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Final Report of the Committee to Study State Compliance with the Federal Indian Child Welfare Act of 1978

Maine State Legislature

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**STATE OF MAINE
122nd LEGISLATURE
SECOND REGULAR SESSION**

**Final Report
of the
COMMITTEE TO STUDY STATE
COMPLIANCE WITH THE FEDERAL
INDIAN CHILD WELFARE ACT OF
1978**

January 2006

Members:

**Sen. Margaret Rotundo, Chair
Rep. Deborah L. Simpson, Chair
Sen. Kevin L. Raye
Rep. Roger L. Sherman
Rep. Mike Sockalexis
Mr. David Hathaway
Hon. Vendean V. Vafiades
Mr. Dan Despard
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EXECUTIVE SUMMARY

The Indian Child Welfare Act (ICWA) was signed into law in 1978 in response to Congressional findings that too many Indian families were broken up by children being removed and then placed in non-Indian foster and adoptive homes and institutions. Congress designed ICWA to restrain the authority of state agencies and courts in removing and placing Indian children. ICWA established specific standards for removing Indian children from their homes, tribal jurisdiction for handling such cases, and substantive requirements including placement preferences for an Indian child entering foster or adoptive care. The dual focus of the Act is the well-being of both tribes and children as fundamental and complementary goals.

The Committee to Study State Compliance with the Federal Indian Child Welfare Act of 1978 (“Committee”) was established during the First Regular Session of the 122nd Legislature by Resolve 2005, Chapter 118. Due to the late appointments of some members, the Committee held only one meeting although a consensus was reached.

The general consensus of the Committee was that Maine’s compliance with ICWA has improved tremendously in recent years. In particular, it appears that fewer children are being removed from Indian homes. There is an improved relationship between tribes, the Department of Health and Human Services (DHHS) and the Office of the Attorney General with respect to ICWA issues. A Wabanaki conference on ICWA issues scheduled for March 2006 has a goal of building on the collaboration that has occurred in recent years, and working towards making Maine ICWA practices and procedures a model for the nation.

State ICWA training programs have improved in recent years. All caseworkers in the DHHS receive ICWA training before starting their casework. The court system has also revised its procedures and forms to include inquiry into the application of ICWA at every stage of a child protection proceeding. However, the Committee discovered that there are still some problems with inadequate training for staff of social service agencies with whom the DHHS contracts.

The State agreement with the Houlton Band of Maliseet Indians, signed in December 2002, appears to be a model of success. The experience of the Houlton Band of Maliseet Indians is illustrative of the changing ICWA environment in Maine. For many years, the Band had serious issues and concerns with respect to child placement decisions, especially the removal of children from their families and placements in non-Indian homes. Since the agreement was signed the Band feels things have improved dramatically; there is now a process and an institutional willingness to work through any issues that do arise.

While state implementation of ICWA seems to have improved markedly in recent years, the Committee did conclude there are areas where further improvements can be made.

The Committee presents the following recommendations:

- 1. ICWA training for DHHS and contract agencies.** The Committee recommends that the DHHS seek input and assistance from the tribes in developing and providing ICWA training for child case workers. The Committee recommends that the DHHS ensure that such training include clear instruction in the purposes of and policy behind ICWA. ICWA training should be provided to all DHHS child case workers as well as to employees of agencies the DHHS contracts with to provide child welfare services. For purposes of ICWA training, the Department is encouraged to seek out and make use of culturally appropriate videos and other educational materials from entities such as the National Indian Child Welfare Association.
- 2. Update and develop agreements between the state and tribes.** Section 1919 of ICWA authorizes Indian tribes and states to enter into agreements respecting care and custody of Indian children and jurisdiction over child custody proceedings. In Maine, the state currently has agreements with the Houlton Band of Maliseet Indians (2002) and the Penobscot Nation (1987). The Committee recommends that the DHHS work with the Penobscot Nation to determine whether an update of its agreement with the State may be appropriate and work with the Aroostook Band of Micmacs and the Passamaquoddy Tribe to determine whether appropriate ICWA agreements may be developed.
- 3. Recruit Indian foster families and placement options.** A major obstacle to implementing ICWA is the lack of available Indian foster families. The Committee recommends that the DHHS work with tribes to provide assistance in recruiting foster families.
- 4. Outreach for non-Indian foster families.** The committee learned that currently, non-Indian foster or adoptive families of Maliseet children receive a resource packet of cultural information that assists families in helping the children identify with their cultural heritage. The Committee recommends that the DHHS work with all of the tribes to ensure that all non-Indian foster or adoptive families of Indian children receive culturally appropriate materials to assist the families in helping the children identify with their cultural heritage.
- 5. Examine the successful model of agreement with the Houlton Band of Maliseet Indians.** The Committee believes the changes that have occurred in the State's handling of ICWA issues with respect to the Houlton Band of Maliseet Indians is a remarkable model of success. While the committee did not have time to examine the process that led to the agreement between the Band and the State or the details of the agreement, it is clear that something fairly dramatic has been accomplished. The committee recommends that the DHHS examine that process and the agreement and, to the extent appropriate, replicate its success across the State.

COMMITTEE PROCESS

The Committee to Study State Compliance with the Federal Indian Child Welfare Act of 1978 (“Committee”) was established during the First Regular Session of the 122nd Legislature by Resolve 2005, Chapter 118. A copy of the authorizing legislation is attached as Appendix A. The 12-member Committee included five Legislators, including the Tribal Representative of the Penobscot Nation, representatives of each of the four federally recognized tribes in Maine, a member of the Office of the Attorney General, a representative of the judicial branch and a representative of the Department of Health and Human Services (DHHS). The roster of Committee members is attached as Appendix C.

The Resolve required the Committee to meet no later than August 1, 2005. Due to some members of the Committee not being appointed until early November, the chairs requested an extension of the reporting deadline from December 7, 2005 to January 9, 2006 (a copy of the letter requesting the extension is attached as Appendix B). This was granted by the Legislative Council on November 28, 2005.

The Committee convened on December 15, 2005 for a single meeting. The Committee discussed how it should proceed given its late start, the timing in relation to the holidays, and the impending deadline of January 9th. The committee learned that a Wabanaki conference on the Indian Child Welfare Act (ICWA), to include representatives from the DHHS and the Office of the Attorney General, is scheduled for March 2006, that a goal of the conference is the build on the collaboration that has occurred in recent years between the State and the Tribes and to work toward making Maine ICWA practices and procedures a model for the nation. The committee discussed coordinating its work with that conference and perhaps seeking to extend the study into the 2006 interim. However, the committee concluded that the best course would be simply to report its consensus recommendations (all of which were readily reached during the committee’s discussion), to acknowledge the tremendous progress that has been made by the State in recent years in meeting the requirements and spirit of ICWA, and to encourage the parties, who seem clearly to be actively involved in on-going collaboration and productive dialogue, to continue that collaboration and dialogue.

The Committee to Study State Compliance with the Federal Indian Child Welfare Act of 1978, pursuant to Resolve 2005, Chapter 118, submits this report and recommendations to the Joint Standing Committee on Judiciary and the Legislative Council of the 122nd Legislature. The committee is not introducing any legislation with this report.

BACKGROUND AND ISSUES OF THE INDIAN CHILD WELFARE ACT

The Indian Child Welfare Act (ICWA) was signed into law in 1978 in response to Congressional findings that “an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by non-tribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions.”¹ From 1969 to 1974, the Association on American Indian Affairs (AAIA) conducted nationwide studies on the impact of state child welfare practices on American Indian children. AAIA’s research, presented at the Congressional hearings, indicated that 25%-35% of all American Indian children in some states were removed from their homes and placed in foster or adoptive homes or in institutions.²

Congress designed ICWA to restrain the authority of state agencies and courts in removing and placing Indian children because in child custody proceedings states “have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.”³ Thus, the law established standards for removing Indian children from their homes, tribal jurisdiction for handling such cases, and substantive requirements for any state decisions involving adoptive and foster placements for children identified as Indian.

ICWA has a dual focus with the well-being of tribes and children as fundamental and complementary goals.⁴ The stated policy of ICWA is “to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families.”⁵ This protection is accomplished in large part by the jurisdictional lines drawn by the Act. ICWA is designed to maximize the opportunity for tribal courts to determine the fate of their children. The Act grants tribes exclusive jurisdiction in all child custody matters involving Indian children who are wards of tribal courts or who reside or are domiciled on Indian reservations. On petition, cases involving Indian children domiciled outside a reservation are required, with some exceptions, to be transferred to the tribal court. This jurisdiction obviously applies to tribes with their own court systems. In Maine, the Passamaquoddy Tribe and the Penobscot Nation have tribal courts and have such jurisdiction. The Houlton Band of Maliseet Indians and the Aroostook Band of Micmacs currently do not have tribal courts so child custody cases are, absent other agreements between the State and either Band, handled through State court. ICWA does permit the State and a tribe to enter into agreements regarding jurisdiction (subject to termination upon 180-day notice by either party).⁶ The Houlton Band of Maliseet Indians have an agreement with the State that provides for the transfer of ICWA cases to the Penobscot court or the Passamaquoddy court, as authorized by the Band in accordance with any

¹ 25 U.S.C. §1901, sub-§4

² Albertson, Kirk (2004-05) “Applying Twenty-Five Years of Experience: The Iowa Indian Child Welfare Act” *American Indian Law Review* 29

³ 25 U.S.C. §1901, sub-§5

⁴ Atwood, Barbara Ann (2002) “Flashpoints Under the ICWA: toward a new understanding of state court resistance” *Emory Law Journal* 51(2)

⁵ 25 U.S.C. §1902

⁶ 25 U.S.C. §1919

agreements the Band has with the Penobscot Nation or the Passamaquoddy Tribe (see Appendix H).

ICWA also contains substantive provisions including preferences for placement of an Indian child for adoption or foster care.⁷ Section 1915(a) provides that an Indian child being adopted must be placed with (1) a member of the child’s extended family; (2) other members of the Indian child’s tribe; or (3) other Indian families. Section 1915(b) provides that an Indian child in foster care should be placed with (1) a member of the child’s extended family; (2) foster home approved by the child’s tribe; (3) an Indian foster home approved by an authorized non-Indian licensing authority; or (4) 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. (See Appendix F for flow charts.)

The Act authorizes tribes and the State to enter into agreements with respect to care and custody of Indian children. These agreements can be terminated with 180 days notice by either side at any time.⁸

ICWA gives flexibility to state courts in both jurisdictional and placement standards by stating that these procedures apply “in the absence of a good cause to the contrary.”⁹ The Bureau of Indian Affairs has outlined “good cause” further in its guidelines.¹⁰ (See Appendix E for a copy of the BIA guidelines.) These guidelines are both non-binding and sometimes controversial. The BIA guidelines provide that good cause exists to prevent transferring a child custody case to tribal court when no tribal court exists; the proceedings are in an advanced stage; the child is over the age of 12 years old; evidence necessary to decide the case could not be presented in tribal court without hardship to the parties; the parents of a child under five are not available and the child has had little contact with the tribe; or the tribal court declines to accept the transfer. The BIA guidelines provide that good cause to deviate from the placement preferences is present when the biological parents request it; extraordinary physical and emotional needs for a child exist as established by a qualified expert witness; and there are insufficient suitable families available for placement after a diligent search has been completed.

The flow charts in Appendix F provide an overview of the ICWA’s jurisdictional and substantive procedures and standards.

Flashpoints

On a national basis, most ICWA disagreements concern transferring jurisdiction of a child custody case from state court to tribal courts and “good cause” exceptions in the

⁷ 25 U.S.C. §1915

⁸ 25 U.S.C. §1919

⁹ 25 U.S.C. §§1911, 1915

¹⁰ Department of the Interior, Bureau of Indian Affairs *Guidelines for State Courts: Indian Child Custody Proceedings* Federal Register, November 26, 1979

law. It does not appear that fundamental disagreements in these areas currently exist in Maine.

Some state courts have employed a judge-made doctrine of the “existing Indian family exception” to deny that ICWA applies in certain child custody cases. This doctrine first appeared in Kansas and has been endorsed by at least 10 states. The Kansas Supreme Court ruled that ICWA did not apply to “an illegitimate infant who has never been a member of an Indian home or culture ... [and] so long as the mother is alive to object, would probably never become part of the [father’s] or any other Indian family”.¹¹ The existing Indian family exception has been used to argue that when neither the child nor parents have maintained a significant social, cultural or political relationship with their tribe, ICWA does not apply and thus the case remains in state court.

A court must show good cause for not following the placement preferences laid out in ICWA. However, in some custody situations, states have argued that it is not in the child’s best interests to remove a child from a long-standing custodial arrangement. Other courts have exhibited misgivings about potential disruption of an Indian child’s placement when there are strong custodial bonds with existing non-Indian caregivers. Some state courts have argued that separating the best interest of the child from the child’s connection with a tribe is contrary to ICWA, which seeks to promote the child’s interest by promoting tribal connection.

State Action Beyond ICWA

ICWA establishes minimum standards for the removal of children from their families and the placement of those children in foster or adoptive homes. States remain free to institute stronger laws with “a higher standard of protection”¹² and some states have done this (for example, Iowa and Nebraska).

The Iowa Indian Child Welfare Act was signed into law in May 2003, and its primary purpose is to limit the ability of state court judges to avoid applying ICWA.¹³ The Act repeats much of the language of the federal ICWA but it clarifies provisions of the federal Act as it applies to Iowa. For example, it requires notice for all custody proceedings whether voluntary or involuntary, allows tribes rather than state courts to determine who is an Indian child, and does not allow a deviation from placement preferences.¹⁴

Studies and Data

In recent years, state governments have undertaken analyses of compliance with ICWA (in particular, Arizona, North Dakota, South Dakota). In addition, the GAO recommended in its April 2005 report that the Administration for Children and Families

¹¹ cited in Albertson

¹² 25 U.S.C. §1921

¹³ Albertson

¹⁴ Iowa Code 232B, also known as the Iowa Indian Child Welfare Act.

(ACF) use ICWA compliance information available through its existing child welfare oversight activities to target guidance and assistance to states; HHS disagreed with this recommendation arguing that it does not have the authority under ICWA to do this.¹⁵ The GAO was hampered by lack of data at the state level. An overview of the GAO report is provided in Appendix G.

Committee member and Penobscot Nation Tribal Representative Michael Sockalexis collected and provided for the committee file various materials related to ICWA, which are listed in Appendix J.

¹⁵ GAO (April 2005) *ICWA: Existing Information on Implementation Issues Could be Used to Target Guidance and Assistance to States*

KEY FINDINGS

The Committee was established to study Maine's compliance with the federal Indian Child Welfare Act of 1978. While the committee met only once, it arrived at several important findings.

1. Maine's compliance vastly improved. The general consensus was that Maine's compliance with ICWA has improved tremendously in recent years; of particular note, it appears fewer children are being removed from Indian homes. There appears to be an improved relationship between tribes, the DHHS and the Office of the Attorney General with respect to ICWA issues. Periodic meetings, improved awareness and training and vastly improved communication have led to problem solving and a climate conducive to meeting the goals of ICWA. The Committee understands that this improvement is a result of the tireless efforts of the tribes to increase state awareness of the issues and to work with the State to resolve them. The Committee recognizes and commends the DHHS for its responsiveness in this area in recent years and for the significant progress that has been made in meeting the goals of ICWA.

2. A model of success: State agreement with the Houlton Band of Maliseet Indians. Tribes and States are authorized, though not required, under ICWA to negotiate agreements with respect to care and custody of Indian children and jurisdiction. The committee learned that only two of the four federally recognized tribes in Maine have agreements with the State. The Houlton Band of Maliseet Indians and the State signed an agreement in December 2002. The Penobscot Nation has an agreement from 1987. Neither the Passamaquoddy Tribe nor the Aroostook Band of Micmacs have agreements with the State.

The experience of the Houlton Band of Maliseet Indians is illustrative of the changing ICWA environment in Maine. For many years, the Maliseets had serious issues and concerns with respect to child placement decisions, especially the removal of children from their families and placements in non-Indian homes. Committee member, Chief Brenda Commander noted to the committee that things are now "100% better" than they were; issues still arise, but there is now a process and an institutional willingness to work through them. The Committee believes that the State's ICWA agreement with the Houlton Band of Maliseets and the good working relationship that has come with it provide a useful model for success.

3. Progress in reducing the number of Indian children removed from their families. The committee learned that the numbers of children being removed from their Indian families has come down since 2002. According to the DHHS, recent efforts have focused on keeping foster children in general in their home communities; the foster care population has been reduced by more than 20% in the last three years. Betsy Tannian, ICWA Director for the Houlton Band of Maliseet Indians, stated that only 2-3 Maliseet children have been removed from their homes in the last couple of years. There are still significant numbers of Indian children in foster care with non-native families; this is because many of these children have been in foster care for some time and the tribes

consider that it would not be in the child's best interest to remove them from those families.

4. Shortage of Indian foster and adoptive homes; maintaining cultural connections. The committee found that there continues to be a shortage of Indian families for foster and adoption placements. Part of the 2002 agreement between the State and the Houlton Band of Maliseet Indians included a cultural agreement to deal with children placed in non-native homes. The intention is to get an agreement with the non-native family to allow the child to continue cultural contacts and shared heritage. A cultural handbook was created by an intern with the Maliseets. The committee believes that efforts to maintain cultural connections are important when an Indian child is placed with non-Indian foster and adoptive families.

5. The importance of training. The committee learned that State ICWA training programs have improved in recent years. All new caseworkers in the Department of Health and Human Services (DHHS) receive ICWA training before starting their casework. The court system has also revised its procedures and forms to include inquiry into the application of ICWA at every stage of a child protection proceeding. However, the committee found that there is room for improvement, in particular with the ICWA training given to staff of social service agencies with whom the DHHS contracts.

CONCLUSIONS AND RECOMMENDATIONS

The Committee to Study State Compliance with the Federal Indian Child Welfare Act of 1978 presents the following conclusions and recommendations. These recommendations advance the conclusion of the Committee members that state compliance with ICWA is tremendously important, has made great strides in the last few years, but that there is still room for improvement. These recommendations were formulated and adopted through a consensus process by the Committee members present at the committee's single meeting held on December 15, 2005.¹⁶

The Committee urges the DHHS to continue its commendable efforts to maintain and improve its working relationships with the tribes on ICWA issues and compliance; the committee urges the DHHS to pay particular attention to training issues and to explore opportunities to discuss and develop appropriate agreements with each of the Maine tribes (building on the successful model of the agreement with the Houlton Band of Maliseet Indians).

Recommendations for Improving Maine's Compliance with the Federal Indian Child Welfare Act

- 1. ICWA training for DHHS and contract agencies.** The Committee recommends that the DHHS seek input and assistance from the tribes in developing and providing ICWA training for child case workers. The Committee recommends that the DHHS ensure that such training include clear instruction in the purposes of and policy behind ICWA. ICWA training should be provided to all DHHS child case workers as well as to employees of agencies the DHHS contracts with to provide child welfare services. For purposes of ICWA training, the Department is encouraged to seek out and make use of culturally appropriate videos and other educational materials available from entities such as the National Indian Child Welfare Association.
- 2. Update and develop agreements between the state and tribes.** Section 1919 of ICWA authorizes Indian tribes and states to enter into agreements respecting care and custody of Indian children and jurisdiction over child custody proceedings. In Maine, the state currently has agreements with the Houlton Band of Maliseet Indians (2002) and the Penobscot Nation (1987). The Committee recommends that the DHHS work with the Penobscot Nation to determine whether an update of its agreement with the State may be appropriate and work with the Aroostook Band of Micmacs and the Passamaquoddy Tribe to determine whether appropriate ICWA agreements may be developed.

¹⁶ Governor Robert Newell, Rosella Silliboy and Representative Roger Sherman were not present for the Committee meeting. Janet Lola represented Erlene Paul who was also unable to be present. This report, however, was circulated to all members for comments.

- 3. Recruit Indian foster families and placement options.** A major obstacle to implementing ICWA is the lack of available Indian foster families. The Committee recommends that the DHHS work with tribes to provide assistance in recruiting foster families.
- 4. Outreach for non-Indian foster families.** The committee learned that currently, non-Indian foster or adoptive families of Maliseet children receive a resource packet of cultural information that assists families in helping the children identify with their cultural heritage. The Committee recommends that the DHHS work with all of the tribes to ensure that all non-Indian foster or adoptive families of Indian children receive culturally appropriate materials to assist the families in helping the children identify with their cultural heritage.
- 5. Examine the successful model of agreement with the Houlton Band of Maliseet Indians.** The Committee believes the changes that have occurred in the State's handling of ICWA issues with respect to the Houlton Band of Maliseet Indians is a remarkable model of success. While the committee didn't have time to examine the process that led to the agreement between the Band and the State or the details of the agreement, it is clear that something fairly dramatic has been accomplished. The committee recommends that the DHHS examine that process and the agreement and, to the extent appropriate, replicate its success across the State.

APPENDIX A

Authorizing Legislation, Resolve 2005, Chapter 118

APPENDIX B

Copy of Letter Requesting Deadline Extension

APPENDIX C

**Membership List, Committee to Study State Compliance with the Federal Indian
Child Welfare Act of 1978**

APPENDIX D

Indian Child Welfare Act of 1978

APPENDIX E

BIA Guidelines for State Courts

APPENDIX F

OPLA Flow Charts Showing Key ICWA Standards and Procedures

APPENDIX G

Highlights, April 2005, GAO Report on ICWA

APPENDIX H

Copy of the Houlton Band of Maliseet Indians ICWA Agreement with the State

APPENDIX I

Copy of the Penobscot Nation ICWA Agreement with the State

APPENDIX J

**List of Materials Supplied to Committee by Penobscot Tribal Representative
Michael Sockalexis**