

Indian Child Welfare Act Higher Standards Resource Brief

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All Indian children deserve a strong, protective circle of caring adults to ensure they are loved, safe, and connected to their community, tribe, and culture.

The [Indian Child Welfare Act](#) (ICWA) of 1978 is a federal law that recognizes how important those connections are while also ensuring the continued existence of tribal nations as unique, distinct, and sovereign. The ICWA was passed into law in response to the alarmingly high number of American Indian and Alaska Native children being removed from their families and placed outside of their communities.

The ICWA is considered the “gold standard” in child welfare policy and requires states and courts to protect the best interest of Indian children by establishing **higher standards of evidence** and **higher standards of family engagement**. This resource brief outlines definitions and provides resources to support tribal child welfare professionals in understanding higher standards.

Higher Standards of Evidence

The ICWA has a higher standard of evidence to prevent removal of an Indian child from their families than other child welfare laws. It requires the testimony of a culturally qualified expert witness before a child can be removed, except in emergencies where the child faces imminent harm.



The ICWA requires high standards of proof and specific substantive findings. It also has a unique requirement for expert testimony. Congress intended for these to place a strong check on biases against tribal communities and cultural practices and directly combat the well-documented history of removal for insubstantial reasons.¹

- Foster care placements require **clear and convincing evidence**.
 - Clear and convincing evidence is a higher level of proof than most states require for foster care placement proceedings. It means that the side favoring foster care placement must present evidence that is not just slightly more persuasive than the evidence against but clearly more persuasive.
- Termination of parental rights requires **evidence beyond a reasonable doubt**.
 - Evidence beyond a reasonable doubt is a higher burden of proof than most states require at termination of parental rights proceedings. It means that the side favoring termination must not only present a more convincing case than the opposition but must be so convincing that it eliminates all reasonable doubts in the mind of the person deciding the case that the child will be at risk of serious physical or emotional damage if the parent maintains custody. If the evidence fails to do so, the court is obligated by ICWA to deny termination.
- There must be **evidence to show a causal relationship** between the conditions in the home and **potential “serious emotional or physical damage to the child”** if returned.

State and federal statutes that provide higher standards of protection to the rights of parents or an Indian custodian apply in ICWA cases. “The ICWA specifically provides that where State or Federal law applicable to a child custody proceeding . . . provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, that standard shall be applied.”²



¹ [Understanding the 2016 Indian Child Welfare Act Regulations](#) (Scott Trowbridge)

² [A Practical Guide to the Indian Child Welfare Act](#) (Native American Rights Fund)

The testimony of an ICWA qualified expert witness (QEW) is required to support a state court's decision to place the child outside of their home. Per the [Federal Rules of Evidence](#), an expert witness is someone who is qualified by knowledge, skill, experience, training, or education and may provide court testimony in the form of an opinion.) QEWs must be qualified to testify regarding whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and should be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe, such as childrearing practices of the tribe.

- Testimony of the QEW must be part of the evidence presented.
- The court or child welfare agency should request assistance from the tribe or regional BIA office to locate an appropriate QEW.
- The QEW may be designated by the child's tribe.
- The QEW cannot be the State/County caseworker regularly assigned to the child.

Related Resources

- [A Guide to Compliance with the Indian Child Welfare Act](#) (National Indian Child Welfare Association, PDF)
- [A Practical Guide to the Indian Child Welfare Act](#) (Native American Rights Fund, Webpage)
- [Beyond Minimum Standards: Federal Requirements and State Interpretations of the Indian Child Welfare Act](#) (Kathryn E. Fort, Michigan State University College of Law, PDF)
- [ICWA Qualified Expert Witness Resource List](#) (Capacity Building Center for Tribes, PDF)
- [ICWA Placement Preferences Resource List](#) (Capacity Building Center for Tribes, PDF)
- [The Policies at Play: A Conversation About Indigeneity and Child Welfare](#) (Capacity Building Center for States, Video and Discussion Guide)
- [Understanding the 2016 Indian Child Welfare Act Regulations](#) (Scott Trowbridge, Publication)

Higher Standards of Family Engagement

The ICWA requirement of "active efforts" is a higher standard of family engagement than the title IV-E program's "reasonable efforts" requirement. Defined in regulation as "affirmative, active, thorough, and timely," these efforts are aimed at maintaining or reuniting children with their families. This includes assisting parents in overcoming barriers to services, connecting them with community resources such as housing and mental health support, and ensuring they have transportation for appointments and visits.³

Related Resources

- [Guidelines for Implementing the Indian Child Welfare Act](#) (Bureau of Indian Affairs, PDF)
- [How can child welfare systems apply the principles of the Indian Child Welfare Act as the “gold standard” for all children?](#) (Casey Family Programs, Publication)
- [ICWA Active Efforts Resource List](#) (Capacity Building Center for Tribes, PDF)



ICWA Advocacy

ICWA advocacy is a necessary component of helping tribal children and families and includes development of intergovernmental relationships and agreements, tribal child welfare program support, and policies. “ICWA advocacy requires dedication, coordination, relationship building, and training to be successful, and is proven to improve outcomes for AI/AN children and families and build more stable, confident tribal child welfare programs.”⁴

³ [How can child welfare systems apply the principles of the Indian Child Welfare Act as the “gold standard” for all children?](#) (Casey Family Programs)

⁴ [Tribal Leadership Series: ICWA Advocacy](#) (National Indian Child Welfare Association)

The [National Indian Child Welfare Association](#) suggests these strategies for ICWA advocacy:

- **Intergovernmental Agreements:** Section 1919 of ICWA explicitly encourages states and tribes to enter into agreements with one another regarding a variety of child welfare purposes.
- **Data Collection Agreements:** Because the ICWA does not provide mandatory collection of data and accompanying review of compliance, tribes and states have had to turn to developing voluntary state data collection efforts.
- **Court Relationships and Tribal-State Forums:** Tribal courts and state courts have a critical role in decision making in child welfare that impacts AI/AN children and families.
- **Using Coalitions to Create State ICWA Laws:** State ICWA laws reiterate the importance of the federal ICWA and create higher state law standards for individual ICWA requirements and provide additional clarification on provisions that the federal statute does not address fully.

Related Resources

- [Building an Effective Tribal State Child Welfare Partnership](#) (Capacity Building Center for Tribes, Toolkit)
- [ICWA Guide for Tribal Governments](#) (Capacity Building Center for Tribes, PDF)
- [Comprehensive State ICWA Laws Map](#) (Capacity Building Center for Tribes, PDF)
- [Tools from Tribes: Sharing Agreements](#) (Capacity Building Center for Tribes, Webpage)
- [Tools from Tribes: Court Documents](#) (Capacity Building Center for Tribes, Webpage)
- [Tribal Information Exchange - Data and Evaluation Resources](#) (Capacity Building Center for Tribes, Webpage)
- [Tribal Information Exchange - ICWA Resources](#) (Capacity Building Center for Tribes, Webpage)
- [Tribal Leadership Series: ICWA Advocacy](#) (National Indian Child Welfare Association)



This resource was created by the
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