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September 4, 2025

Senator Jesse L. James, Chair
Committee on Mental Health, Substance Abuse
Prevention, Children and Families
Room, 319 South State Capitol
Madison, WI 53707

Re: Comments in Opposition to SB 79 – Disclaimer of Parental Rights by Affidavit

Dear Chair James:

We thank you and the Senate's Committee on Mental Health, Substance Abuse Prevention, Children and Families for allowing the Lac Courte Oreilles Band of Lake Superior Chippewa Indians ("LCO") the opportunity to submit written comments on this Bill that negatively impacts the Tribe. Since 2021, Tribes in Wisconsin have been expressing their concern that the proposed path of terminating one's parental rights through an affidavit would be a backdoor approach to avoid the requirements and protections of the federal and Wisconsin Indian Child Welfare Act (ICWA/WICWA). We call upon legislative decision-makers to vote no on SB 79.

Brief ICWA Overview

Already heavily hit by the removals during the boarding school era[1] (roughly 1869-1960s), many Tribal families were subjected to the U.S. Bureau of Indian Affairs' Indian Adoption Program in the 1950s and 1960s. This Program actively recruited non-Native adoptive families from the east to adopt Native children by disparaging Native families and Tribal culture with sensationalized statements like "unwed Indian mothers, deviant extended families, and hopelessly impoverished and alcoholic parents."[2] Tribal families, at alarming rates, had to likewise endure state social workers inserting themselves into Tribal families' lives and analyzing them through a white middle-class lens during this period leading up to the late 1970s. Instead of finding actual abuse, social workers would instead say they found instances of *social deprivation* for behaviors or living standards that were completely normal and appropriate within the constructs of Tribal traditional values and customs. Despite no factual safety risk being found, Native children were whisked away from their families and Tribal communities forever.

Across the country, 25%-35% of Native children were being removed from their families. A staggering 85% of these removals resulted in Native children being placed outside their families despite relatives or tribal members being ready and able to care for them. Here in Wisconsin, you

[1] DAVID W. ADAMS, EDUCATION FOR EXTINCTION 27 (1995) (finding that by 1926 nearly 83% of Indian school-age children were attending boarding schools).
[2] Margaret D. Jacobs, "Remembering the 'Forgotten Child': The American Indian Child Welfare Crisis of the 1960s and 1970s," 37 Am. Indian Q. 136, 144 (2013).

were 1,600% more likely to be removed if you were a Native child versus a non-Native child pre-enactment of the ICWA. Ultimately, Congress enacted the ICWA in 1978 to address this grossly disproportionate removal of Native children from not just their families, but importantly their Tribal communities.

Even with the efforts Wisconsin has made since state codification of the ICWA in 2009, DCF reported the entry and out-of-home care rate for Native children was 4.5 times higher than the total Native children living in the state for the 2023 calendar year.[3] In 2019, Wisconsin had the 2nd highest Native disproportionality rate in the country, with a 5.87% disproportionality rate for Native children in foster care according to the National Indian Child Welfare Association.[4] As such, Tribes continue to fight and be vocal advocates for their Tribal children even 46 ½ years after the passage of the ICWA.

The ICWA is an entirely unique child welfare law in that it protects the best interests of both Indian children and Tribes – and these are interwoven interests. "Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People."[5] With that congressional testimony from Mississippi Band of Choctaw Indians' Tribal Chief, Calvin Isaac, Congress found that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children."[6] Likewise, it is the policy of Wisconsin to "[p]rotect the best interests of Indian children and promote the stability and security of Indian tribes and families by…placing an Indian child in a placement that reflects the unique values of the Indian child's tribal culture and that is best able to assist the Indian child in establishing, developing, and maintaining a political, cultural, and social relationship with the Indian child's tribe and tribal community."[7]

Ultimately, the ICWA is known across the country as the *gold standard* in child welfare.[8] This is because research and tried experience both show that children are best served by preserving their connections with family and community – for all children, Native and non-Native; newborns and teens.

SB 79- Oppose, but appreciate the addition of ICWA language since the 2021 version

- ***Without having parents at a hearing, it allows for ICWA/WICWA avoidance and would not be in compliance with federal regulations.***

Disclaiming parental rights via written affidavit fails to meet the federal standard as set forth in 25 C.F.R. § 23.107, and thus the federal regulation would preempt this proposed legislation. The regulation creates an affirmative duty to ask the parties during a voluntary or involuntary child-custody proceeding whether a participant knows or has reason to know that the child is Indian. Beyond that, it establishes how one goes about fulfilling that duty. This standard and the process set

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[3] Wisconsin Department of Children and Families, *Wisconsin Out-of-Home Care (OHC) Report Calendar Year 2023*, at 6, https://dcf.wisconsin.gov/files/publications/pdf/5692.pdf (last visited May 19, 2025).

[4] National Indian Child Welfare Association, *Disproportionality in Child Welfare Fact Sheet*, Oct. 2021, https://old.nicwa.org/wp-content/uploads/2021/12/NICWA_11_2021-Disproportionality-Fact-Sheet.pdf.

[5] *Haaland v. Brackeen*, 143 S. Ct. 1609, 1623 (2023) (quoting *Hearing on S. 1314 Before the Subcomm. on Indian Affs. and Pub. Lands of the H. Comm. on Interior and Insular Affs*., 95th Cong., 2d Sess., 193 (1978) (statement of the Tribal Chief of the Miss. Band of Choctaw Indians)).

[6] 25 U.S.C. § 1901(3).

[7] Wis. Stat. § 48.01(2).

[8] Casey Fam. Programs, Child and Family Services Practice Model (2021), https://www.casey.org/media/101-Practice-Model-1.pdf (stating "[t]he principles of ICWA have been part of Casey's practice for years and are embodied in the values of the CFS practice model. The explicit adoption of these principles as the gold standard allows Casey Family Programs to demonstrate why ICWA should be implemented, and how it can serve all children and families in the best possible ways.")

forth in regulation warrants more than SB 79 provides, as SB 79 bypasses these courtroom opportunities altogether.

> **25 C.F.R. § 23.107 How should a State court determine if there is reason to know the child is an Indian child?**
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> (a) State courts must ask each participant in an emergency or voluntary or involuntary child-custody proceeding whether the participant knows or has reason to know that the child is an Indian child. The inquiry is made at the commencement of the proceeding and all responses should be on the record. State courts must instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child.
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> **25 C.F.R. § 23.124 What actions must a State court undertake in voluntary proceedings?**
>
> (a) The State court must require the participants in a voluntary proceeding to state on the record whether the child is an Indian child, or whether there is reason to believe the child is an Indian child, as provided in § 23.107.
>
> …

By having the parents at a court hearing, it allows the Judge to ask the appropriate questions to be able to truly determine whether the court "knows or has reason to know" a child is an Indian child. It is not enough that there is information within the Affidavit. The inquiry is to be made by the Judge in every proceeding. It is far easier to perpetuate a lie when it comes down to simply checking the box that a child is not Indian. However, when a parent is before a Judge who can fully explain the consequences of lying on the record and who can ask more detailed and open-ended questions, it allows for a greater level of honesty and ICWA/WICWA compliance.

Further, appearances can be deceiving. There is no one size fits all "look" for someone who is a tribal member. As such, the requirement that every single person be asked if they know or have reason to know if the child is an Indian child is one of the most important added protections of the ICWA and federal regulations. This protection was put into place because Tribal children can and will slip through the cracks without the added protection of having a Judge asking the necessary questions of every single party in every single case.

There are not enough protections within the bill to account for private agency or public agency abuse, including sanctions for those who would try and persuade someone to deceive the court regarding the Indian status of a child in order to avoid ICWA/WICWA.

Disclaiming parental rights solely through affidavit should give everyone pause- not just Tribal members. The opportunity for abuse and duress is at times far greater than those may be willing to admit. This is always true of women within the days after giving birth, when fluctuating hormones affect cognitive functioning. While they have a full year to accomplish this disclaimer, it is most likely that fraud and duress tactics will be used during these vulnerable days post-delivery. And even with a three-month statute of limitations for fraud and duress, a parent who is likely to use this disclaimer is likely not going to be in the best position to successfully navigate the invalidation process in such a short timeframe and could in turn be pulled unfairly into the child welfare system.

Further, there are concerns about how fathers are treated differently, which could give rise to equal protection concerns. The fact that fathers or alleged fathers can give up their rights in this manner prior to the birth of their child shows that fathers are not perceived equally or given similar

respect. Additionally, there is grave concern that alleged fathers are terminating rights to which they arguably do not even have, if they are only in "alleged" status. Everything is being rushed, instead of ensuring the correct person is even involved.

The use of a written affidavit to disclaim parental rights can be used as a tool for avoidance of ICWA/WICWA in not only voluntary actions, but also in involuntary actions. Perhaps some may argue that the stronger language added, specifically that this bill does not apply to matters where ICWA/WICWA would apply or an Indian child is involved, and better cross-referencing could save this bill. Even with this though, we believe this legislation still lays the groundwork for ICWA/WICWA avoidance. For a number of years, protective plans were utilized by county agencies as a tool to avoid ICWA/WICWA. The contributing factor that allowed for these to be abused was the fact that they are tools used outside of the courtroom processes. We fear that these affidavits could be used in the same manner- as a loophole.

In summation, we have numerous concerns regarding SB 79:

- Affidavits being used as an ICWA/WICWA avoidance tool;
- Federal preemption concerns for failing to set forth a procedural system that adequately follows 25 C.F.R. § 23.107;
- Equal protection under the law with regards to procedural differences between mothers and alleged fathers; and
- Legal concerns over non-marital alleged fathers disclaiming rights to which they do not possess until paternity is acknowledged or adjudicated after birth of a child.

Conclusion

There is nothing more important to a Tribe than its children. They are our future, and they will ultimately be the links to our past. It is likewise in their best interests to have the opportunity to learn about their Indian heritage and be connected with their Tribal communities. We- Wisconsin and Tribes- must work together to find a fix before we lose any more of our Tribal children and before our Tribal children lose us. Great things happen when we work together- just look at WICWA.

We thank you for the opportunity to provide written comments on this bill. Please accept this as our opposition to SB 79. Should further discussion be sought we would welcome a seat at the table for that purpose.

Respectfully Submitted,

Lac Courte Oreilles Band of Lake
Superior Chippewa Indians
Tribal Governing Board

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25 C.F.R. § 23.107 How should a State court determine if there is reason to know the child is an Indian child?

(a) State courts must ask each participant in an emergency or voluntary or involuntary child-custody proceeding whether the participant knows or has reason to know that the child is an Indian child. The inquiry is made at the commencement of the proceeding and all responses should be on the record. State courts must instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child.

(b) If there is reason to know the child is an Indian child, but the court does not have sufficient evidence to determine that the child is or is not an "Indian child," the court must:

(1) Confirm, by way of a report, declaration, or testimony included in the record that the agency or other party used due diligence to identify and work with all of the Tribes of which there is reason to know the child may be a member (or eligible for membership), to verify whether the child is in fact a member (or a biological parent is a member and the child is eligible for membership); and

(2) Treat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition of an "Indian child" in this part.

(c) A court, upon conducting the inquiry required in paragraph (a) of this section, has reason to know that a child involved in an emergency or child-custody proceeding is an Indian child if:

(1) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that the child is an Indian child;

(2) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child;

(3) The child who is the subject of the proceeding gives the court reason to know he or she is an Indian child;

(4) The court is informed that the domicile or residence of the child, the child's parent, or the child's Indian custodian is on a reservation or in an Alaska Native village;

(5) The court is informed that the child is or has been a ward of a Tribal court; or

(6) The court is informed that either parent or the child possesses an identification card indicating membership in an Indian Tribe.

(d) In seeking verification of the child's status in a voluntary proceeding where a consenting parent evidences, by written request or statement in the record, a desire for anonymity, the court must keep relevant documents pertaining to the inquiry required under this section confidential and under seal. A request for anonymity does not relieve the court, agency, or other party from any duty of compliance with ICWA, including the obligation to verify whether the child is an "Indian child." A Tribe receiving information related to this inquiry must keep documents and information confidential.

§ 23.124 What actions must a State court undertake in voluntary proceedings?

(a) The State court must require the participants in a voluntary proceeding to state on the record whether the child is an Indian child, or whether there is reason to believe the child is an Indian child, as provided in § 23.107.

(b) If there is reason to believe the child is an Indian child, the State court must ensure that the party seeking placement has taken all reasonable steps to verify the child's status. This may include contacting the Tribe of which it is believed the child is a member (or eligible for membership and of which the biological parent is a member) to verify the child's status. As described in § 23.107, where a consenting parent requests anonymity, a Tribe receiving such information must keep relevant documents and information confidential.

(c) State courts must ensure that the placement for the Indian child complies with §§ 23.129-23.132.