Practice Brief 4: Tribal Sovereignty and the CAC Model

Native Child Advocacy Resource Center

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The CAC movement and individual CACs have established a strong commitment to the development of culturally responsive services and are attuned to disproportionalities in victimization and access to services among various racial and ethnic groups. Enhancing American Indian and Alaska Native (AI/AN) families' access to CAC services, however, requires an additional layer of understanding that does not apply to other groups.

Beyond their status as part of a federally defined racial/ethnic group, AI/AN children and families potentially have a separate, legally consequential political status as citizens of sovereign Tribal nations. Under the Indian Child Welfare Act (ICWA)[1], AI/AN children in custody proceedings are defined as "Indian children" and subject to the law's provisions when 1) they are currently enrolled Tribal members or 2) they are eligible for enrollment according to the relevant Tribes' standards and have a biological parent who is an enrolled member[2]. Some states have passed their own Indian Child Welfare Acts with different and more expansive definitions of "Indian" that CAC professionals in those states should be sure they understand. Regardless of the state where you work, you should be aware that when children subject to ICWA become involved with state child protection systems, the relevant Tribes have a legal status as party to the child protection proceedings[3], and they are empowered to assume jurisdiction over those cases[4]. Enrolled or enrollment-eligible children living on Tribal lands, meanwhile, are exclusively subject to Tribal jurisdiction[5].

The legal status of Tribal children, as well as that of Tribes in child protection proceedings involving Tribal children, predates ICWA. It derives from the well-established concept of Tribal sovereignty, or a Tribe's right to self-govern. Tribes were recognized as sovereigns from the earliest period of their involvement with the U.S. government, and their status as sovereigns is encoded in Article 1, Section 8 of the U.S. Constitution[6]. , and repeatedly affirmed by hundreds

of treaties between the U.S. government and Tribes, by the U.S. Supreme Court, by U.S. Presidents, and by Congress over hundreds of years of U.S. history[7]. While sovereignty and the closely related concept of self-determination (a Tribe's right to make decisions about what is best for itself and its people)[8] may be little understood outside of Tribal communities, they are generally of paramount importance to Tribal leaders and citizens. Sovereignty and self-determination constitute the foundational framework for Tribal legal systems, Tribal economic and community development initiatives, and Tribal human services systems and agencies.

For many Tribes and Tribal citizens, in no area is sovereignty more fundamental to the wellbeing and flourishing of communities, families, and individuals than in child and family services. Tribal assertions of sovereignty in child and family services are a response to the generations of damage done to tribes and tribal families by U.S. government policies of forced assimilation. These policies, spanning the early 1800s through the 1970s, focused on the removal of children from their homes and communities as a means of forcing upon Tribes a broader acceptance of Anglo-American ways of life[9]. While policies of forced assimilation were officially discontinued in the 1970s, Native children in state child protection jurisdictions continue to be removed from their homes at rates far in excess of their share of the population[10], threatening the continued survival of Tribes, the restoration of their cultures and ways of life, and the wellbeing of their children and families.[11]

Many accredited CACs currently serve American Indian and Alaska Native (AI/AN) children and families without formally entering into partnerships with Tribes[12]. Such an approach to CAC services suggests, at a minimum, a lack of awareness of or sensitivity to the importance of Tribal sovereignty in child and family services. In some cases, a CAC that serves Tribal children without meaningfully partnering with the relevant Tribe(s) may be perceived as actively antagonistic to Tribal sovereignty and self-determination. In addition to alienating Tribal leaders and communities, a CAC operating in this way may also limit its referral pool to AI/AN families whose cases originate in state jurisdictions, leaving some of the most disproportionately affected children—those living on Tribal lands—unserved by effective multidisciplinary teams.

Understanding the importance of Tribal sovereignty as it affects decisions about child custody and family law is a step in the direction of addressing these disproportionalities. This understanding will mean little, however, unless it is operationalized in your CAC's organizational structure, policies, and procedures. The fundamental ingredient for doing so is authentic and consistent partnerships and engagement with Tribal leaders and relevant Tribal agency staff. These partnerships should be formalized in regularly updated MOUs that articulate the scope of collaboration and the Tribe's inherent right to determine what is in the best interest of its children and families.[13] We also recommend including considerations relating to Tribal sovereignty and jurisdictional complexities in your internal quality improvement processes and modifying your internal policies and procedures accordingly.

[1] Indian Child Welfare Act of 1978, 25 USC §§1901-63. https://www.nicwa.org/wp-content/uploads/2016/11/Indian-Child-Welfare-Act-of-1978.pdf

[2] Indian Child Welfare Act, §1903

[3] Indian Child Welfare Act, §1911c

[4] Indian Child Welfare Act, §1911b

[5] Indian Child Welfare Act, §1911a

[6] Article 1, Section 8 enumerates the powers of the U.S. Congress, stating in Clause 3 that Congress has power "To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes".

[7] "Tribal Governance," National Congress of American Indians," https://www.ncai.org/policy-issues/tribal-governance

[8] Specific examples of self-determination occur when Tribes assume control over government or service functions previously controlled by the federal government under Public Law 93-638. For example, Tribes are authorized to assume control over health care and related services previously provided by the Indian Health Service, utilizing federal funds to supply the services through Tribal agencies.

[9] The National Native American Boarding School Healing Coalition website provides a comprehensive account of the history of the Federal Indian Boarding School system. In addition, *see* D.W. Adams, *Education for Extinction: American Indians and the Boarding School Experience, 1875-1928* (Lawrence: U Press of Kansas, 1995); *Brenda* J. Child, *Boarding School Seasons: American Indian Families, 1900-1940* (Lincoln: U of Nebraska Press, 2000); Nick Estes, "The U.S. stole generations of Indigenous children to open the West," High Country News, Oct. 14, 2019; and Preston S. McBride, "A Lethal Education: Institutionalized Negligence, Epidemiology, and Death in Native American Boarding Schools, 1879-1934" (Dissertation, 2021).

Numerous historical government documents also establish many of the facts related to the purposes of and conditions within the boarding school system, including the U.S. Senate Committee on Labor and Public Welfare's *Indian Education: A National Tragedy – A National Challenge*, S. Rep. No. 91-501 at 143 (1969), widely referred to as the Kennedy Report; and Lewis Meriam, Institue for Government Research, *The Problem of Indian Administration* (1928), known as the Meriam Report. The Department of the Interior's *Federal Indian Boarding School Initiative Investigative Report* (2022) offers a comprehensive survey of archival government documents to confirm both the overall narrative and the specific details of abuses documented in prior histories of the boarding school era.

For an overview of the scope and nature of the Indian Adoption Project prior to 1978, see the Congressional report issued to the full House accompanying the passage of the Indian Child Welfare Act, Hearing on *Establishing Standards for the Placement of Indian Children in Foster or Adoptive Homes, To Prevent the Breakup of Indian Families, And for Other Purposes*, H.R. Rep. 95-13896, at 9, 95th Cong., 2d Sess. (1978); also see the contemporaneous reporting on the crisis of child removals in Indian Country in Broadhead, S., Calac, M., Rhodes, W.R., Alexander, P., and Wharton, D.R., *Final Report to the American Indian Policy Review Commission* (1976), https://narf.org/nill/documents/icwa/federal/lh/76rep/76rep.pdf. Other historical accounts of the Adoption Era include Karen Balcom, "The Logic of Exchange: The Indian Child Welfare League of America, the Adoption Resource Exchange Movement and the Indian Adoption Project, 1958-1967," *Adoption & Culture*, 1(1), 5-67 (2007); Patrice H. Kunesh, "The Indian Child Welfare Act of 1978: Protecting Essential Tribal Interests," 60 U. Colo. L. Rev. 131 (1988); Margaret D. Jacobs, *A Generation Removed* (Lincoln: U of Nebraska Press, 2014); and "Adoption History: Indian Adoption Project," University of Oregon (2012) (uoregon.edu).

[10] National Indian Child Welfare Association, "What Is Disproportionality in Child Welfare?" (2019), https://www.nicwa.org/wp-content/uploads/2019/08/Disproportionality-Table-2019.pdf

[11] Read more about the history of government-sanctioned forced assimilation through compulsory boarding schools and child welfare practices in NCARC Practice Brief #3, "Tribal Children and Forced Assimilation."

[12] See National Children's Alliance (NCA), "Interactive National Map: 2021 Coverage of Tribal Areas" (2022), https://maps.esp.tl/maps/ 2021-NCA-Member-CACs-Serving-Federally-Recognized-Tribes/pages/map.jsp?geoMapId=1041278&TENANT ID=132538. NCA data show that fewer than one-third of accredited CACs serving Tribal communities have Memoranda of Understanding or other formal agreements in place with the Tribes whose children and families they serve.

[13] For a more detailed discussion of MOUs between CACs and Tribes, see NCARC Practice Brief #5, "MOUs and Authentic Partnership."