/amnestynow/soulwound.html](http://amnestyusa.org/amnestynow/soulwound.html)

## **Turtle Talk: Indigenous Law and Policy Center**

<http://turtletalk.wordpress.com/>

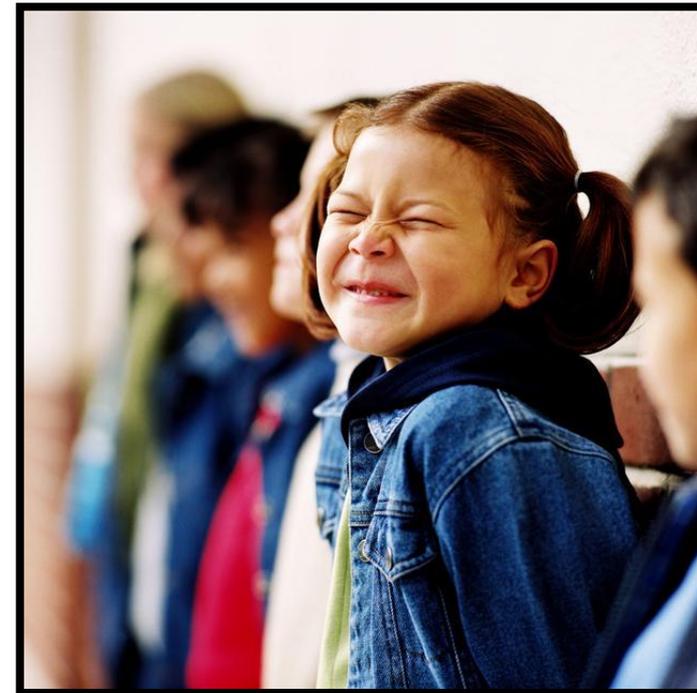


Image: Child care/ Tribal Child Care Association of California (2010)

Always Remember!

We all  
smile in the  
same  
language



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