

August 2020

State-Tribal Relations Committee
Hope Stockwell

FINAL REPORT TO THE 67TH MONTANA LEGISLATURE

DRAFT

**IMPROVING
COMMUNICATION ON
ICWA CASES**

2019-2020

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Before the close of each legislative session, the House and Senate leadership appoint lawmakers to interim committees. The members of the State-Tribal Relations Committee, like most other interim committees, serve one 20-month term. Members who are reelected to the Legislature, subject to overall term limits and if appointed, may serve again on an interim committee. This information is included in order to comply with 2-15-155, MCA.

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EXECUTIVE SUMMARY

This report is a summary of the work of the State-Tribal Relations Committee (STRC), specific to the committee's 2019-2020 study of improving communication between the Child & Family Services Division (CFSD) at the Department of Public Health and Human Services and tribes as outlined in the STRC's work plan. Members received additional information and public testimony on the subject, and this report is an effort to highlight key information and the processes followed by the STRC in reaching its conclusions.

The STRC dedicated 200 hours in its work plan to the study and initially planned to review the following:

- current communication practices between CFSD and tribes;
- perspectives on communication from members of the Indian Child Welfare Act (ICWA) Court team in Billings; and
- data on number of American Indian children in foster care and a comparison of placement rates for American Indian children compared to other youth.

As the study evolved, the STRC also discussed:

- CFSD caseload data;
- timelines for initial hearings in child abuse and neglect cases;
- how CFSD trains child protection specialists overall as well as how to work with tribal members and about ICWA;
- who selects qualified expert witnesses (QEW) for ICWA cases and efforts the state is making to recruit additional QEWs;
- how CFSD tracks the location of children in foster care; and
- the impacts of COVID-19 on CFSD operations.

To review additional information, including audio minutes and exhibits, visit the committee website: <http://leg.mt.gov/tribal>.

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INTRODUCTION

At their August 2019 meeting, members of the State-Tribal Relations Committee discussed whether a disproportionate number of American Indian children are placed in foster care compared to other children and how a lack of communication between tribes and the Child & Family Services Division (CFSD) at the Department of Public Health and Human Services contributes to the situation.

Central to communications is the handling of ICWA cases where the state has jurisdiction because a case of abuse, neglect, or certain acts of juvenile delinquency¹ involving an Indian child occurred outside the boundaries of a reservation.² Federal law defines Indian children as:

- unmarried and under 18 years of age; and either
- a member of an Indian tribe or eligible to be a member; and
- the biological child of a member of an Indian tribe.³

If it's known or there is reason to believe a child is an Indian child, federal regulations require child protection specialists (CPS) and courts to handle the case as an ICWA case until proven otherwise.⁴

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¹ The acts of juvenile delinquency include offenses that would not be a crime if committed by an adult, e.g., drinking, running away, and truancy.

² A Guide to Compliance with the Indian Child Welfare Act, National Indian Child Welfare Association, page 1.

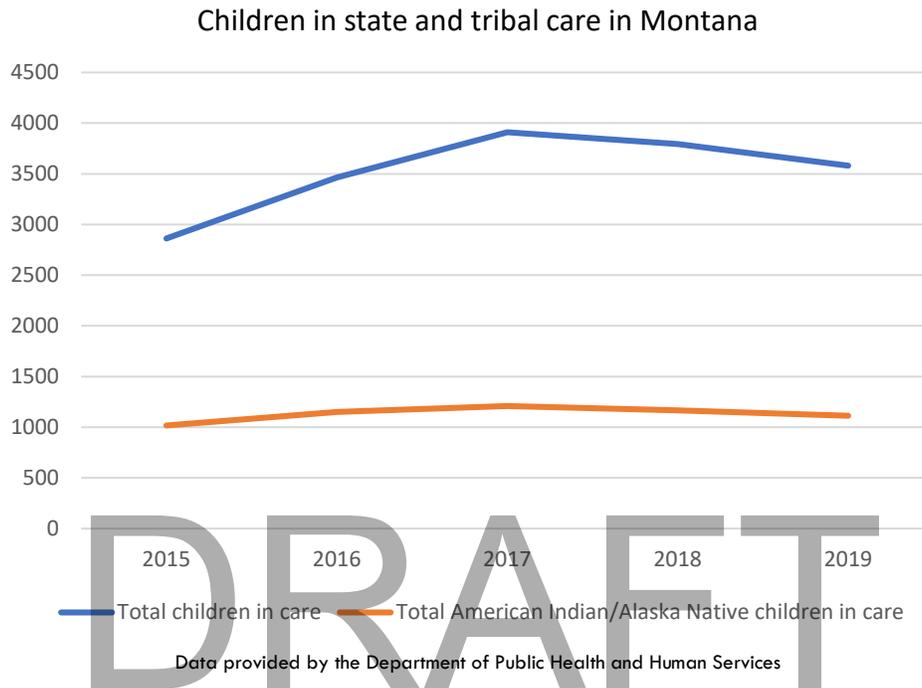
³ 25 USC 1903.

⁴ 25 CFR 23.107(b).

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HOW MANY INDIAN CHILDREN ARE IN CARE?

For children in state *and* tribal care, 35.5 percent identified as American Indian or Alaska Native in 2015. In 2019, it was 31 percent.



When looking at state care alone, American Indian and Alaska Native children comprised an average of 22 percent of the total number of children in care per year between 2015 and 2019.

Either way, American Indian and Alaska Native children are overrepresented since they comprise 12.3 percent of all children in Montana according to the July 2018 Census Bureau population estimate.

Montana is not alone in this disparity. Data compiled by the National Indian Child Welfare Association ranked Montana ninth in 2017 in overrepresentation of Indian children in foster care.⁵

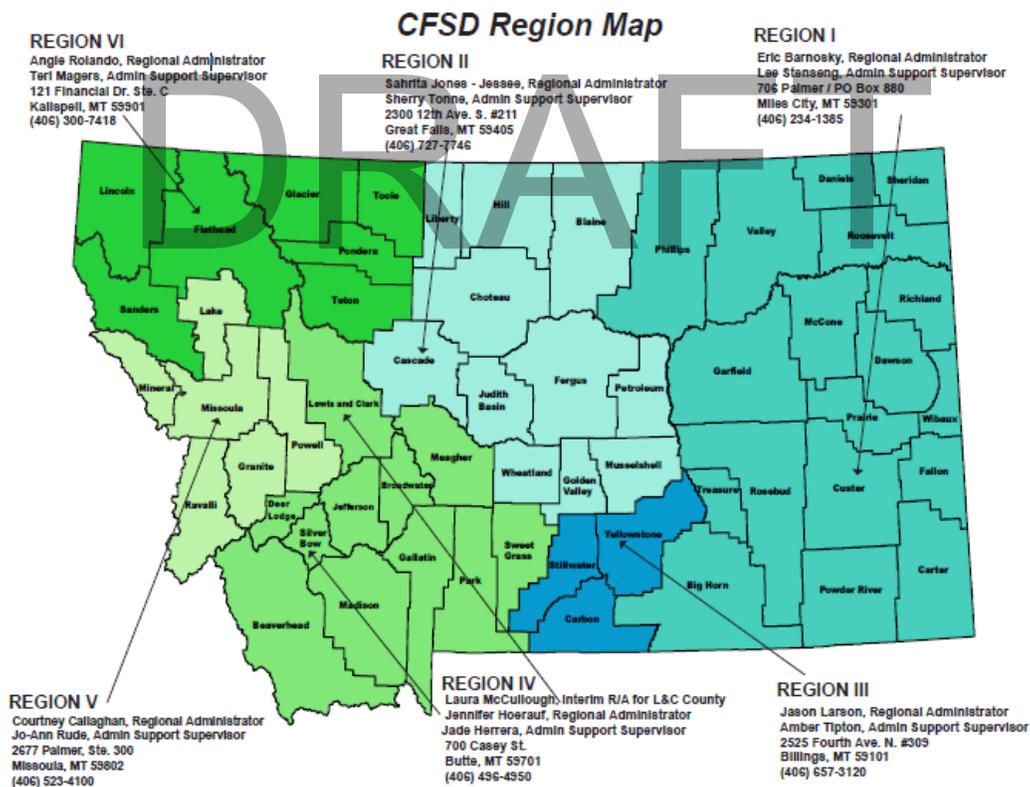
⁵ [Disproportionality in Child Welfare, Fact Sheet](#), National Indian Child Welfare Association, page 2.

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Where are the most ICWA cases located?

The CFSD database doesn't automatically track ICWA cases. In a one-time review of all its cases on February 4, 2020, CFSD found 676 ICWA cases in Montana. About a quarter of those cases are actually tribal cases at Fort Peck that the state handles in tribal court through an agreement with the tribal government. Of the remaining cases, most are in the CFSD regions that include Great Falls, Havre, and Billings.

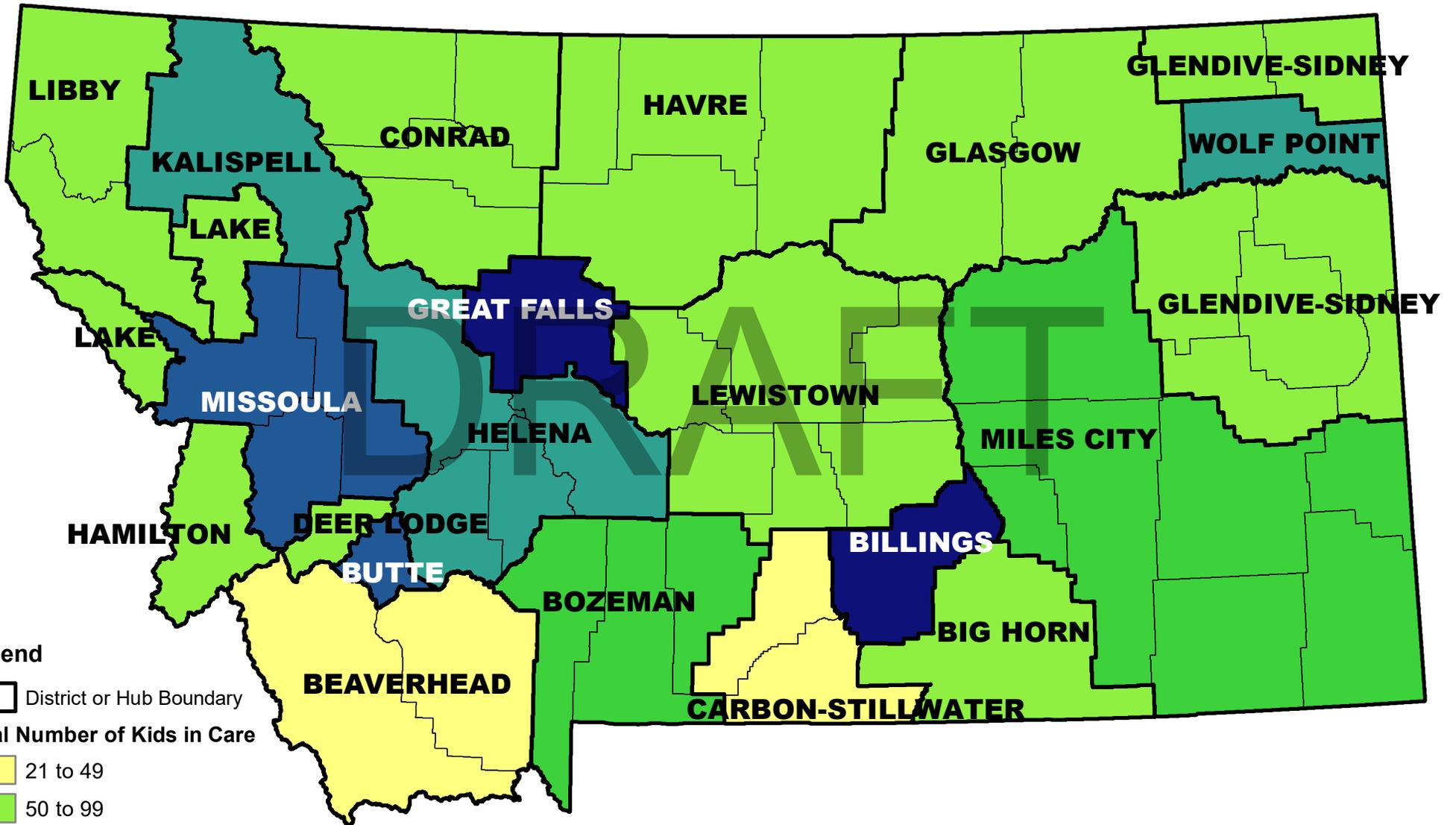
Region	Number of ICWA cases
I	178
II	211
III	221
IV	13
V	22
VI	31
Total	676



A review of caseload data from November 2019 shows the highest number of youth in care in Chouteau and Yellowstone Counties and the highest rates of youth per CFSD worker in Chouteau and Roosevelt Counties. Each of those counties have high numbers of ICWA cases.

Total Number of Youth in Care by CFSD District

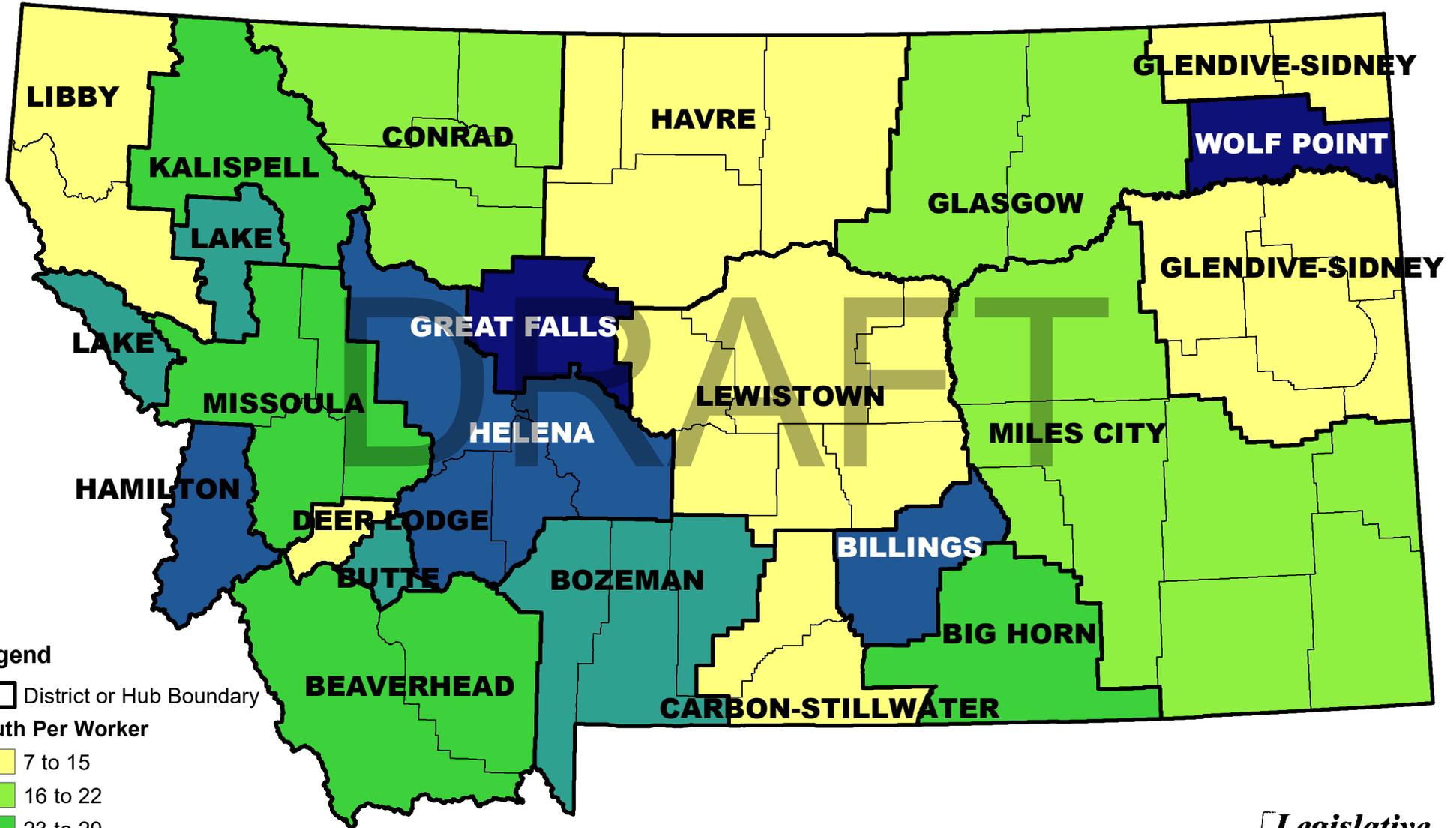
Prepared for the State-Tribal Relations Committee
March 2020



Data Source: Montana Department of Public Health and Human Services, November 2019

Number of Youth Per Case Worker by CFSD District

Prepared for the State-Tribal Relations Committee
March 2020



Legend

District or Hub Boundary

Youth Per Worker

- 7 to 15
- 16 to 22
- 23 to 29
- 30 to 35
- 36 to 40
- 40 or more

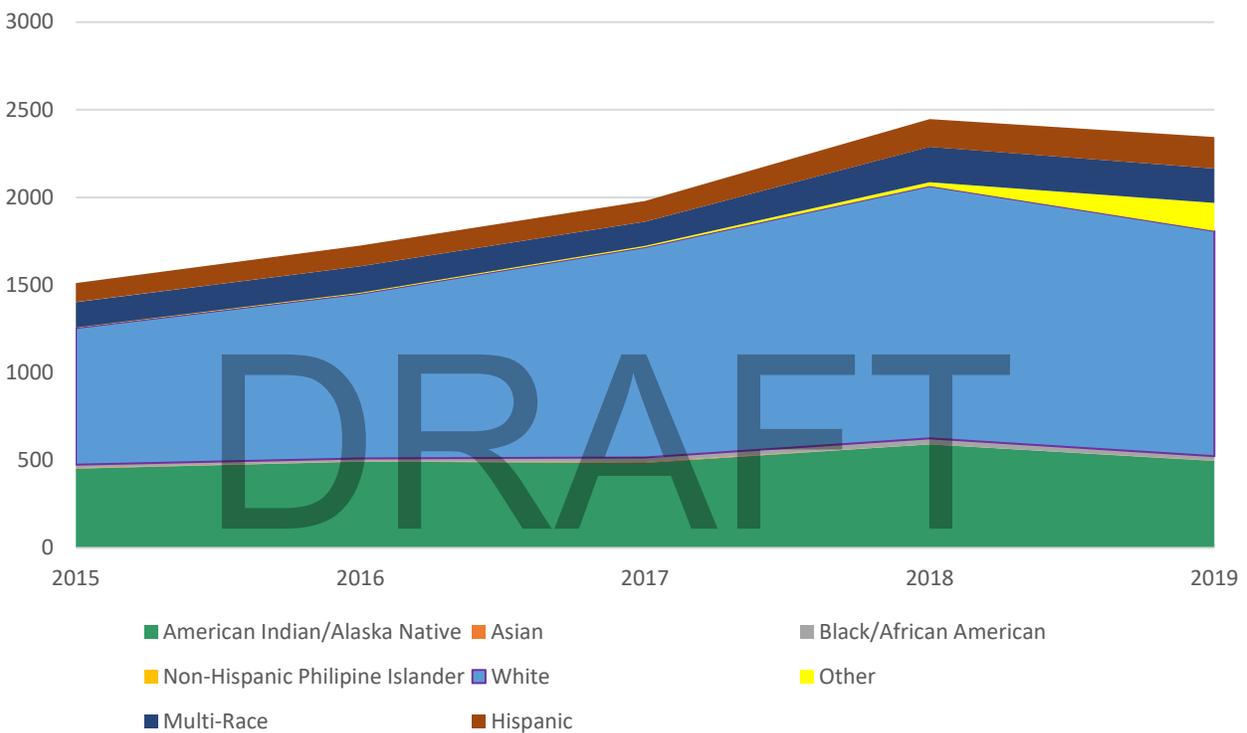
Data Source: Montana Department of Public Health and Human Services, November 2019

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How long do Indian children stay in the system?

CFSD provided data that show not how long the average child stays in care, but the percentage of children exiting care by race. When comparing data over a 5-year period, the rate of American Indian and Alaska Native children exiting state and tribal care decreased from 30 percent of all children in 2015 to 21 percent in 2019. When looking at children solely in state care, 21 percent exiting care in 2015 identified as American Indian or Alaska Native compared to 16 percent in 2019.

Number of children exiting state and tribal care by race



Data provided by the Department of Public Health and Human Services

Please note, some Indian children may be included in the "multi-race" or "other" categories of the table above.

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HOW DOES THE WORK AFFECT THE WORKERS?

Marti Vining, CFSD administrator, told the STRC in November 2019 that her division saw a 40% turnover in staff the previous year.

"This is a tough job," said Vining. "You lay in bed at night wondering if you did the right thing and that can be: did I do the right thing to leave that child in the home, or did I do the right thing by removing that child? That is a constant struggle we face every day."

WHAT STEPS IS CFSD TAKING TO IMPROVE?

Vining says the high turnover rate and numerous CFSD leadership changes in the past several years contributed to difficulties in improving the system. Since taking over as administrator in 2018, Vining says she and the management staff developed a new vision for the work, which is being a system that's ready to help families carry their burdens -- addiction and violence -- when they can't carry them alone, and that families should feel that the system wants them to succeed.

Vining says CFSD can't carry the load by itself and needs community stakeholders and resources, the judicial system, public defenders, families, tribes, and others to be part of the solution.

In September 2018, CFSD met with tribal partners to open communication lines and develop relationships. CFSD committed to meeting with them again every 6 months. In those meetings, Vining says tribal social service workers expressed the same issues and concerns as state workers. They also talked about how a lack of housing on reservations complicates reunification of children with families.

At Rocky Boy's, CFSD now meets monthly with the tribal social service program to discuss ICWA cases. Vining says the relationships built in those meetings result in faster placements for children. She hopes to do the same with other tribes and hold common training programs for state and tribal workers, so everyone is on the same page about what child welfare looks like in Montana and where it needs to go.

In 2019, CFSD began offering what it calls CORE trainings around the state to educate communities, stakeholders, and tribal partners about the division's processes and how it makes decisions. CFSD also developed a parent survey to get feedback on their interactions with CFSD staff and whether they feel supported.

Vining says child protection specialists are now trained to use four in-home safety questions to create a list of conditions that, if met, allow a child placed outside of the home to return home. Vining told the STRC the goal is to stop raising the bar on parents. The four questions are:

- Is there a home-like setting where the parents/children live?
- Is the home calm enough to allow for safety providers in the home and safety activities to occur?
- Is at least one parent willing to cooperate with the safety plan?
- Are the necessary safety activities and resources available to implement the plan?

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State workers also receive training from DPHHS Tribal Relations Manager Lesa Evers to familiarize them with the tribes in Montana and the department's partnership approach to working with them, the historical context surrounding passage of ICWA, the continuing impact of historical trauma, and the deep meaning of "home" in an Indian value system.

WHAT ABOUT COMMUNICATION IN COURT?

CFSD's case review in February 2020 found about a third of its ICWA cases are in CFSD Region III, which includes Yellowstone County.

ICWA Courts

In July 2017, Judge Rodney Souza led the effort to have all ICWA cases in Yellowstone County involving youth who are Crow, Northern Cheyenne, or Assiniboine or Sioux from Fort Peck assigned to his court. One of only a half dozen ICWA courts in the United States at the time, the idea was to use a collaborative approach to reduce the adversarial nature of the proceedings, including giving parents more opportunities to participate in decision making.



Pictured left: Judge Souza's ICWA Court, Billings.

Pictured right: STRC members waiting to observe proceedings on November 12, 2019.

The STRC observed Judge Souza's ICWA court in Billings on November 12, 2019. During a panel discussion beforehand, Judge Souza said he seeks to improve communication, come up with creative solutions, and keep down the number of children removed from their homes. Edie Adams, who testifies as a federally required qualified expert witness on tribal culture and the fitness of parents to retain custody, says the ICWA court resulted in a big change in attitudes on all sides.

Ingrid Firemoon, ICWA coordinator at Fort Peck, called for more ICWA courts around the state, saying her office has worked really hard and long to build a relationship with the state and to relate how tribal members live their lives, what it means to have a family, what happens when children are removed, and the effects of

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historical trauma. Since then, Missoula County opened an ICWA court and Hill and Chouteau Counties are in the planning process.

Yellowstone County tests shorter hearing timeline

Meanwhile, Judges Jessica Fehr and Ashley Harada in Yellowstone County began a pilot project in February 2020 to shorten the timeframe between removal of a child from a home and the parents' initial hearing in court.

Right now, statute requires a so-called "show cause" hearing within 20 days. But the sample timeline on the next page demonstrates how that can drag out in calendar days, particularly for ICWA cases.

Parents can't see their children until after the first hearing. Multiple panelists told the STRC this interim that the longer a parent waits to see a child, the less engaged and hopeful they are about reunification. Pending a court hearing, there may also be delays in drug and alcohol treatment and other services needed to stabilize a parent.

The legislature enacted the 20-day show cause hearing timeline in 1985 (House Bill 686), but how the 20 days was chosen is not apparent. John Madsen of the then-named Department of Social and Rehabilitation Services said the bill was a protection for parents to fully understand allegations made and what the court required them to do.⁶

The 2001 Legislature cut the timeline to 10 days, excluding weekends and holidays (Senate Bill 170), at the request of the Law, Justice, and Indian Affairs Interim Committee. Sponsoring Senator Mike Halligan said the bill responded to accelerated timelines in the federal Safe Families Act. He called decreasing the show cause hearing timeline "the most important provision", saying the bill adds parents' rights for the first time. Halligan said telecommunications could be used in rural areas where a judge may not be available within the 10-day timeframe.⁷

In 2003, the legislature changed the timeline back to 20 days (Senate Bill 95) at the request of DPHHS. Then CFSD Division Administrator Shirley Brown provided testimony that many county attorneys and district court judges indicated the 10-day timeline was unworkable.⁸

In their pilot project, Judges Fehr and Harada aim to have all initial hearings within 2 to 5 calendar days. Parents' attorney Jim Reintsma with the Office of Public Defender (OPD) in Billings told the STRC in March 2020 that there are bumps to work out, but it's wonderful for him to have hands-on interactions with his clients sooner, since he doesn't necessarily see them before the first court date. He says the speedier timeline also helps diffuse tension between child protection specialists and parents.

⁶ Minutes, House Judiciary Committee, February 22, 1985, page 1.

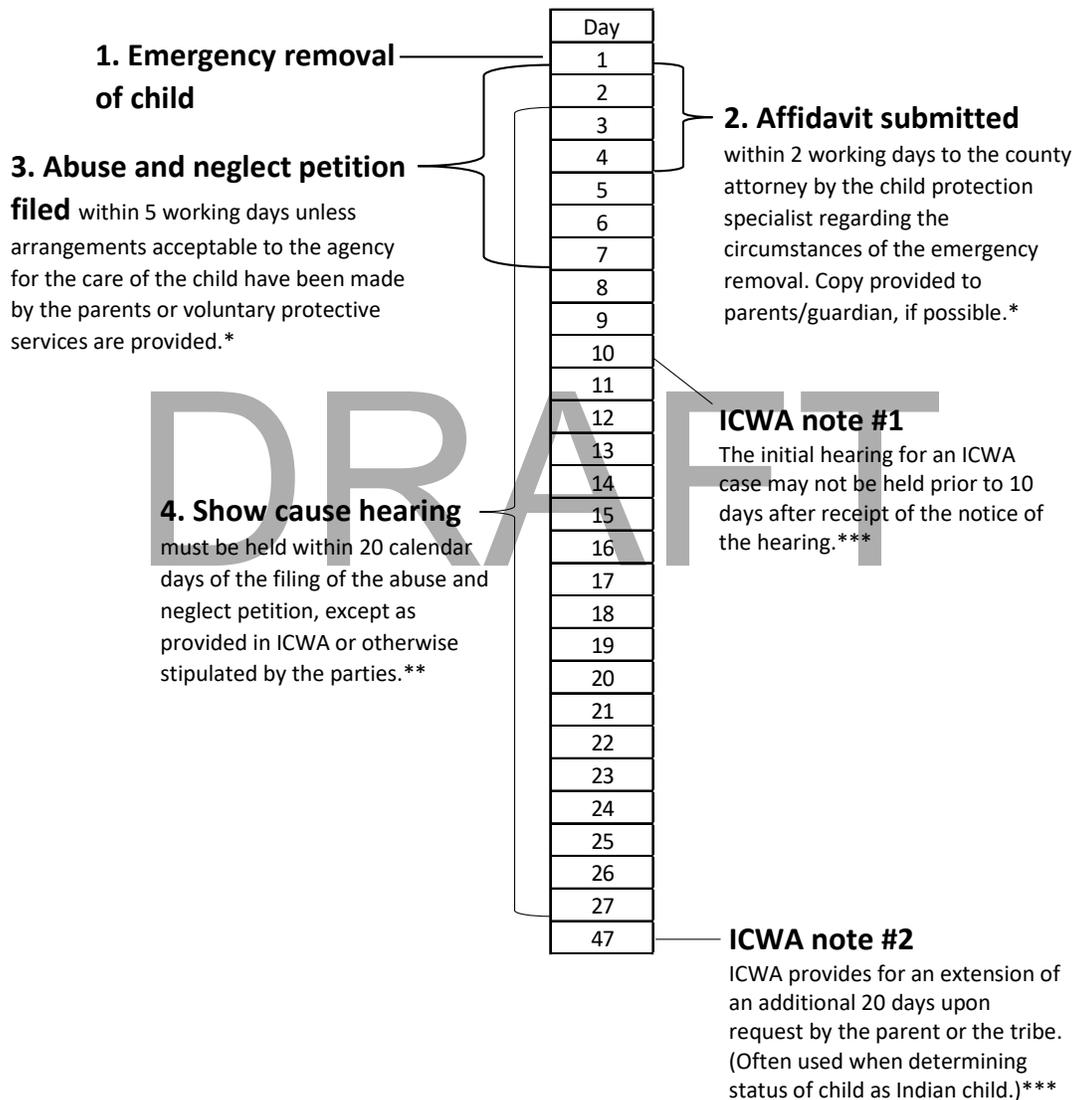
⁷ Minutes, Senate Committee on Judiciary, January 10, 2001, page 6, and House Committee on Judiciary, March 5, 2001, page 4.

⁸ Minutes, Senate Committee on Public Health, Welfare and Safety, January 22, 2003, Exhibit 2, page 3.

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Reintsma and Judge Souza acknowledged that shortening the timeline for every case in the state would strain the resources of OPD and CFSD, but Reintsma said parents should be afforded the same expediency in initial court hearings that accused criminals get. Marti Vining told the STRC in March 2020 the shorter timeline for the initial hearing is simply the right thing to do and the CFSD staff is on board.

Detailed Show Cause Hearing Timeline



*41-3-301(6), MCA.

**41-3-432, MCA.

***Child and Family Services Policy Manual: Legal Procedure, Required Judicial Hearings 301-2, page 10.

SOURCE: LEGISLATIVE SERVICES DIVISION

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Judges Fehr and Harada plan to bring their initial results back to the STRC's August 24, 2020, meeting. Depending on what the data show, the STRC said it could consider sponsoring committee legislation to reduce the timeline for all cases. Judge Souza told the STRC such legislation would have little impact until CFSD staffing issues are addressed.

The Children, Families, Health, and Human Services Interim Committee (CFHHS) is also [studying topics](#) this interim related to child protective services, including ways to support families, reducing the number of children removed from their homes, and the role of law enforcement and courts in the process. At its August 28, 2020, meeting, CFHHS will review proposals to [reduce the show cause hearing deadline to 5 days](#) or [create an emergency process](#) that requires a hearing with 72 hours of a child's removal.

What are the hearing timelines in other states?

As summarized in the table below, a review conducted by legislative staff for the CFHHS found nearby states have significantly shorter timelines for initial hearings when a child is removed from a home.⁹

Colorado	within 72 hours, excluding weekends and holidays, or within 48 hours if a child is removed by law enforcement and placed in a facility not operated by the state.
Idaho	within 48 hours of the removal of a child or within 24 hours of the removal of an offender, excluding weekends and holidays. May be continued for a reasonable time at the request of a child's parent, custodian, or attorney.
North Dakota	within 96 hours.
South Dakota	within 48 hours, excluding weekends and holidays, unless extended by court order.
Wyoming	within 48 hours, excluding weekends and holidays. If a judge is unavailable, a district court commissioner may hold the hearing. The court must review the commissioner's report, orders, and actions as soon as reasonably possible and confirm/modify as appropriate.

⁹ Sandru, Alexis, HJR 48/49: Child Protective Services, Initial Hearing Timeframes, January 2, 2020.

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Can an ICWA case be transferred to tribal court?

The STRC asked in November 2019 whether an ICWA case can be transferred to tribal court. The answer is yes, if requested by a child's parent, Indian custodian¹⁰, or tribe. If the request is made by a tribe, the child's parent(s) or Indian custodian may object.¹¹

The state must transfer a case to tribal court unless the tribal court declines jurisdiction, either parent objects, or the state determines there is good cause to deny the request. Reasons for the denial must be documented and other parties given the opportunity to respond. Reasons may include the objection of a child who is over 12 years of age and difficulty in presenting necessary evidence and witnesses in tribal court.¹²

FINDINGS AND RECOMMENDATIONS

TBD

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¹⁰ 25 USC 1903 defines Indian custodian as an Indian person who has legal custody of an Indian child under tribal law or custom or state law or to whom temporary physical care, custody, and control has been transferred by the child's parent.

¹¹ A Guide to Compliance with the Indian Child Welfare Act, National Indian Child Welfare Association, page 4.

¹² Ibid, pages 4-5.