

NPR Story Follow Up

10/27/11

Does DSS kidnap Indian children?

The article implies that state Child Protection Services staff are taking Indian children off the reservation from their families without any legal due process. Peter Lengkeek, Crow Creek Tribal Council Treasurer, is quoted as saying: "It's kidnapping. That's how we see it." This is not true.

Pursuant to state law, Child Protection Services staff within the South Dakota Department of Social Services are not authorized to remove children and place them in protective custody. Only law enforcement officers and judges have the legal authority to remove a child. Laura Sullivan was provided a citation to this law but this didn't support the "story" she wanted to tell.

Here are the facts, supported by law and implemented in practice. Three of the nine South Dakota tribes operate their own child protection and foster care programs. A fourth operates foster care programs, but not child protection. The Department of Social Services provides child protection services to the seven tribes that do not operate their own, and provides foster care services to the five tribes that do not operate their own.

In the situations when the Department of Social Services provides services to the tribes, removal of children occurs through tribal police or tribal court action and placement after that removal is with the Department of Social Services. The decisions and periodic review of those decisions remain with the tribal court. Tribes as sovereign nations have their own laws and codes.

In cases involving removal of a child, Child Protection Services, law enforcement and the states attorney or tribal prosecutor are all involved in the process. Their roles are:

- Child Protection Services - receives reports of child abuse and neglect, coordinates investigations with law enforcement, and receives and arranges for placement of children removed by law enforcement;
- Law Enforcement – receives reports of child abuse and neglect, investigates abuse and neglect cases, and takes protective custody of children when necessary;
- States Attorney– receives reports of child abuse and neglect, determines whether a petition should be filed in civil court and/or whether criminal charges should be filed, represents the state in child abuse and neglect cases, and notifies parties required by ICWA.

If the Child does not live within the boundaries of a reservation, the review of the temporary removal and any initial proceedings are in state court and the following apply:

No child may be held in temporary custody longer than 48 hours without a hearing being held before a Circuit Court Judge (“48 Hour Temporary Custody Hearing”). The parties are given notice and the purpose of the hearing is to determine whether continued temporary custody outside the home is necessary to protect the child. The state bears the burden to prove that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

If the Circuit Court orders that temporary custody continues the court will schedule review hearings and the department must make reasonable efforts to return the child (unless certain exceptions are met as provided in law).

The Indian Child Welfare Act (ICWA) applies to all state court abuse and neglect proceeding involving an Indian Child. It does not apply to tribal court proceedings. If an Indian Child is involved, the state must provide notice of hearing 10 days prior to the hearing to the parent or Indian custodian and the tribe. If the identity of the parent or Indian custodian and tribe is unknown, 15 days notice of hearing must be given to the Secretary of the Interior. The 10 or 15 day notice provision doesn’t apply to emergency removal or the 48 hour temporary custody hearing. Section 1911 (a) of the Act gives tribes exclusive jurisdiction over proceedings that involve the foster care placement of Indian children who live on the reservation.

In the Yellow Robe case highlighted in the article removal of the children would have necessitated tribal law enforcement involvement and involvement by the tribal prosecutor as to whether a petition for abuse or neglect is filed.

DSS places children in foster care for the money.

According to Laura Sullivan, “A close review of South Dakota’s budget shows that they receive almost \$100 million a year to subsidize its foster care program”.

The entire budget for all programs and services in the Division of Child Protection services is \$59 million. Of that total almost half- 45% (\$26.9 million)- is state funds, 52% (\$30.9 million) is federal funds and 3% (\$1.2 million) is other funds. During SFY11, DSS spent a total of \$8 million for foster care and foster care support services for children.

“The federal government sends the state thousands of dollars for every child it takes”.

Because the source data in this story is vague, we can only assume Laura Sullivan is referring to Title IV-E payments for foster care. DSS received approximately \$6.4 million in Title IV-E funding for family foster care from the federal government in FFY 11.

Laura Sullivan failed to report that, the state to receive IV-E funding from the federal government for children in foster care, specific standards must be met that are in place to protect children. The following requirements must be met for each child:

- the child must first be determined to be income eligible for IV-E,

- there must be court findings regarding reasonable efforts to prevent removal and that reasonable efforts will be made to return the child and that remaining in the home would be contrary to the welfare of the child,
- responsibility for placement and care vested with the State agency or a tribe if there is a IV-E agreement between the state and the tribe,
- placement in a licensed foster family home or childcare institution

The federal government conducts IV-E Reviews of every state every three years to assure that all federal requirements are met, and SD is in compliance with all requirements.

Furthermore, the state must provide state funds or a “match” for all federal funds used to pay for care through the Title IV-E program. SD paid state funds for IV-E services in FY11. Having more kids in care only increases the state’s financial commitment to their care.

“More than half of that money went to the department’s administrative costs, according to federal records”.

This is not true under any definition of “administrative costs.” Less than 30 percent of the total budget of the Division of Child Protection Services is spent on “administration and staff,” which includes not only administrative costs but all staff, including child protection workers. Only about 10 percent of Title IV-E expenditures are spent on Child Protection Services administration and staff.

Numbers don’t lie, or do they?

The article states that “nearly 700 Native American in South Dakota are being removed from their homes every year”, but it fails to mention that according to [the Child Welfare Outcomes 2004-2007: Report to Congress](#), in federal fiscal year 2007, while 755 Native American children entered care, 721 Native American children in South Dakota left care.

Current data from DSS, indicates that for **all** children in foster care, approximately 54% are under the authority of state courts, while 46% are under the authority of tribal courts in South Dakota. Tribal courts have the authority to makes decisions about Native American children in care.

According to Bill Napoli, former state legislator: ...”when the state first saw the large amounts of money the federal government was sending the Department of Social Services in the later 1990s- ‘that’s when we saw a real influx of kids being taken out of families’”

Average Monthly Family Foster Care Placements

FY94 – 487

FY95 – 456

FY96 – 427

FY97 – 469

FY98 – 520

FY99 – 540 (11% increase from FY94)- hardly a real influx

The NPR report claimed that “Last year [Crow Creek Tribal Council Treasurer Peter] Lengkeek asked social service officials to tell him where the children were and who they were placed with. Seven months later, he received a list. Lengkeek says every single child was placed in a white foster home”.

On February 22, 2011, Crow Creek Tribal Vice Chair Wilfred Keeble stopped at the DSS office in Pierre asking for statistics about children with DSS from the Crow Creek Sioux Tribe be sent to Peter Lengkeek.

On February 23, 2011, Virgena Wieseler, Director of the Division of Child Protective Services, sent Peter Lengkeek an email with the statistics he requested. On February 23, 2011, Virgena forwarded the email sent to Peter Lengkeek to Wilfred Keeble.

Statistics sent in February 2011 to Peter and Wilfred

Children from Crow Creek Tribe in Tribal Court out of the Chamberlain Office – 29

- Trial Reunification = 1
- Relative Placement = 8
- Foster Care with Relative = 3
- Foster Care off the Reservation = 8 (2 are in Native American homes)
- Boarding School = 3
- Group Care Center = 1
- Residential Treatment Center = 5

Children from Crow Creek Tribe in State Court out of the Chamberlain Office = 4

- Relative Placement = 1
- Foster Care off the Reservation = 3

What can tribes do?

Tribes are able to operate their own child protection programs and DSS has had agreements with Sisseton-Wahpeton Oyate since 1978, Standing Rock Sioux Tribe since 1993, Flandreau Santee Sioux since 2000 and Lakota Oyate Wakanyeya Owicakiyapi (LOWO) of the Oglala Sioux Tribe since March 2008. These programs access federal Title IV-E funding through DSS to provide for the care of tribal children in foster care and two of the tribes also submit claims for IV-E administrative costs for operation of their child protection program.

Crow Creek Sioux Tribe had an IV-E Agreement with the State beginning in 1995 through June 2009. The Tribe did not sign the agreement offered in FY10 or FY11.

When Tribes do not operate a child protection program, the state provides that service. The Department of Social Services has reached out to tribes across the state several times in recent years encouraging them to provide child protection services directly to their members.

The federal Fostering Connections to Success and Increasing Adoptions Act of 2000 - Public Law 110-351 –provides the following opportunities to Tribes:

- Allows federally-recognized Indian Tribes, Tribal organizations, and Tribal consortia to apply to receive title IV-E funds directly from the federal government for foster care, adoption assistance, and kinship guardianship assistance (effective October 1, 2009)
- Requires federal HHS to provide technical assistance and implementation services to Tribes seeking to operate title IV-B and IV-E programs
- Authorizes one-time grants to Tribes that apply to assist in developing a title IV-E program

ADDITIONAL FACTS

1. “The state says parents have ‘neglected’ their children, a subjective term”.

The State does not define “neglect” arbitrarily. The definition of abused or neglected child can be found in SDCL 26-8A-2:

26-8A-2. Abused or neglected child defined. In this chapter and chapter 26-7A, the term, abused or neglected child, means a child:

- (1) Whose parent, guardian, or custodian has abandoned the child or has subjected the child to mistreatment or abuse;
- (2) Who lacks proper parental care through the actions or omissions of the child's parent, guardian, or custodian;
- (3) Whose environment is injurious to the child's welfare;
- (4) Whose parent, guardian, or custodian fails or refuses to provide proper or necessary subsistence, supervision, education, medical care, or any other care necessary for the child's health, guidance, or well-being;
- (5) Who is homeless, without proper care, or not domiciled with the child's parent, guardian, or custodian through no fault of the child's parent, guardian, or custodian;
- (6) Who is threatened with substantial harm;
- (7) Who has sustained emotional harm or mental injury as indicated by an injury to the child's intellectual or psychological capacity evidenced by an observable and substantial impairment in the child's ability to function within the child's normal range of performance and behavior, with due regard to the child's culture;
- (8) Who is subject to sexual abuse, sexual molestation, or sexual exploitation by the child's parent, guardian, custodian, or any other person responsible for the child's care;
- (9) Who was subject to prenatal exposure to abusive use of alcohol, marijuana, or any controlled drug or substance not lawfully prescribed by a practitioner as authorized by

chapters 22-42 and 34-20B; or

(10) Whose parent, guardian, or custodian knowingly exposes the child to an environment that is being used for the manufacture, use, or distribution of methamphetamines or any other unlawfully manufactured controlled drug or substance.

Source: SDC 1939, § 43.0301 (12) as enacted by SL 1968, ch 164, § 1; SL 1984, ch 192, § 1; SL 1990, ch 170, § 4; SL 1991, ch 217, § 111B; SDCL Supp, § 26-8-6; SL 1998, ch 204, § 2; SL 2004, ch 181, § 1; SL 2005, ch 141, § 1; SL 2008, ch 137, § 1.

2. “Letters to the state and governor went unanswered”.

Senator Bradford provided a letter written by Janice Howe dated March 10, 2010 addressed to State of South Dakota Legislators to DSS and DOH. The letter indicated that Janice Howe had talked to Roger Campbell, the Native Liaison for Governor Rounds and nothing had been done yet. The letter voiced her concerns about the Indian Child Welfare Act Director (ICWA) for the Crow Creek Sioux Tribe who signed an agreement the state to allow the state to come on the reservation, do investigations, and remove children and place them in foster homes paid by the state. Her letter was a complaint about the ICWA Director. Responses were drafted for Senators Hunhoff, Abdallah and Bradford.

- **Information provided to Laura Sullivan in August 2011:** DSS had 65 licensed Native American foster homes.
 - 59 Native American children placed in 24 of these homes.
 - 35 of the foster families have chosen subsidized guardianship for children placed with them.
 - 21 of the foster families adopted the children in their care.
 - 15 of the foster families only want to care for their relatives and are not interested in taking other children.
 - 12 of the foster families have requested not to be considered for placement due to other needs, but remain licensed in case their situation changes.
 - **NOTE:** These numbers are duplicative in all or some of the above categories.

3. “Less than 12 percent of the children in foster care in SD have been actually physically or sexually abused in their homes. That’s less than the national average”.

While it is true that the majority of substantiated cases in South Dakota involve child neglect, Laura Sullivan fails to say that this is consistent with the national trend.

4. “Walters says the workers don’t understand that most tribal members don’t have money to buy gas for a parenting class two hours away or that food is often shared among families”.

DSS has and continues to provide financial assistance to families to assist with reunification such as funding for gas to facilitate visitation, beds/dressers for relatives to care for children, groceries, rental fees, rental deposits, utilities, child care assistance, etc.

In the last 12 month period, Child Protection Services provided financial assistance for as many as 200 Native American families to support efforts to keep children in the parents' home, to support efforts to reunify children with their parents, and to support efforts to place and maintain children in relative care when children needed to be placed out of the home.

Case Example:

Assistance provided to a family DSS was working with while the children were in the parent's home: DSS bought gas on more than one occasion for a parent to transport their child to out of town appointments, helped pay her water bill, helped replaced groceries after mice infestation, helped her with fees required to renew her driver's license so she could get to work.

5. Jolene Abourezk, ex-employee who worked for the state for 7 years.

True over a decade ago. Jolene Abourezk was employed as a family service specialist in the Rapid City office from 1995- 2001.

6. Bill Napoli, chaired the Senate Appropriations Committee

Bill Napoli never chaired Senate Appropriations. He served on Appropriations from 2003-2006.

7. A decade ago, SD designated all Native American children 'special needs', which means Native American children who are permanently removed from their homes are worth more financially to the state than other children".

South Dakota and 39 other states and the District of Columbia mention either race or minority or ethnic background in their definition of "special needs".

The phrase "special needs" in this context does not necessarily refer to a person with developmental disabilities. Rather, South Dakota's definition of "special needs" as listed on the Child Welfare Information Gateway website is a child with at least one of the following needs or circumstances that may be a barrier to placement or adoption without financial assistance:

- Eight years of age or older
- Race or religion (Native American)
- Member of a sibling group to be placed together for adoption
- Physical, emotional, neurological, or intellectual handicap or problem
- Need of a prosthesis, extensive, on-going, or anticipated medical care, or therapy for speech, physical, or psychological problems
- Adoption by foster parents with whom the child is living is the only appropriate permanency plan

8. Confidentiality of Child Abuse and Neglect Investigations

All investigative case records and files relating to reports of child abuse and neglect are confidential and may not be disclosed except as provided in law. Therefore, the article's mention of sources who have reviewed the records and files is highly suspect. Any person who knowingly violates the confidential nature of the records, files or information is guilty of a class 1 misdemeanor.

This same law also prohibits the department from disclosing or discussing the facts of any particular case or situation, even if it would set the record straight by correcting misinformation.