SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 1862 (Ramos)
Version: March 29, 2022
Hearing Date: June 21, 2022
Fiscal: Yes
Urgency: No
AWM

SUBJECT

Tribally Approved Homes Compensation Program

DIGEST

This bill clarifies what entities designated by a federally recognized Indian tribe may approve homes as tribally approved homes for the placement of Indian children in foster or adoptive homes, and establishes the Tribally Approved Homes Compensation Program to provide allocations to eligible tribes and tribal organizations to aid in the cost of recruiting and approving tribally approved homes for the placement of Indian children.

EXECUTIVE SUMMARY

"The Indian Child Welfare Act of 1978 (ICWA), which establishes federal standards for state-court child custody proceedings involving Indian children, was enacted to address 'the consequences . . . of abusive child welfare practices that [separated] Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes,' [citation]." (*Adoptive Couple v. Baby Girl* (2013) 570 U.S. 637, 637.) Among other things, ICWA sets forth minimum federal standards by: (1) establishing jurisdictional requirements; (2) allowing for notice of and intervention in Indian child custody proceedings by a tribe; and (3) imposing preferences on the placement of an Indian child in a foster or adoptive home that prioritize the maintenance of the child's relationship with their Indian tribe.

Under existing state law, a federally recognized tribe or tribal organization may approve homes for the placement of Indian children for the purpose of placing an Indian child into foster care or an adoptive home that comports with the ICWA's requirements. These tribally approved homes are not subject to state approval except for minimal background check requirements. Unfortunately, because there is no state funding for the establishment of these tribally approved homes or for the organizations that find them, there is a shortage of tribally approved homes which thwarts the intent

of the ICWA and perpetuates the historical American cycle of removing Indian children from their families and tribes and placing them in non-Indian settings that do not understand or respect the child's heritage.

This bill is intended to facilitate the establishment of tribally approved homes, to further compliance with the ICWA and ensure that more Indian children are placed in homes within their extended families or tribe. The bill first clarifies that a tribal organization that represents more than one federally recognized tribe may approve tribally approve homes. Second, and significantly, the bill establishes the Tribally Approved Homes Compensation Program, which will provide eligible tribal organizations with allocations of funds to aid in the establishment of tribally approved homes. Tribes and tribal organizations receiving such funds will be required to report on the uses of those funds which will then be compiled into a report to the Legislature that will shed light on what additional action should be taken to protect the goals of the ICWA.

This bill is sponsored by the California Tribal Families Coalition and is supported by ACLU California Action, the Alliance for Children's Rights, the Habematolel Pomo of Upper Lake, the National Association of Social Workers – California Chapter. There is no known opposition. This bill passed out of the Senate Human Services Committee with a vote of 5-0.

PROPOSED CHANGES TO THE LAW

Existing federal law:

1) Establishes the Indian Child Welfare Act (ICWA), which provides guidance to states regarding the jurisdictional requirements, proceedings of tribal courts, and custody proceedings involving the removal of Indian children from their parents. Custody. (25 U.S.C., ch. 21, §§ 1901 et seq.)

2) Provides regulations for the implementation of 1). (25 C.F.R., ch. 1, subch. D, pt. 23, §§ 23.1 et seq.)

Existing state law:

1) Establishes a state and local system of child welfare services, including foster care, for children who have been adjudged by the court to be at risk of abuse and neglect or to have been abused or neglected, as specified. (Welf. & Inst. Code, § 202.)

2) Establishes the juvenile court, which has jurisdiction over minors who are suffering or at substantial risk of suffering harm or abuse and may adjudge the minor to be a dependent of the court. (Welf. & Inst. Code, § 300.)

3) Provides that the purpose of the juvenile court and the dependency system is to provide the maximum safety and protection for children who are currently being physically, sexually, or emotionally abused, being neglected, or being exploited, and to ensure the safety, protection, and physical and emotional well-being of children who are at risk of that harm. This safety, protection, and physical and emotional well-being may include provision of a full array of social and health services to help the child and family and to prevent the reabuse of children. (Welf. & Inst. Code, § 300.2.)

4) Provides that it is the intent of the Legislature to preserve and strengthen a child's family ties whenever possible so that a child is removed from the custody of their parents only when necessary for their welfare or the safety and protection of the public. (Welf. & Inst. Code, §§ 16000, 16500.1.)

5) Requires a local child support agency to develop a case plan for a child under the jurisdiction of the dependency court, which must set forth a description of the type of home or institution in which the child is to be placed; the decision shall be based upon the selection of a safe setting that is the least restrictive family setting that promotes normal childhood experiences and the most appropriate setting that meets the child's individual needs and is available, in proximity to the parent's home, in proximity to the child's school, and consistent with the selection of the environment best suited to meet the child's special needs and best interests. (Welf. & Inst. Code, § 16501.1.)

6) Defines the following relevant terms:
    a) The terms "Indian," "Indian child," "Indian custodian," "Indian tribe," "reservation," and "tribal court" are defined as in federal law, as specified; except that the term "Indian child" in connection with an Indian child custody proceeding also means an unmarried person who is 18 years of age or over, but under 21 years of age, who is a member of an Indian tribe or eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe, and who is under the jurisdiction of the dependency court, unless the person elects not to be considered as such.
    b) An "Indian child custody proceeding" means a hearing during a juvenile court proceeding involving an Indian child, as specified.
    c) "Indian foster home" is a foster home where one or more of the licensed or approved foster parents is an Indian as defined in the ICWA.
    d) "Tribally approved home" is a home that has been licensed or approved by an Indian child's tribe, or a tribe or tribal organization designated by the Indian child's tribe, for foster care or adoptive placement of an Indian child using standards established by the child's tribe pursuant to the ICWA.
        i. A tribally approved home is not required to be licensed or approved by the state or county and is equivalent to a state-licensed or county-licensed or approved home.

ii. Specified background check requirements for foster care or adoptive placement apply to tribally approved homes, including fingerprinting requirements. (Welf. & Inst. Code, § 224.1; Pen. Code, § 11105.08(b).)

7) Provides that the state is committed to protecting the essential tribal relations and best interest of an Indian child by promoting practices, in accordance with the ICWA and other applicable law, designed to prevent the child's involuntary out-of-home placement and, whenever such a placement is ordered, by placing the child, whenever possible, in a placement that reflects the unique values of the child's tribal culture and is best able to assist the child in establishing, developing, and maintaining a political, cultural, and social relationship with the child's tribe and tribal community. (Welf. & Inst. Code, § 224(a).)

8) Requires a court, in all Indian child custody proceedings as defined in the ICWA, to consider all of the factors in 7), strive to promote the stability and security of Indian tribes and families, comply with the ICWA and other applicable laws, and seek to protect the best interest of the child. When an Indian child is removed from a foster care home or institution, guardianship, or adoptive placement for the purpose of a further placement, placement of the child shall be in accordance with the ICWA and other applicable law. (Welf. & Inst. Code, § 224(b).)

9) Provides that a determination by an Indian tribe that an unmarried person under the age of 18 years is either (1) a member or citizen of an Indian tribe or (2) eligible for membership or citizenship in an Indian tribe and a biological child of a member or citizen of an Indian tribe shall constitute a significant political affiliation with the tribe and shall require the application of the ICWA and other applicable law to the proceedings. (Welf. & Inst. Code, § 224(c).)

10) Provides that a court, county welfare department, and probation department have an affirmative and continuing duty to inquire whether a child for whom a dependency or delinquency petition may be or has been filed is or may be an Indian child. If there is reason to believe the child is an Indian child, the court, county welfare department, or probation department must conduct an additional investigation to determine whether the child is an Indian child, as specified. (Welf. & Inst. Code, § 224.2.)

11) Provides that an Indian child removed from the custody of their parent or Indian custodian must be placed according to a specified order of priority, starting with a member of the child's extended family, as defined in the ICWA; a foster home licensed, approved, or specified by the child's tribe; an Indian foster home licensed or approved by an authorized non-Indian licensing authority; and lastly, an institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the child's needs. (Welf. & Inst. Code, § 361.31(b).)

12) Provides that, in an adoptive placement of an Indian child, preference shall be given to placement with one of the following in descending priority order: a member of the child's family, as defined in the ICWA; other members or citizens of the child's tribe; or another Indian family. (Welf. & Inst. Code, § 361.31(c).

13) For placements under 11) and 12), if a different order of placement preference is established by the child's tribe, the court or agency effecting the placement shall follow the order of preference established by the tribe as long as the placement is the least restricted setting appropriate to the particular needs of the child as specified. (Welf. & Inst. Code, § 261.31(d).)

14) Authorizes the California Department of Social Services (CDSS) to, upon the request of an Indian tribe, enter into an agreement regarding the care and custody of Indian children, as specified. (Welf. & Inst. Code, § 10553.1.)

15) Authorizes a federally recognized tribe to license or approve a home for the purpose of foster or adoptive placement of an Indian child pursuant to the ICWA. A "tribal organization" for purposes of this provision means an entity designated by a federally recognized tribe as authorized to approve homes consistent with the ICWA for the purpose of placing an Indian child into foster or adoptive care. (Welf. & Inst. Code, § 10553.12.)

This bill:

1) Clarifies that a "tribal organization," for purposes of licensing or approving homes for the purpose of foster or adoptive placement pursuant to the ICWA, may serve one or more federally recognized tribes.

2) Establishes the Tribally Approved Homes Compensation Program (Program) to provide funding to eligible tribes and tribal organizations in California to assist in funding the costs associated with recruiting and approving homes for the purpose of foster or adoptive placement of an Indian child pursuant to the federal Indian Child Welfare Act.

3) Provides that, under the Program, CDSS shall provide annual allocations of $75,000 to tribal organizations each fiscal year.

4) Sets forth procedures by which a tribe or tribal organization can be eligible for the allocation, which includes submitting a letter of intent with the estimated number of homes the tribal staff member will investigate and potentially approve per year.

5) Prohibits CDSS from establishing a minimum number of tribally approved homes requirement.

6) Requires a tribe or tribal organization that receives funding under the Program to submit a progress report to CDSS by August 1 following the close of the fiscal year in which an allocation was received that includes details about how many homes were approved, recruitment efforts, and challenges experienced during the fiscal year it was funded.

7) Requires CDSS to annually compile the reports it receives pursuant to 6) and report to the Legislature with the information from the progress reports no later than January 1 following the close of the fiscal year covered by the reports.

COMMENTS

1. Author's comment

According to the author:

> The Indian Child Welfare Act was passed as a remedial statute to protect the best interests of Indian children and tribes in ensuring that Indian children in foster care are placed in family homes in their community. Yet in California, the majority of Indian children (56 percent) are being placed in non-familial homes that are not tied to the child's tribal culture even though there is a large body of evidence that children placed with extended family develop strong attachments and have better long-term outcomes than children in non-familial placements. Some researchers even say "ICWA placement preferences should be the gold standard for all children, not just those who are Native, given the benefits of kinship care."
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> This bill seeks to ensure Indian children are placed in culturally appropriate and legally compliant placements by establishing the Tribally Approved Homes Compensation Program. Through the Tribally Approved Homes Compensation Program, tribes will receive funding, as non-tribal home approval agencies do, so tribes can continue providing this vital service and build additional internal capacity to approve foster and adoptive homes, thereby creating more available ICWA compliant family placements while easing county home approval workloads.

2. Background on the ICWA and California's (lack of) compliance with it

Congress enacted the ICWA in 1978.[1] The bill was passed in response to federal hearings that "revealed a pattern of wholesale public and private removal of Native American children from their homes, undermining Native American families, and

[1] *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 32.

threatening the survival of Native American tribes and tribal cultures."[2] The ICWA acknowledges that states "often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families," and that the removal of Indian children was "often unwarranted."[3] The goal of the ICWA is thus to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families."[4] To accomplish this goal, the "ICWA establishes minimum federal standards, both procedural and substantive, that govern the removal of Indian children from their families" and subsequent placement in foster or adoptive homes.[5] Under the ICWA, there is a presumption that it is in the best interests of an Indian child to retain tribal ties and cultural heritage and in the interest of the tribe in preserving future generations.

Because states, not the federal government, have primary control over child welfare, foster care, and adoption issues, the ICWA "lays out a dual jurisdictional scheme" that modifies how states may exercise their child welfare authority when an Indian child is involved.[6] These standards take precedence over requirements the state has implemented with respect to non-Indian children; for example, the ICWA prohibits a court from terminating Indian parental rights without proof beyond a reasonable doubt, including the testimony of a qualified expert, that continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child.[7] Moreover, absent "good cause," the ICWA requires that an adoptive placement of an Indian child be made "preferentially to (1) members of the child's extended family, (2) other members of the same tribe, or (3) other Indian families."[8]

California codified the relevant provisions of the ICWA in 2006.[9] The state provisions, known as Cal-ICWA, codified the state's intent to preserve a child's connection to their tribal culture and community whenever possible and contains provisions on the process for tribal child custody proceedings.[10] Since then, the state has continued to enact policies that seek to improve the process of collaboration between the state and tribes regarding child welfare. Despite these policy changes aimed at increasing outcomes for tribal youth, CDSS reports that tribal children continue to have one of the lowest rates of achieving timely permanency.

Relevant to this bill are the ICWA and Cal-ICWA's requirements for placing an Indian child in a foster home or adoptive placement. Under these laws, an Indian child must be

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[2] California ICWA Compliance Task Force, Report to the California Attorney General's Bureau of Children's Justice (2017) at p. 4 (ICWA Compliance Task Force Report).
[3] 25 U.S.C. § 1901.
[4] 25 U.S.C § 1902.
[5] *Fresno County Dep't of Children & Family Services v. Superior Court* (2004) 122 Cal.App.4th 626, 641.
[6] *Mississippi Band of Choctaw Indians*, *supra*, 490 U.S. at p. 36.
[7] 25 U.S.C. §§ 1911 et seq.; see also Welf. & Inst. Code, § 366.26(c)(2)(B)(ii).
[8] *Mississippi Band of Choctaw Indians*, *supra*, 490 U.S. at pp. 36-37.
[9] SB 678 (Ducheny, Ch. 838, Stats. 2006).
[10] *See id.*

placed in a foster or adoptive home according to a stated order of preference, starting with a member of the child's extended Indian family, as defined in the ICWA, and then to other members of the child's tribe or other Indian families.[11] In recognition of the unique circumstances of tribal organizations, federally recognized tribes may approve homes for the foster or adoptive placement of Indian children and are exempt from most state licensing approval standards.[12] According to the United States Supreme Court, these placement requirements are the "most important substantive requirements" of the ICWA.[13]

Unfortunately, it appears that the state is not living up to its mission to ensure the best interests of Indian children. According to bill supporter National Association of Social Workers - California Chapter, between 2010 and 2020 only 44 percent of Indian children in California's foster care system were placed according to ICWA placement preferences. And in 2017, the California ICWA Task Force reported that "systemic problems with compliance" with the ICWA and Cal-ICWA persisted.[14] The report notes that "[t]ribal attorneys and representatives experience frequent resistance and dismissiveness" from other participants in the juvenile court system and that the "perception that Indian tribes, parents, and children receive unnecessary special treatment persists—even though such treatment is entirely congruent with federal law recognizing the unique political status of tribes."[15]

Regarding the ICWA and Cal-ICWA placement requirements for Indian children, the Task Force reported that "achieving this mandate remains elusive in several counties" due to, among other things, "failure to place Indian children within the specified order of preference [and] failure to make efforts to locate an ICWA-complaint placement."[16] Some of this failure is apparently because "agencies are reluctant to place children in tribally approved homes (TAHs)" because they "exhibit a lack of trust in TAHs and do not trust a tribe's assessment."[17] Instead of following the law—which authorizes tribes and tribal organizations to approve their own foster and adoptive homes—"[c]ounties insist on imposing their standards rather than accept a 'tribally approved home' designation."[18] Given that the ICWA was passed to avoid just this problem—wherein non-Indian governments decide that their determination of an Indian child's best interest should trump that of the child's tribe, generally with the violent result of ripping the child from their tribe and placing them with a non-Indian family—this ongoing refusal to deter to tribes as required by federal and state law requires serious legislative attention.

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[11] *See* Welf. & Inst. Code, § 366.31(b), (c).
[12] Welf. & Inst. Code, § 224.1.
[13] *Mississippi Band of Choctaw Indians*, *supra*, 490 U.S. at p. 36.
[14] ICWA Compliance Task Force Report, *supra*, fn. 2, at p. 9.
[15] *Ibid.*
[16] *Id.* at p. 73.
[17] *Id.* at p. 79.
[18] *Ibid.*

3. This bill takes steps to improve California's compliance with the ICWA and to further protect the best interest of Indian children

This bill is intended to strengthen the implementation of the ICWA and Cal-ICWA in the arena of tribally approved homes for the foster and adoption placements of Indian children. First, this bill clarifies that a "tribal organization" that is authorized to establish tribally approved homes consistent with the ICWA may serve one or more federally approved tribes. This should resolve any confusion over whether organizations representing multiple tribes can establish tribally approved homes, which may increase the number of organizations capable of approving those homes.

Second, and more significantly, this bill establishes the Tribally Approved Homes Compensation Program (the Program) to provide tribes with funding to assist with the recruitment and retention of tribally approved homes. As discussed above, California's rate of placing Indian children in accordance with ICWA placement preferences is abysmal. The Program, by providing $75,000 allocations to entities designated by federally recognized tribes, could increase the percentage of culturally appropriate and timely permanent placements for tribal youth.[19] As California continues to address the racial inequities prevalent in our safety net systems through policy, it is essential to ensure that the state's historically underfunded populations are financially supported to implement the necessary strategies for meaningful change.

Finally, the bill also imposes reporting requirements on the tribes or tribal organizations that receive funding through the Program. By August 1 after the close of the fiscal year in which the tribe or tribal organization received a Program allocation, the recipient must provide a report to CDSS that includes details how many homes were approved, recruitment efforts, and challenges experienced during the fiscal year that was funded. DCSS is then required to compile the reports into a single report to the Legislature no later than the following January 1. These reports will help the Legislature determine what additional actions are needed to further the goals of the ICWA and improve state and county actors' compliance with its requirements.

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[19] Although no one has argued that Proposition 209's prohibition on racial and ethnic preferences might apply, it is worth noting that Proposition 209 likely does not apply here. (*See* Cal. Const., art. 1, § 31.) The United States Supreme Court has held that classifications based on federally recognized tribal status does not constitute a racial classification, but rather a political one. (*Morton v. Mancari* (1974) 417 U.S. 535, 553-554.) Moreover, the unique nature of Indian tribes and California's obligation to implement the ICWA mean that, even if this bill expressed a racial preference, it would likely be preempted by federal law. (*See id.* at p. 553 ("Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.").)

4. Arguments in support

According to the California Tribal Families Coalition, the sponsor of the bill:

> The Indian Child Welfare Act (ICWA) was passed over 40 years ago to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." California also recognized the critical role that ICWA protections provide for Native children and families by incorporating federal standards into state law.
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> Now, dependent Indian children in the state child welfare system must be placed in homes in compliance with ICWA and various California state laws. However, between 2010 and 2020, on average only 44 percent of Indian children in California's foster care system were placed according to the required placement preferences. This means the majority of Indian children could be being placed in non-familial homes that are not tied to the child's tribal culture even though there is a large body of evidence that all children placed with extended family develop strong attachments and have better long-term outcomes than children in non-familial placement. ICWA placement preferences are known as the "gold standard" in child welfare because they ensure child placement with family and kin when possible.
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> This bill is an important step in making funding available to tribes for internal capacity-building that will allow tribes to approve more homes and ease the burden on county child welfare agencies in the already-difficult foster care and adoptive placement process. It is important that the funding authorized by this bill remain accessible to all tribes and tribal organizations as it is currently written to truly make on-the-ground change.

SUPPORT

California Tribal Families Coalition (sponsor)
ACLU California Action
Alliance for Children's Rights
Habematolel Pomo of Upper Lake
National Association of Social Workers – California Chapter

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: AB 1950 (Ramos, 2022) among other things, authorizes an Indian child's tribe to participate by telephone or other remote means in proceedings in which the ICWA might apply. AB 1950 is pending before the Assembly Human Services Committee.

Prior Legislation:

AB 1055 (Ramos, Ch. 287, Stats. 2021) modified the definition of "students in foster care" to eliminate the requirement that a dependent child of the court of an Indian tribe also meet the definition of a dependent child of a county court, and to include a child of an Indian tribe who is the subject of a voluntary placement agreement.

AB 873 (Ramos, Ch. 284, Stats. 2021) eliminated tribal share of cost requirements for an agreement entered into by the CDSS with a tribe, consortium of tribes, or tribal organization regarding the care and custody of Indian children and jurisdiction over Indian child custody proceedings, struck existing law related to the breakdown of the tribal share of costs, as provided, and prohibited cost-sharing going forward.

AB 685 (Reyes, 2019) would have required the State Bar of California to administer grants to nonprofit legal service organizations to provide support and technical assistance related to the implementation of ICWA. AB 3076 was substantially amended to remove provisions relating to the ICWA.

AB 3171 (Waldron, Ch. 833, Stats. 2018) updated various provisions of the Welfare & Institutions Code that impact custody and treatment of Indian children in an effort to bring state law into compliance with new regulations promulgated under the ICWA.

AB 3076 (Reyes, Ch. 2018) would have required the State Bar of California to administer grants to nonprofit legal service organizations to provide support and technical assistance related to the implementation of ICWA. AB 3076 was held on the Senate Appropriations Committee suspense file.

AB 1962 (Wood, Ch. 748, Stats. 2018) amended the definition of foster youth for Local Control Funding Formula purposes by including a student who is in foster care under the placement and care responsibility of an Indian tribe.

SB 678 (Ducheny, Ch. 838, Stats. 2006) codified portions of the ICWA into state law.

PRIOR VOTES:

Senate Human Services Committee (Ayes 5, Noes 0)
Assembly Floor (Ayes 76, Noes 0)

Assembly Appropriations Committee (Ayes 16, Noes 0)
Assembly Human Services Committee (Ayes 8, Noes 0)

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