RESOLVED, That the American Bar Association urges Congress to amend Part E of Title IV of the Social Security Act to provide direct access for foster care and adoption services for Indian children under tribal court jurisdiction.
Background

On March 15, Senator Daschle introduced S. 550, the Indian and Alaska Native Foster Care and Adoption Services Amendments of 2001. Original cosponsors are Senators McCain, Inouye, Baucus, Cochran and Feinstein. The bill would correct a long-standing inequity in the Foster Care and Adoption Assistance Act (Act). That Act reimburses states for services provided to income-eligible children who are placed in foster care or adoptive homes through state agencies. Services provided by tribes for income-eligible children placed by tribal agencies are not eligible for reimbursement unless there is a tribal-state agreement. The legislation will allow direct tribal administration of the Foster Care and Adoption Assistance Entitlement Program.

S. 550 would amend the Act to allow tribal governments and Indian children placed by tribal agencies in out-of-home placements direct access to funding under the Foster Care and Adoption Assistance Act. It would also allow for tribal-state agreements. The bill was referred to the Senate Finance Committee.

The National Indian Child Welfare Association has worked for several years on the legislation. Among those endorsing the legislation are the National Congress of American Indians and the Native American Rights Fund. The American Public Human Services Association - the association of state social service agencies - has enforced amending the Foster Care and Adoption Assistance Act to allow for direct tribal administration of the program.

The Foster Care and Adoption Assistance Act, enacted in 1980 and codified in Title IV-E of the Social Security Act, is often referred to as “Title IV-E”. It is an open-ended federal entitlement program that provides reimbursement to states for training, administration and data collection related to foster care and adoption programs, for foster care maintenance payments and for adoption assistance. Maintenance payments help pay for things such as food, shelter, clothing, daily supervision, school supplies, general incidentals, liability insurance for the child, and reasonable travel to the child’s home for visits. Administrative monies fund case management and other related functions that support placement of the child. Training assistance is focused on agency people who provide services and also on foster care and adoptive families. States provide varying matching amounts for the various programs under the Act. Federal funding under this Act is approximately $6 billion per year. Nearly half of the funding is used for state administrative, case management, training, and data collection responsibilities under the Act. Other funding is paid directly to foster care homes.

Regulations for the Act allow states and tribes to enter into agreements in order to provide services to Indian children under tribal jurisdiction. Such agreements, however, have been difficult to reach and, in many cases, provide tribes with only some of the services that states receive under the Act. Approximately 70 tribes have Title IV-E agreements with states. Many of those agreements do not include a pass-through of training, administration or data collection funding to tribes. One impediment to tribal-state agreements is that states, as the grantee, retain liability for the expenditure of the funds.
Because the Foster Care and Adoption Assistance Act funding has not served tribes and Indian children in tribal areas in the same manner it serves states, tribes have had to turn to a discretionary program under the Bureau of Indian Affairs (BIA) social services - child welfare assistance - for some assistance. These BIA funds are very limited, are not available to all tribes and, when available, generally provide for only maintenance payments for foster care homes. Some Indian children living in tribal areas who meet the income criteria for the Foster Care and Adoption Assistance program are placed in foster care homes without the benefit of financial assistance. Funding for the array of other services offered states through the Act - case management, administration, training of staff and of foster care and adoptive families, data collection - is not generally available through the BIA. State governments and income-eligible children placed in foster care and adoptive homes through state agencies, on the other hand, receive reimbursement for these services as an entitlement of the Foster Care and Adoption Assistance Act. If S. 550 were enacted it would assist those tribes directly administering the program in the implementation of the Indian Child Welfare Act (ICWA). Many times tribes do not request transfer to tribal court of an Indian child in an ICWA state court proceeding due to the lack of financial resources to support the child. Many children in ICWA proceedings meet the income-criteria for eligibility for the Foster Care and Adoption Assistance Act, but when they are transferred from state to tribal jurisdiction, the financial support and services of that Act do not follow the child to his or her tribal community. Enactment of S. 550 would also free up the BIA social services funding that is now used for foster care maintenance payments for other pressing social service needs, possibly including any tribal match requirements for the Foster Care and Adoption Assistance Act programs. Several members of Congress have in recent years proposed that legislation such as S. 550 be included in the welfare reform law and/or as part of adoption legislation. These members include Senators McCain, Campbell, Inouye, Daschle and Dorgan as well as Representatives Richardson, Young, Hayworth and McDermott. Testimony has been presented before the House Ways and Means Committee, the Senate Finance Committee, and the Senate Committee on Indian Affairs regarding the need to amend the Foster Care and Adoption Assistance Act to provide equitable resources to Indian tribes and Indian children. In the 106th Congress, Senator Daschle introduced S. 1478, legislation that is nearly identical to S. 550. The Impact of the Indian & Alaska Native Foster Care and Adoption Services Amendments of 2001 S. 550 would bring a government-to-government relationship to the Title IV-E Foster Care and Adoption Assistance Act. Under this legislation, tribal governments could apply to the Department of Health and Human Services (DHHS) to directly administer the program. Tribal governments would also retain the option to enter into tribal-state agreements. Key features of S. 550 are:

* Tribes and tribal consortia could apply to DHHS to directly administer the program.
• Tribes could utilize their own foster care standards in the operation of the program.
• Foster care maintenance payments would be made according to the tribe's medical assistance rate. The highest federal share would be 83 percent.
• DHHS would establish regulations to establish the federal/tribal shares for the training, administration, and data collections programs under the Foster Care and Adoption Assistance Act.
• Tribes, unlike states, could use other federal or state funds to provide any match that may be required for programs under the Foster Care and Adoption Assistance Act.
• Tribal-state agreements in effect at the time of enactment may continue and tribes and states could enter into future agreements as well.
• In an effort to make tribal-state agreements more attractive, S. 550 would allow a state, as part of a tribal-state agreement, to utilize the tribe’s federal medical assistance rate (that, in most cases, would be higher than the state’s rate) in providing the match for foster care and adoption payments for children under tribal jurisdiction. Under current tribal-state agreements, states pay the required foster care/adoption match at its own federal medical assistance rate.
• For tribes that do not have a tribal-state agreement and do not operate the program directly, provision is made for less formal tribal-state agreements that would allow foster care maintenance payments to be made for children placed by tribal agencies.
• Upon the request of a tribe or tribes, the Secretary may modify the requirements of the Act if she/he determines it is in the best interests of the children being served by the tribe or tribes.

Conclusion

Due to congressional oversight, Native American children under tribal court jurisdiction are not afforded the same entitlement to foster care and adoption services as other children pursuant to Part E of Title IV of the Social Security Act. The proposed amendment, S. 550, will remedy this error by providing equitable access to foster care and adoption services for Indian children under tribal court jurisdiction. Given that the current language of Title IV-E of the Social Security Act results in the preferential treatment of one class of children and neglects to extend the same benefits and rights to Indian children under tribal jurisdiction, the American Bar Association must lend support to correct this mistake.

Respectfully submitted,

August 2001

Josephine A. McNeil
Chair
GENERAL INFORMATION FORM
To Be Appended to Reports with Recommendations

Submitting Entity: Commission on Homelessness and Poverty
Submitted By: Josephine A. McNeil, Chair

1. Summary of Recommendation(s).
This recommendation supports the amendment of Part E of Title IV of the Social Security Act to provide equitable access for foster care and adoption services for Indian children under tribal court jurisdiction.

2. Approval by Submitting Entity.
Approved by the Commission on Homelessness and Poverty on May 22, 2001.

3. Has this or a similar recommendation been submitted to the House or Board previously?
No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?
The American Bar Association House of Delegates has approved numerous recommendations with regard to children in foster care but has not addressed the issues in this recommendation. This recommendation would enhance existing policy to address the inequities that currently exist in the Foster Care and Adoption Assistance Act.

5. What urgency exists which requires action at this meeting of the House?
There is currently discussion in Congress regarding the need to amend the Foster Care and Adoption Assistance Act to provide equitable resources to Indian tribes and Indian children. Adoption of this recommendation would allow the Association to join the debate and express its views on this important matter.

6. Status of Legislation. (If applicable.)
On March 15, 2001 Senator Daschle introduced S. 550, the Indian and Alaska Native Foster Care and Adoption Services Amendments of 2001. The bill has been referred to the Senate Finance Committee.

7. Cost to the Association. (Both direct and indirect costs.)
N/A

8. Disclosure of Interest. (If applicable.)
N/A
9. **Referrals.**
   In late May 2001, this Report and Recommendation was referred to the Chairs and staff of all ABA Sections and Divisions and the Chair and staff of the Steering Committee on the Unmet Legal Needs of Children.

10. **Contact Person.** (Prior to the meeting.)
    Amy E. Horton-Newell, Staff Director
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11. **Contact Person.** (Who will present the report to the House.)
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12. **Contact Person Regarding Amendments to This Recommendation.**
    There are no known proposed amendments at this time.