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# Who's Watching the Watchdog?

## **A Critique of NPR Ombudsman Edward Schumacher-Matos' Egregious Errors in Attacking Laura Sullivan and Amy Walters' Reporting on Native Foster Care**

In August 2013, the ombudsman for National Public Radio (NPR), Edward Schumacher-Matos, produced a biased and factually flawed review of Laura Sullivan and Amy Walters' Peabody Award winning series of stories exposing South Dakota's egregious violations of the Indian Child Welfare Act and mistreatment of Native American children, who are removed from familial custody at 3.5 times the rate of non-Native children in the state. In "Who's Watching the Watchdog?," the Lakota People's Law Project documents the irresponsibility of Schumacher-Matos' overwrought, 22 month effort to exonerate South Dakota for violating federal law. We do this by exposing six serious errors in his "re-reporting" of Sullivan and Walters' story, for which he spoke to virtually no Native American people, instead relying entirely for his data on the very South Dakota state officials his report defends.

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***\*This report can be downloaded at: [www.LakotaLaw.org/watching-the-watchdog](http://www.LakotaLaw.org/watching-the-watchdog).***

## Introduction

In 2011, NPR aired a Peabody Award winning series of stories on South Dakota Native foster care reported by journalists Laura Sullivan and Amy Walters. In August 2013, National Public Radio's Ombudsman, Edward Schumacher-Matos, the former founding editor of *The Wall Street Journal Americas*, issued a report criticizing Sullivan and Walters, and calling into question NPR's decision to air the series, based upon his assertion that the reports were unfairly harsh to South Dakota's Department of Social Services (DSS).

We find [Schumacher-Matos'] unprecedented effort to 're-report' parts of the story to be deeply flawed...Overall, the process surrounding the ombudsman's inquiry was unorthodox, the sourcing selective, the fact-gathering uneven, and many of the conclusions, in our judgment, subjective or without foundation.

Despite [Schumacher-Matos'] sweeping claims, the only source that figures in any significant way in the ombudsman's account is a state official whose department activities were the subject of the series.

- National Public Radio "Editors' Note" - 8/9/13

The [Lakota People's Law Project](#) rejects Schumacher-Matos' polemic against Sullivan and Walters as ideologically motivated and willfully ignorant of salient facts. We have worked on enforcement of the [Indian Child Welfare Act](#) (ICWA) in South Dakota for the past eight years, and over just the last six months we have interviewed, on camera, approximately one hundred Lakota parents whose legal right to have their children raised by Native relatives has been violated by the state of South Dakota. It is this fundamental violation of Native people's rights and the blatantly disparate treatment of Native people by South Dakota's child welfare system that is the core subject of Sullivan and Walters' stories, and in exculpating state authorities, Schumacher-Matos is virtually alone among journalists and policy advocates who have reviewed the situation. Indeed, response to the ombudsman's report by journalists has been almost uniformly negative. First and foremost, NPR's own editorial board [has firmly and unanimously rejected](#) both the principal thrust and most of the specifics of Schumacher-Matos' report. They wrote:

We find [Schumacher-Matos'] unprecedented effort to "re-report" parts of the story to be deeply flawed...Overall, the process surrounding the ombudsman's inquiry was unorthodox, the sourcing selective, the fact-gathering uneven, and many of the conclusions, in our judgment, subjective or without foundation.<sup>1</sup>

<sup>1</sup> National Public Radio, Editors; "Editors' Note"; 8/9/13:  
<http://www.npr.org/blogs/ombudsman/2013/08/09/210615253/editors-note?live=1>

Additionally, a reporter for Time Magazine, [Jack Dickey](#), and South Dakota's principal newspaper, the [Rapid City Journal](#), have both rebuffed central claims of Schumacher-Matos' broadside against NPR, along with his conclusion that the three-part series on ICWA never should have aired as written. Finally, an important figure from the non-profit sector has weighed in critically on Schumacher-Matos' overwrought, 80-page document, the fruit of an ill-intended prosecution that took 22 months to complete. Richard Wexler, former executive director of the [National Coalition for Child Protection and Reform](#) (NCCPR), has [debunked](#) Schumacher-Matos' work point-by-point. We have produced this report, *Who's Watching the Watchdog?*, specifically to supplement Wexler's detailed critique, with additional criticisms both substantive and methodological. In the body of this document we set forth our substantive claims; methodologically, we strongly object to Schumacher-Matos' having, apparently, *relied almost exclusively upon DSS sources* during his research and writing. The ombudsman spoke to virtually *no Native people* in preparing his report. According to NPR's editors:

Despite [Schumacher-Matos'] sweeping claims, the only source that figures in any significant way in the ombudsman's account is a state official whose department activities were the subject of the series.<sup>2</sup>

We have identified six primary errors in the ombudsman's "re-reporting" of Native foster care in South Dakota, not including those discussed at length by Richard Wexler. These six errors are numbered, explicated, and rebutted in the following pages.

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<sup>2</sup> National Public Radio, Editors; "Editors' Note"; 8/9/13:  
<http://www.npr.org/blogs/ombudsman/2013/08/09/2013/08/09/210615253/editors-note?live=1>



Laura Sullivan, correspondent and investigative reporter for National Public Radio. Her unflinching series, 'Native Foster Care,' which aired in three parts on All Things Considered in October 2011, earned Sullivan both a Peabody Award and a Robert F. Kennedy Award.



In August 2013, National Public Radio's Ombudsman, Edward Schumacher-Matos, the former founding editor of The Wall Street Journal Americas, issued a report criticizing Sullivan and Walters, and calling into question NPR's decision to air the series.

## Executive Summary

**1. Schumacher-Matos grossly understates the growth rate of foster child removal in South Dakota versus that of the nation as a whole, thus completely disregarding the fundamental violation of Native people’s rights and the blatantly disparate treatment of Native people by South Dakota’s child welfare system that is the core subject of Sullivan and Walters’ stories:** Schumacher-Matos writes: “[B]etween 1995 and 2002, as the national rate [of foster child removal grew]...at a fast clip, the average monthly number in South Dakota of all children in foster care grew to 795 from 426... This was a growth rate of 86 percent — not too unlike the national rate.”<sup>3</sup> In truth, from 1995-2002, while South Dakota’s foster care enrollment increased 87%, the increase for the nation as a whole was only 12%.<sup>4</sup>

**2. Schumacher-Matos exhibits extreme cultural bias when he mischaracterizes the voluntary decisions of Native families to place their children with kin as equivalent to instances where the state forcibly removes Native children from Native custody:** Schumacher-Matos notes that when Native people in South Dakota voluntarily place their children with kin for periods of time, it is the same—for the statistical purpose of determining state-wide “child removal rates”—as when the state forcibly removes children and places them with white families. Schumacher-Matos then cites the fact that a high number of Native children in South Dakota live with relatives, and draws the



<sup>3</sup> Schumacher-Matos, Edward; “Indian Foster Care in South Dakota: A Case Study in Investigative Storytelling Gone Awry”; 8/9/13; P. 38:

[http://www.npr.org/assets/blogs/ombudsman/South\\_Dakota\\_Foster\\_Care.pdf](http://www.npr.org/assets/blogs/ombudsman/South_Dakota_Foster_Care.pdf)

<sup>4</sup> Casey Families Program; Barbell, Kathy & Freundlich, Madelyn; “Foster Care Today”; P. 2:

[http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/policy-issues/foster\\_care\\_today.pdf](http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/policy-issues/foster_care_today.pdf). ALSO: Department of Health and Human Services; Administration for Children and Families; “Final Estimates for FY1998 through FY2002”: <http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport12.pdf>. Calculations: Per national numbers,  $533,000 - 468,000 = 65,000$ ;  $65,000 / 468,000 = 11.8\%$ . Per state numbers,  $795 - 426 = 369$ ;  $369 / 426 = 86.6\%$ .

illicit conclusion that this helps explain sky-high state removals: “Indian families have set their own high removal rate, which the state is following.”<sup>5</sup>

Contrary to Schumacher-Matos’ claims, when Native parents, in their private capacities, voluntarily place children into the care of extended family, *this bears little resemblance to the state forcibly removing and placing Indian children with white families*. It is widely understood in Lakota country that relatives caring for relatives is extremely common and culturally appropriate; it need not occur due to neglect nor other circumstances that could justify the coerced removal of a child by the state.<sup>6</sup>

Contrary to Schumacher-Matos’ claims, when Native parents, in their private capacities, voluntarily place children into the care of extended family, this bears little resemblance to the state forcibly removing and placing Indian children with white families.

**3. Based on an inappropriately narrow frame of reference for understanding the economic impact of public sector social service and health care spending, Schumacher-Matos summarily dismisses contentions that economic incentives may be playing a role in driving the astronomical rates at which Native children are taken out of Native custody:**

In his report, the ombudsman writes the following concerning NPR’s assertion that economic incentives may, in part, lie at the root of runaway seizures and illegal placement of Native children in South Dakota by DSS: “Confusion over just what [financial] incentives mean is at the heart of how the [NPR] series goes astray on the money angle... Seen in private industry terms, the more [South Dakota] puts Native children into foster care, the more it loses, not gains.”<sup>7</sup> Schumacher-Matos simply ignores the well-established conclusion by policy analysts that the economies of poor states like South Dakota are heavily stimulated by federal funding, including funding for foster care. By placing more Native children into foster care and adoption programs, South Dakota *does* benefit economically. For example, \$18,360,340—much of it federal funding—was spent in FY 2012 by the South Dakota Department of Social Services on

<sup>5</sup> Schumacher-Matos, Edward; “Indian Foster Care in South Dakota: A Case Study in Investigative Storytelling Gone Awry”; 8/9/13; P. 23-24:

[http://www.npr.org/assets/blogs/ombudsman/South Dakota Foster Care.pdf](http://www.npr.org/assets/blogs/ombudsman/South%20Dakota%20Foster%20Care.pdf)

<sup>6</sup> Jones, B.J.; “The Indian Child Welfare Act: The need for a separate law”; American Bar Association; 1995; P. 3-7

<sup>7</sup> Schumacher-Matos, Edward; “Indian Foster Care in South Dakota: A Case Study in Investigative Storytelling Gone Awry”; 8/9/13; P. 40-41:

[http://www.npr.org/assets/blogs/ombudsman/South Dakota Foster Care.pdf](http://www.npr.org/assets/blogs/ombudsman/South%20Dakota%20Foster%20Care.pdf).



non-Native, privately-run group homes, psychiatric facilities, and religious organizations based in South Dakota that house foster children.<sup>8</sup>

**4. Schumacher-Matos accepts at face value, without any critical scrutiny, claims of South Dakota DSS officials regarding the levels of their foster care-related spending that are blatantly contradicted by federal data:**

Concerning the factor of economic incentives in the form of increased spending on health and social services funded overwhelmingly by leveraging federal funds, the ombudsman accepts the South Dakota DSS' statement that: "The entire expenditure for all children of all races in DSS custody for all manners of care in fiscal year 2010 [the year covered by the NPR series] was \$68 million. This includes \$12.7 million for Medicaid, as well as all other medical expenses."<sup>9</sup> In fact, the U.S. Department of Health and Human Services' Centers for Medicare and Medicaid Services (CMS) reports that South Dakota's Medicaid expenditures for children in foster care and related groups in FY 2010 were \$47,177,195<sup>10</sup>, indicating that overall spending was \$102,477,195—providing a much greater economic stimulus than would \$68 million.



**5. Schumacher-Matos claims, in apparent ignorance of federal law, that there absolutely must be a licensing agreement between the state and a tribe for the state to recognize a**

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<sup>8</sup> Government of South Dakota; Spreadsheet of DSS contracts with private entities: <http://www.open.sd.gov/>. Note: The figure \$18,360,340 is just for South Dakota-based companies.

<sup>9</sup> Schumacher-Matos, Edward; "Indian Foster Care in South Dakota: A Case Study in Investigative Storytelling Gone Awry"; 8/9/13; P. 5:

[http://www.npr.org/assets/blogs/ombudsman/South\\_Dakota\\_Foster\\_Care.pdf](http://www.npr.org/assets/blogs/ombudsman/South_Dakota_Foster_Care.pdf)

<sup>10</sup> Centers for Medicare and Medicaid Services; "FY2010 Quarterly Cube": <http://www.cms.gov/Research-Statistics-Data-and-Systems/Computer-Data-and-Systems/MedicaidDataSourcesGenInfo/MSIS-Mart-Home.html>. Note: we have subtracted \$422,526 of spending by the Indian Health Service on foster care children from the total provided by CMS, because these dollars were spent on children under the jurisdiction of the tribes themselves. For a description of what is included in the definition of "foster care" for the purpose of the CMS Quarterly Cube, see P. 151 of the "Medicaid and CHIP Statistical Information System: File Specifications and Data Dictionary": <http://www.cms.gov/Research-Statistics-Data-and-Systems/Computer-Data-and-Systems/MedicaidDataSourcesGenInfo/Downloads/MSIS-Data-Dictionary-2012.pdf>.

**tribally-licensed foster home, when in fact the law requires that children be placed in available, tribally-licensed foster homes unless there is good cause not to do so— regardless of whether there is a tribal/state agreement:** Schumacher-Matos writes: “There is no exploring [by Sullivan and Walters] the inconvenient unavailability of properly licensed [Native] foster homes.”<sup>11</sup> By “properly licensed,” he means *by the state* as opposed to *by the tribes*. Schumacher-Matos then argues that the state *could not legally* place children in tribally-licensed foster homes even if it wanted to, unless there exists a formal agreement between the tribe and state: “[Ignoring tribally-licensed homes as options for placement] is a federal requirement — not a devious state one.”<sup>12</sup> To the contrary, according to the Department of Health and Human Services, the Indian Child Welfare Act asserts “licensing or approval of foster or adoptive homes or institutions by an Indian tribe is equivalent to licensing or approval by a state.”<sup>13</sup>

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<sup>11</sup> Schumacher-Matos, Edward; “Indian Foster Care in South Dakota: A Case Study in Investigative Storytelling Gone Awry”; 8/9/13; P. 72:

<http://www.npr.org/assets/blogs/ombudsman/South%20Dakota%20Foster%20Care.pdf>

<sup>12</sup> Schumacher-Matos, Edward; “Indian Foster Care in South Dakota: A Case Study in Investigative Storytelling Gone Awry”; P. 56:

<http://www.npr.org/assets/blogs/ombudsman/South%20Dakota%20Foster%20Care.pdf>

<sup>13</sup> Wexler, Richard; “The Schumacher-Matos Report on NPR’s Coverage of Child Welfare in South Dakota: A Case Study in an Ombudsman Gone Awry”; P. 16: [www.nccpr.org/reports/NPRombudsman.pdf](http://www.nccpr.org/reports/NPRombudsman.pdf). Also: Health and Human Services Department, Children’s Bureau:

[http://www.acf.hhs.gov/cwpm/programs/cb/laws\\_policies/laws/cwpm/policy\\_dsp.jsp?citID=145#693](http://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=145#693).

Note: It may occur to some that the Adoption and Safe Families Act (ASFA), passed in 1997, contains licensing restrictions on placements for a child that trump ICWA’s preferential placement mandates, contained in Section 1915(b). At least one ruling by the South Dakota Supreme Court undermines this hypothesis. That case dealt with whether or not ASFA trumps ICWA concerning the requirement by ICWA that states make active efforts to reunite Indian families before terminating parental rights. The Court found in favor of ICWA’s requirements, writing: “[N]o provision in ASFA specifically purports to modify ICWA. It would seem illogical that ASFA would implicitly leave unchanged certain ICWA provisions...while modifying others...[Furthermore] when interpreting a statute pertaining to Indians, the United States Supreme Court has stated, ‘statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.’” Source: *The People of the State of South Dakota in the Interest of J.S.B., JR., Minor Child and Concerning J.S.B., Sr. and O.L.J., Respondents*; first paragraph of case brief:

<http://www.narf.org/icwa/state/southdakota/case/jsb.html>. Additional note: *Native Village of Stevens v. Smith* also affirms our position that states have the legal right to place children into tribally-licensed homes

without there being a formal licensing agreement between state and tribe. In that 9<sup>th</sup> Circuit case, the ruling is clear that, due to ICWA’s 1978 mandate that tribally-licensed homes are equivalent to state-licensed ones for the purposes of tribal children, the much older (1935) federal requirement from the Social Security Act, U.S.C. § 672, that licensing agencies for the state must have formal agreements with the state is *met* when a tribe is the one who licenses a foster home for a tribal child. Source:

<http://www.narf.org/icwa/federal/appeals/stevens.html>.

**6. Schumacher-Matos falsely claims that tribal courts are directly responsible for placing Native children with white foster families and group homes at similar or higher rates than state authorities, when the truth is that many of the tribal courts in question have delegated placing authority to DSS:** Schumacher-Matos asserts: "Tribal courts are largely sovereign and are not 'the state.'...The tribal courts place Indian children in white foster families or group centers at similar or even higher rates than state courts."<sup>14</sup>

B.J. Jones, Professor of Law at the University of North Dakota, ICWA expert, and a South Dakota tribal court judge for over twenty years, writes instead that: "Most tribal court orders on Rosebud, Crow Creek, Cheyenne River and Yankton [i.e. tribes in South Dakota for whom DSS is principally responsible for placing children] award placement rights to DSS, and tribal courts usually play little role in placement decisions unless a family member is asking for placement and DSS is contesting."<sup>15</sup>

Taken together, the six errors enumerated above demonstrate Schumacher-Matos' systematic mis-contextualization of the key issues at stake in the debate over South Dakota's illegal practice of stripping extraordinary numbers of Native children from their communities. These errors also demonstrate a shocking ignorance of the basic facts at hand, and, when combined with the many others cited by Richard Wexler, provide necessary and sufficient grounds for the rejection of Schumacher-Matos' report as a whole.

The ICWA crisis in South Dakota is real, as reported by NPR's investigative team since 2011—

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<sup>14</sup> Schumacher-Matos, Edward; "Indian Foster Care in South Dakota: A Case Study in Investigative Storytelling Gone Awry"; 8/9/13; P. 61:

<http://www.npr.org/assets/blogs/ombudsman/South%20Dakota%20Foster%20Care.pdf>

<sup>15</sup> Jones, BJ; Email communication with LPLP; 9/2/13

**'Tribal courts are largely sovereign and are not 'the state.'...The tribal courts place Indian children in white foster families or group centers at similar or even higher rates than state courts.'**

*- Edward Schumacher-Matos*

*"Indian Foster Care in South Dakota: A Case Study in Investigative Storytelling Gone Awry"*

**"Most tribal court orders on Rosebud, Crow Creek, Cheyenne River and Yankton award placement rights to DSS, and tribal courts usually play little role in placement decisions unless a family member is asking for placement and DSS is contesting."**

*- B.J. Jones*

*Professor of Law at the University of North Dakota, ICWA expert, and a South Dakota tribal court judge*



despite Edward Schumacher-Matos' effort to gloss over it. Moreover, in the view of our Lakota People's Law Project, the most important way the federal government can support Lakota tribes in ending state abuses is to work intensively with Lakota leaders to develop tribal, federally funded, Title IV-E family services and foster care programs.<sup>16</sup> For more on this, please read our special report, ["Sovereignty and Self-Governance in the Provision of Child and Family Services."](#) Tribally-run programs will take time to put in place, but they can—and should—be established as rapidly as practicable.

## **Contrived Counting and Cultural Bias: Schumacher-Matos' Systematic Understatement of the Numbers of Native Children in White Custody**



Through a combination of contrived counting and cultural bias, Schumacher-Matos systematically understates the numbers of Native children being placed in white custody, and thereby understates the extent of the crisis facing South Dakota's Native people.

First, Schumacher-Matos grossly understates the growth rate of foster child removal in South Dakota versus that of the nation as a whole, thereby completely disregarding the fundamental violation of Native people's rights and the blatantly disparate treatment of Native people by South Dakota's child welfare system that is the core subject of Sullivan and Walters' stories. In his section "Looking for Proof," Schumacher-Matos attempts to excuse South Dakota's colossal Native child removal rate by contending that the sharp increase of children in foster care in

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<sup>16</sup> Lakota People's Law Project; "Sovereignty and Self-Governance in the Provision of Child and Family Services: Securing Direct Federal Funding for Tribal Administration of Title IV-A, IV-B, IV-C, and IV-E Services"; 7/5/13

South Dakota is consistent with a national trend.<sup>17</sup> However, upon closer inspection, one finds that Schumacher-Matos' contention is based upon a misleading comparison of incommensurable data drawn from different lengths of time and different periods of time. Schumacher-Matos illegitimately compares a putative 76% increase in the nationwide number of children in foster care during the years 1986-1995 (according to the Casey Families Program, the true figure is actually 74%<sup>18</sup>) to the 86% increase in the number of South Dakota children in foster care over the

**Schumacher compares national data from the 9 years ending in 1995 with South Dakota data from the 7 years beginning in 1995, and then uses this illegitimate comparison to draw the illicit conclusion that South Dakota's rate of growth in the number of foster placements was "not too unlike the national rate."<sup>20</sup>**

years 1995-2002.<sup>19</sup> That is to say, Schumacher compares national data from the 9 years ending in 1995 with South Dakota data from the 7 years beginning in 1995, and then uses this illegitimate comparison to draw the illicit conclusion that South Dakota's rate of growth in the number of foster placements was "not too unlike the national rate."<sup>20</sup> It should have been obvious to Schumacher-Matos that the amount of growth over a nine-year period would necessarily be larger than that over a seven-year period—and also that it is important to compare identical time periods. Why does he not do so?

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<sup>17</sup> Schumacher-Matos, Edward; "Indian Foster Care in South Dakota: A Case Study in Investigative Storytelling Gone Awry"; 8/9/13; P. 38:

<http://www.npr.org/assets/blogs/ombudsman/South%20Dakota%20Foster%20Care.pdf>

<sup>18</sup> Casey Families Program; Barbell, Kathy & Freundlich, Madelyn; "Foster Care Today"; P. 2:

[http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/policy-issues/foster\\_care\\_today.pdf](http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/policy-issues/foster_care_today.pdf).

<sup>19</sup> Schumacher-Matos, Edward; "Indian Foster Care in South Dakota: A Case Study in Investigative Storytelling Gone Awry"; 8/9/13; P. 38:

<http://www.npr.org/assets/blogs/ombudsman/South%20Dakota%20Foster%20Care.pdf>

<sup>20</sup> Casey Families Program; Barbell, Kathy & Freundlich, Madelyn; "Foster Care Today"; P. 2:

[http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/policy-issues/foster\\_care\\_today.pdf](http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/policy-issues/foster_care_today.pdf). ALSO

Schumacher-Matos, Edward; "Indian Foster Care in South Dakota: A Case Study in Investigative Storytelling Gone Awry"; 8/9/13; P. 38:

<http://www.npr.org/assets/blogs/ombudsman/South%20Dakota%20Foster%20Care.pdf>

*If, instead of adopting Schumacher's illegitimate comparison, we compare national data and state data from the same time period, 1995-2002, we see that the national numbers of children in foster care increased only 12%<sup>21</sup>, while South Dakota's foster care enrollment increased 87%, more than 7 times faster. Thus, Schumacher-Matos's claim that "the growth in foster care in South Dakota was part of a national trend"<sup>22</sup> is completely unsustainable. Rather, the numbers indicate a terrifyingly outsized expansion in the size and scope of South Dakota's foster care industry near the end of the century.*

**If, instead of adopting Schumacher's illegitimate comparison, we compare national data and state data from the same time period, 1995-2002, we see that the national numbers of children in foster care increased only 12%, while South Dakota's foster care enrollment increased 87%, more than 7 times faster. <sup>21</sup>**

Beyond his gross miscalculations of the comparative growth rates of foster placements in South Dakota and the nation as a whole, Schumacher-Matos also exhibits extreme cultural bias when he attempts to excuse South Dakota's skyrocketing rate of non-Native foster placements for Native children by mischaracterizing the voluntary decisions of Native families to place their children with kin as equivalent to instances where the state forcibly removes Native children from Native custody. On page 23-24 of his report, Schumacher-Matos writes:

Kim Malsam-Rysdon, secretary of the state Department of Social Services (DSS), confirmed the 3.5-to-one disproportion cited by [Melissa] Block [of NPR, i.e. Native children, though they make up 15% of the child population in SD, constitute 53% (3.5 x 15%) of those removed from their homes]...The statistic, however, turns out to be a poor indicator...an even more telling insight into just what the 3.5-to-one number means comes from looking at a comparative reference group: these are Indian children who are not under court custody but have moved in with relatives anyway...The only ones for whom we have measurable statistics are the ones living with kin who receive

<sup>21</sup> Casey Families Program; Barbell, Kathy & Freundlich, Madelyn; "Foster Care Today"; P. 2: [http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/policy-issues/foster\\_care\\_today.pdf](http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/policy-issues/foster_care_today.pdf). ALSO: Department of Health and Human Services; Administration for Children and Families; "Final Estimates for FY1998 through FY2002": <http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport12.pdf>. Calculations: Per national numbers, 533,000-468,000=65,000; 65,000/468,000=11.8%. Per state numbers, 795-426=369; 369/426=86.6%.

<sup>22</sup> Schumacher-Matos, Edward; "Indian Foster Care in South Dakota: A Case Study in Investigative Storytelling Gone Awry"; 8/9/13; P. 39: <http://www.npr.org/assets/blogs/ombudsman/South%20Dakota%20Foster%20Care.pdf>

welfare aid under the federal/state Temporary Assistance for Needy Families Program, or TANF. It is probably safe to say that, like the children in state custody, these children come from economically poor families that have broken down for whatever reason.... And what running the numbers on this reference group shows is that their demographic disproportion is even greater than that of the Indian children taken by the courts...This suggests that extended Indian families have set their own high removal rate, which the state is following.<sup>23</sup>

Schumacher's tortured logic here is that the state, in removing Native children into court custody at 3.5 times the rate of non-Native children, is simply mirroring the organic behavior of Native communities, in which families voluntarily place low-income children with kin. This argument is preposterous on its face, *inappropriately conflating actions taken by Indian people themselves with actions taken by the state*. It is a widely accepted cultural norm in Lakota communities to have an extended kinship network in which relatives often care for other relatives; thus, placements of Native



children with relatives need not occur due to neglect nor any other circumstance that could justify the coerced removal of a child by the state.<sup>24</sup> The ombudsman, showing utter disregard for Indian child-rearing practices, glosses over this distinction entirely. Worse still, it is by conflating intra-family placements with state removals and collapsing the categories that he conjures the questionably relevant and thoroughly misleading observation that "[only] one out of every 10 state-supported Indian children living away from their parents is in a white foster home."<sup>25</sup> Also contributing to this deceptively low number is the fact that Schumacher-Matos excludes from it those Native children placed by the state into non-Native institutions, like psychiatric facilities and group homes—a category that accounts for 18% of Native foster

<sup>23</sup> Schumacher-Matos, Edward; "Indian Foster Care in South Dakota: A Case Study in Investigative Storytelling Gone Awry"; 8/9/13; P. 23-24:

<http://www.npr.org/assets/blogs/ombudsman/South%20Dakota%20Foster%20Care.pdf>

<sup>24</sup> Jones, B.J.; "The Indian Child Welfare Act: The need for a separate law"; American Bar Association; 1995; P. 3-7

<sup>25</sup> Schumacher-Matos, Edward; "Indian Foster Care in South Dakota: A Case Study in Investigative Storytelling Gone Awry"; 8/9/13; P. 70:

<http://www.npr.org/assets/blogs/ombudsman/South%20Dakota%20Foster%20Care.pdf>



children forcibly removed and placed by the DSS.<sup>26</sup> Psychiatric facility and group home placements clearly should be considered in judging the state's compliance with ICWA, since the law requires Native youth to be kept in culturally sensitive environments.

A correct accounting of the displacement rate of Native American children into non-Native environments would include involuntary TANF placements and transfers to non-Native institutions by the state, but exclude voluntary placements of Native children with their relatives. *According to this calculus, South Dakota's Child Protective Services in 2010 placed Native American children into white environments 60% of the time—6 times the rate acknowledged by Schumacher-Matos.*

## **False Frameworks and Faulty Fact Checking: Schumacher-Matos' Failure to Examine the Economic Impact of Native Foster Placements**

Based on an inappropriately narrow frame of reference for understanding the economic impact of public sector social service and health care spending, Schumacher-Matos summarily dismisses Sullivan and Walters' contentions that economic incentives may be playing a role in driving the astronomical rates at which Native children are taken out of Native custody. On page 40-41 of his report, he writes:



Confusion over just what incentives mean is at the heart of how the [NPR] series goes astray on the money angle. The federal and state governments speak of federal funding as an 'incentive,' but the series miscommunicates the intended meaning. To the extent that federal funds help the state do its job, the money is indeed an incentive...But this is not like a common incentive in the private sector. There is neither a sliding scale nor a bonus for the state if it meets or passes certain targets... Seen in private industry terms, the more the state puts Native children into foster care, the more it loses, not gains. This

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<sup>26</sup> Schumacher-Matos, Edward; "Indian Foster Care in South Dakota: A Case Study in Investigative Storytelling Gone Awry"; 8/9/13; P. 68:

<http://www.npr.org/assets/blogs/ombudsman/South%20Dakota%20Foster%20Care.pdf>. Calculations: TANF – 306; Non-Native foster homes – 402; Native foster homes – 82; group homes – 70; psychiatric institutions – 102. Total = 962.  $70/962=7.3\%$ ,  $102/962=10.6\%$ . Total children placed into group homes or psychiatric institutions = 17.9%.

'loss' is in the ever-greater amount that the state itself has to pay for a greater number of children.<sup>27</sup>

The ombudsman argues that the NPR series was incorrect in its understanding of the way federal incentives and reimbursements work. However, Schumacher-Matos' framing of the issue of incentives from a private business perspective leads him to an incorrect assumption: that additional federal reimbursements cannot possibly incentivize state governments to spend beyond the subsistence needs of their states, because those additional reimbursements result only from additional expenditures of state funds.

The truth is that poor states like South Dakota rely heavily upon federal funding to stimulate their economies. In 2010, the year that is the focus of the story, South Dakota's total state government budget was almost \$3.6 billion; the state portion was \$1.13 billion, the federal portion was \$1.85 billion, and the remainder came from "other" sources.<sup>28</sup> Thus, the federal government paid 64% more than the state to cover the daily functioning of South Dakota's government that year. The Tax Foundation ranks South Dakota 4th in the nation for general dependence on federal support.<sup>29</sup> These data

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demonstrate the significant role of federal spending to South Dakota's state economy, and undermine Schumacher-Matos' simplistic treatment of the economic incentives at play.

To provide an example of how economic stimulus from governmental health and social spending works, let us look at Medicaid, a source of federal spending that factors heavily in

<sup>27</sup>Schumacher-Matos, Edward; "Indian Foster Care in South Dakota: A Case Study in Investigative Storytelling Gone Awry"; 8/9/13; P. 40-41:

<http://www.npr.org/assets/blogs/ombudsman/South%20Dakota%20Foster%20Care.pdf>.

<sup>28</sup> State of South Dakota Budget in Brief, Fiscal Year 2010: [http://bfm.sd.gov/budget/BiB/SD\\_BIB\\_FY2010.pdf](http://bfm.sd.gov/budget/BiB/SD_BIB_FY2010.pdf)

<sup>29</sup> The Tax Foundation; "Federal Aid to State Budgets," 12/10/2012: <http://taxfoundation.org/blog/monday-map-federal-aid-state-budgets>

Native foster care in South Dakota (the Centers for Medicare and Medicaid Services [CMS] assert that \$47,177,195 flowed into South Dakota from Medicaid in FY 2010 for foster care and related services.<sup>30</sup>) Fiscal conservatives lament the high cost of Medicaid, yet this program is economically highly beneficial to poor states like South Dakota, and policy makers in South Dakota know it. According to the non-profit healthcare consumer advocacy group Families USA:

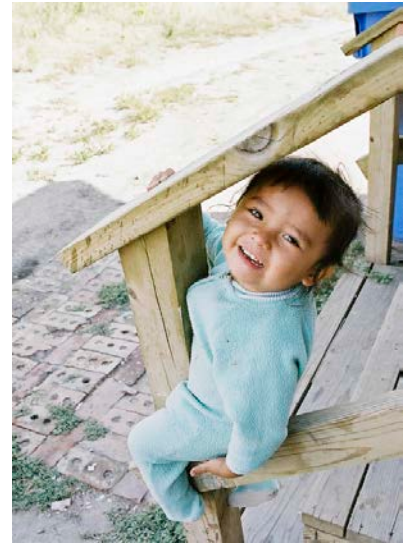
State funds that are spent on Medicaid and State Children's Health Insurance Program (SCHIP) are matched by the federal government at a rate that varies by state ... Because SCHIP is a block grant, each state receives a certain amount of federal funding to pay for the program each year, but it is up to the state to spend the money to draw down those federal dollars... Because of their financing structures, SCHIP and Medicaid introduce new money into [South Dakota's] economy, which has a positive and measurable impact on state business activity, available jobs, and overall state income. SCHIP and Medicaid payments to hospitals and other health-related businesses have a direct impact on the state's economy. These dollars trigger successive rounds of earnings and purchases as they continue to circulate through the state's economy... This ripple effect of spending is called the 'economic multiplier effect.' **This is why South Dakota will reap so many economic benefits from additional SCHIP and Medicaid spending, above and beyond expanded coverage for children.** If SCHIP is reauthorized [in 2007] with the full \$50 billion in additional five year funding promised in the budget resolution, the \$129.6 million in additional federal dollars injected in South Dakota's economy will generate \$48.7 million in new business activity (output of goods and services), \$18.6 million in new wages, and 667 new jobs [emphasis added].<sup>31</sup>

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<sup>30</sup> Centers for Medicare and Medicaid Services; "FY2010 Quarterly Cube": <http://www.cms.gov/Research-Statistics-Data-and-Systems/Computer-Data-and-Systems/MedicaidDataSourcesGenInfo/MSIS-Mart-Home.html>. Note: we have subtracted \$422,526 of spending by the Indian Health Service on foster care children from the total provided by CMS, because these dollars were spent on children under the jurisdiction of the tribes themselves. For a description of what is included in the definition of "foster care" for the purpose of the CMS Quarterly Cube, see P. 151 of the "Medicaid and CHIP Statistical Information System: File Specifications and Data Dictionary": <http://www.cms.gov/Research-Statistics-Data-and-Systems/Computer-Data-and-Systems/MedicaidDataSourcesGenInfo/Downloads/MSIS-Data-Dictionary-2012.pdf>.

<sup>31</sup> Families USA; "SCHIP Reauthorization: What's at Stake for South Dakota?"; 2007; page 4

This phenomenon of economic stimulus deriving from federal support for state healthcare and social service programs, combined with the strong circumstantial evidence provided by Sullivan and Walters in their stories (including explicit statements by former SD State Senator Bill Napoli and former SD Governor Bill Janklow<sup>32</sup>) that there *is* an economic incentive related to foster care for Native children in South Dakota, justify the limited claim the NPR series makes. This claim is that there exist conditions in South Dakota and Washington D.C. which create an economic incentive for the South Dakota’s DSS to take a large number of Native children into foster care—and that this incentive *likely plays some* role in policy making and/or implementation at the state level.



To continue with the example of Medicaid, there is currently a debate going on in South Dakota over the optional expansion of Medicaid eligibility under Obamacare that makes clear that state officials understand the economic benefits to South Dakota of expanded Medicaid coverage. According to the Associated Press:

Arguments for expanding Medicaid [in South Dakota] include having the federal government pay most of the cost, improving the health of low-income people, **boosting the economy with the extra medical spending** and giving people something in return for the taxes they pay [emphasis added].<sup>33</sup>

Another AP report describes a taskforce appointed by South Dakota’s governor to assess whether the state ought to expand Medicaid:

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<sup>32</sup> Sullivan, Laura & Walters, Amy; “Native Foster Care: Lost Children, Shattered Families”: <http://www.npr.org/2011/10/25/141672992/native-foster-care-lost-children-shattered-families>. Janklow says: “[The federal money that is coming into South Dakota social services is “incredibly important. Look, we’re a poor state. We’re not a high-income state. We’re like North Dakota without oil. We’re like Nebraska without Omaha and Lincoln. We don’t have factories opening here, hiring people at high-wage jobs.”; Napoli says: “I’m sure that [the Department of Social Services was] trying to answer a public perception of a problem and then slowly, it grew to the point that they had so much power that no one - no one - could question what they were doing. Is that a recipe for a bureaucracy that’s totally out of control? I would say so.”; George Sheldon, assistant secretary for the Administration of Children and Families, is also quoted as saying: “When you have a financing system that pays states based on the number of children in care, what’s the incentive to keep kids out of care?”

<sup>33</sup> Associated Press; “South Dakota Hospital Executives Support Expanding Medicaid”; 4/24/13: <http://newsok.com/sd-hospital-executives-support-expanding-medicaid/article/feed/532371>



The task force estimates that if Medicaid is indeed expanded, the state would pay about \$102 million through 2020 as its share of covering additional patients and administering the expanded program. The federal government would spend an extra **\$2.1 billion** in South Dakota for an expanded program from 2014 through 2020 [emphasis added].<sup>34</sup>

This new expansion of Medicaid, according to the same formula used by Families USA (above), would bring the state \$790 million in new business activity, \$302 million in new wages, and 10,815 new jobs through 2020.<sup>35</sup> Meanwhile, according to the Associated Press, the dominant reason South Dakota's politicians have thus far been hesitant to endorse Medicaid expansion is that they are *"uncertain whether the federal government will be able to meet its pledge of paying most of the costs."*<sup>36</sup> This logic is entirely consistent with an understanding on the part of South Dakota's political class that Medicaid serves as a critical stimulus to the state's economy, so long as the federal government covers most of its cost.

Schumacher-Matos wrongly disparages Sullivan and Walters' notion that there exists a financial incentive for DSS to take a large number of Indian children into foster and adoptive care, where instead he should have scrutinized the question of if and how the state acts on this incentive—a question NPR posed in 2011 but did not try to answer definitively.

Beyond the fundamentally false framework that informs his attack on Sullivan and Walters, Schumacher-Matos is also guilty of accepting at face value, without any critical scrutiny, the claims of South Dakota DSS officials regarding the levels of their foster care-related spending that are blatantly contradicted by federal data. Schumacher-Matos implies that DSS expenditures on foster children are too small to have a significant economic impact, writing that Kim Malsom-Rysdon, the DSS Secretary, told him: "The entire expenditure for all children of all races in DSS custody for all manners of care in fiscal year 2010 (the year covered by the series) was \$68 million. This includes \$12.7 million for Medicaid, as well as all other medical

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<sup>34</sup> Associated Press; Brokaw, Chet; "South Dakota Task Force Finishes Medicaid Expansion Study"; 8/21/13: <http://finance.yahoo.com/news/sd-task-force-finishes-medicaid-142130559.html>

<sup>35</sup> Calculations:  $(48.7/129.6) \times (2.1) = \$790$  million in new business activity;  $(18.6/129.6) \times (2.1) = \$302$  million in new wages;  $(667/129.6) \times (2.1) = 10,815$  new jobs

<sup>36</sup> Associated Press; Brokaw, Chet; "South Dakota Task Force Finishes Medicaid Expansion Study"; 8/21/13: <http://finance.yahoo.com/news/sd-task-force-finishes-medicaid-142130559.html>

expenses."<sup>37</sup> Schumacher-Matos additionally chastises Sullivan's supposedly imprecise accounting: Sullivan's research found South Dakota's budget for foster care and related services to be "almost \$100 million,"<sup>38</sup> with approximately "\$37 million to \$70 million in medical reimbursements."<sup>39</sup> Schumacher-Matos says: "This is a large range for what seems to be a verifiable number from the federal government."<sup>40</sup>

**Remarkably, if Schumacher-Matos had done what he suggests Sullivan and Walters should have done, and checked the relevant figures with the federal government, he would have learned that data from the Centers for Medicare and Medicaid Services (CMS) dramatically contradicts the information provided him by the state.**

Remarkably, if Schumacher-Matos had done what he suggests Sullivan and Walters should have done, and checked the relevant figures with the federal government, he would have learned that data from the Centers for Medicare and Medicaid Services (CMS) dramatically contradicts the information provided him by the state. CMS reports that South Dakota's Medicaid expenditures on foster children and related groups in FY 2010 was \$47,177,195.<sup>41</sup> While it is true that CMS includes one group in its accounting that the DSS excludes, the 18-21 year olds who have aged out of foster care but still receive Medicaid, expenditures for these young adults

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<sup>37</sup> Schumacher-Matos, Edward; "Indian Foster Care in South Dakota: A Case Study in Investigative Storytelling Gone Awry"; 8/9/13; P. 5:

<http://www.npr.org/assets/blogs/ombudsman/South%20Dakota%20Foster%20Care.pdf>

<sup>38</sup> Schumacher-Matos, Edward; "Indian Foster Care in South Dakota: A Case Study in Investigative Storytelling Gone Awry"; 8/9/13; P. 5:

<http://www.npr.org/assets/blogs/ombudsman/South%20Dakota%20Foster%20Care.pdf>

<sup>39</sup> Schumacher-Matos, Edward; "Indian Foster Care in South Dakota: A Case Study in Investigative Storytelling Gone Awry"; 8/9/13; P. 5:

<http://www.npr.org/assets/blogs/ombudsman/South%20Dakota%20Foster%20Care.pdf>

<sup>40</sup> Schumacher-Matos, Edward; "Indian Foster Care in South Dakota: A Case Study in Investigative Storytelling Gone Awry"; 8/9/13; P. 5:

<http://www.npr.org/assets/blogs/ombudsman/South%20Dakota%20Foster%20Care.pdf>

<sup>41</sup> Centers for Medicare and Medicaid Services; "FY2010 Quarterly Cube": <http://www.cms.gov/Research-Statistics-Data-and-Systems/Computer-Data-and-Systems/MedicaidDataSourcesGenInfo/MSIS-Mart-Home.html>. Note: we have subtracted \$422,526 of spending by the Indian Health Service on foster care children from the total provided by CMS, because these dollars were spent on children under the jurisdiction of the tribes themselves. For a description of what is included in the definition of "foster care" for the purpose of the CMS Quarterly Cube, see P. 151 of the "Medicaid and CHIP Statistical Information System: File Specifications and Data Dictionary": <http://www.cms.gov/Research-Statistics-Data-and-Systems/Computer-Data-and-Systems/MedicaidDataSourcesGenInfo/Downloads/MSIS-Data-Dictionary-2012.pdf>.

provide exactly the same kind of stimulus to South Dakota's economy as expenditures for children under 18, and therefore must be counted to accurately represent the extent to which such spending makes a positive economic impact in predominantly white communities by drawing down additional federal dollars based disproportionately on the placement of Native youth in non-tribal foster care arrangements.<sup>42</sup>

Using CMS' numbers to correct the state's gross under-reporting of medical expenses for children overseen by DSS, we find that the total budget for DSS spending on these individuals during FY 2010 was \$102,477,195 (\$47,177,195 + \$55.3 million [\$68 million - \$12.7million] = \$102,477,195). This sum must provide a much greater stimulus to South Dakota's economy than would the \$68 million figure reported by DSS and accepted uncritically by Schumacher-Matos.<sup>43</sup>



Finally, our discussion of federal spending on Native foster children raises one additional important question: precisely where in South Dakota is all of this spending going? One answer is that substantial sums of it are going to White-owned or White-run companies with direct ties to South Dakota politicians. The most prominent example of this, reported in Sullivan and Walters' 2011 stories, is that the current governor of South Dakota, Dennis Daugaard, ran the Children's Home Society (CHS) from 2002-2009—the very same years that Mr. Daugaard served as the state's Lieutenant Governor. CHS is one of South Dakota DSS' main providers of foster care and youth psychiatric services: in 2012 the company received \$6,822,259 for serving children.<sup>44</sup> Another noteworthy example is that, according to the *Argus Leader*, it was due to the urging of a man named Bill Peterson that Dennis Daugaard entered South Dakota politics in

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<sup>42</sup> Centers for Medicare and Medicaid Services; "Medicaid and CHIP Statistical Information System: File Specifications and Data Dictionary"; P. 151: <http://www.cms.gov/Research-Statistics-Data-and-Systems/Computer-Data-and-Systems/MedicaidDataSourcesGenInfo/Downloads/MSIS-Data-Dictionary-2012.pdf>

<sup>43</sup> Schumacher-Matos, Edward; "Indian Foster Care in South Dakota: A Case Study in Investigative Storytelling Gone Awry"; 8/9/13; P. 5: <http://www.npr.org/assets/blogs/ombudsman/South%20Dakota%20Foster%20Care.pdf>

<sup>44</sup> Government of South Dakota; Spreadsheet of DSS contracts with private entities: <http://open.sd.gov/>.

1996 as a state senator.<sup>45</sup> Bill Peterson at that time was Minnehaha County Republican Party chairman; now he is the vice president for resource development (read: chief fundraiser) for Lutheran Social Services, a religious social service agency that received \$2,189,349 from DSS in 2012 to care for children.<sup>46</sup>



Before concluding our discussion of economic incentives for the removal of Native children from Native custody, let us address the question of whether there is a *net gain* of federal Medicaid dollars to the state due to the seizure of Native American children, since Medicaid accounts for such a significant percentage of total spending on South Dakota’s children in foster care. Indeed, some critics of Sullivan and Walters’ reporting have asserted that Native children would be covered by Medicaid even if they did not enter the DSS system—and hence there is no incentive whatsoever related to Medicaid. This is misleading. Native children, when they remain with their families and tribes—as they are supposed to—receive virtually all of their health care from the Indian Health Service, a federal program that does receive some reimbursements through Medicaid. However, the total expenditures by IHS on Indian children in South Dakota for fiscal year 2010 were \$30,836,624.<sup>47</sup> Considering that IHS serves between

<sup>45</sup> Walker, John; *The Argus Leader*; “Steady Optimism Guides Dennis Dugaard’s Quest to be Governor”; 10/17/13: <http://www.argusleader.com/article/20101017/NEWS/10170319/Steady-optimism-guides-Dennis-Daugaard-s-quest-governor>

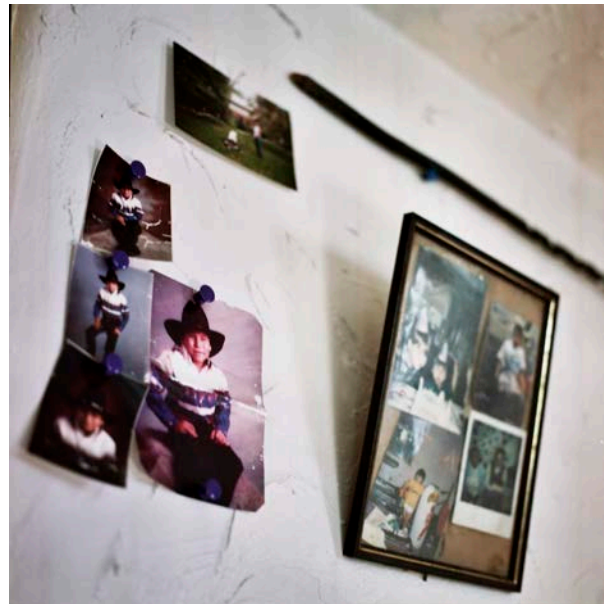
<sup>46</sup> Government of South Dakota; Spreadsheet of DSS contracts with private entities: <http://open.sd.gov/>.

<sup>47</sup> Centers for Medicare and Medicaid Services; “FY2010 Quarterly Cube”: <http://www.cms.gov/Research-Statistics-Data-and-Systems/Computer-Data-and-Systems/MedicaidDataSourcesGenInfo/MSIS-Mart->



10 and 15 times the number of Native youth each year that DSS does<sup>48</sup>, this is a small number compared to the \$17,726,433 that the Department of Social Services spent on Native American children in 2010 (South Dakota is second only to Alaska in DSS Medicaid spending on Indian foster children and related groups).<sup>49</sup> This suggests strongly that the comparative economic impact of Medicaid spending on children removed by DSS is disproportionately large.

For the record, the Lakota People's Law Project does not advocate that the federal government spend *less* on the health and welfare of Indian children. Nor do we object to government spending on health and social services serving a socially positive roll by providing economic stimulus. Rather, we argue, consistently with NPR's reporting in 2011, that current policy and practices, both state and federal, may well incentivize South Dakota to *remove* Lakota children from Native custody in violation of the Indian Child Welfare Act, *redirect* federal Medicaid dollars away from Native American



communities, and *spend* those dollars on non-Native concerns which often have close relationships to South Dakota politicians. The federal government should act immediately to correct these abuses by working intensively with tribes to assist them in developing their own Title IV-E family services and foster care programs.<sup>50</sup> Principal tribal leaders from all nine of South Dakota's Sioux tribes have signed, in just the past several months, resolutions and/or

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Home.html. Calculations: \$2,966,868 (children under 1) + \$12,727,477 (children 1-5) + \$8,172,703 (children 6-12) + \$1,829,824 (children 13-14) + \$5,139,752 (children 15-18) = \$30,836,624.

<sup>48</sup> According to NPR, Native children make up 15% of the population in South Dakota (<http://www.npr.org/2011/10/25/141672992/native-foster-care-lost-children-shattered-families>), and according to the Child Welfare League of America, there are 202,797 children in South Dakota (<http://www.cwla.org/advocacy/statefactsheets/2012/southdakota.pdf>). This means there are approximately 30,419 Native children in the state. IHS accounts for the health needs of the vast majority of these children, and hence is responsible for a much larger number of youth than DSS, who provides for a few thousand at most, according to the Department of Health and Human Services (<http://cwoutcomes.acf.hhs.gov/data/downloads/pdfs/south%20dakota.pdf>).

<sup>49</sup> Centers for Medicare and Medicaid Services; "FY2010 Quarterly Cube": <http://www.cms.gov/Research-Statistics-Data-and-Systems/Computer-Data-and-Systems/MedicaidDataSourcesGenInfo/MSIS-Mart-Home.html>

<sup>50</sup> Lakota People's Law Project; "Sovereignty and Self-Governance in the Provision of Child and Family Services: Securing Direct Federal Funding for Tribal Administration of Title IV-A, IV-B, IV-C, and IV-E Services"; 7/5/13

letters to the Department of Interior asserting a desire to run their own foster care and adoptive programs, with the assistance of direct, Title IV-E federal funding.<sup>51</sup> This tribal system of family and child protective services will take time to put in place, but it can—and should—be established as rapidly as possible.

## **Blaming the Victims by Blurring the Law: Schumacher-Matos' Effort to Excuse the Acts of State Officials Based Upon Faulty Legal Claims**

Finally, Schumacher-Matos tries to blame Native Americans in South Dakota for their own predicament by faulting their purported failure to secure “proper” licenses for tribal foster homes, and for tribal courts’ purported placement of Native children with non-Native foster care settings at a rate equal to—or perhaps at even greater—than DSS.

To begin, Schumacher-Matos claims, in plain ignorance of federal law, that there absolutely must be a licensing agreement between the state and a tribe before the state can recognize a tribally-licensed foster home. In fact, the law requires states to place children into available, tribally-licensed foster homes unless there is good cause not to do so.

On page 9 of his report, Schumacher-Matos states, “[A]rguably the major [reason] why Native children are put in white foster homes: there is an acute national shortage of licensed Indian ones.”<sup>52</sup> He contends that the NPR series ought to have highlighted this: “There is no exploring [by NPR] the inconvenient unavailability of properly licensed foster homes.”<sup>53</sup> Schumacher-Matos has here used the term “properly” to negate Sullivan and Walters’ use of testimony from certain Lakota grandmothers, like Susan Crow, whom Schumacher-Matos says had “incorrect”<sup>54</sup> licenses, i.e. tribally-sanctioned ones rather than state-sanctioned ones. Wexler, however, debunks the myth that such licenses are “incorrect”:

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<sup>51</sup> By the above statement, we do not mean to signify that all tribal leaders on all nine reservations are uniformly in support of moving to a direct funding relationship with the federal government for foster care. But the tribal chairman and/or the tribal council for each of the nine reservations has/have officially signed onto the goal.

<sup>52</sup> Schumacher-Matos, Edward; “Indian Foster Care in South Dakota: A Case Study in Investigative Storytelling Gone Awry”; 8/9/13; P. 9:

<http://www.npr.org/assets/blogs/ombudsman/South%20Dakota%20Foster%20Care.pdf>

<sup>53</sup> Schumacher-Matos, Edward; “Indian Foster Care in South Dakota: A Case Study in Investigative Storytelling Gone Awry”; 8/9/13; P. 72:

<http://www.npr.org/assets/blogs/ombudsman/South%20Dakota%20Foster%20Care.pdf>

<sup>54</sup> Schumacher-Matos, Edward; “Indian Foster Care in South Dakota: A Case Study in Investigative Storytelling Gone Awry”; 8/9/13; P. 56:

<http://www.npr.org/assets/blogs/ombudsman/South%20Dakota%20Foster%20Care.pdf>

"Schumacher-Matos...claim[s] that a tribal license is insufficient in the absence of an agreement with the state. [The ombudsman says] 'This is a federal requirement - not a devious state requirement,' ...Really? How does Schumacher-Matos know this? Did he check the relevant federal statutes - or did he just rely on what he was told by state officials? I can find no reference to a requirement for any such agreement on the website of the Department of Health and Human Services Administration for Children and Families, and at least one of the questions and answers on [their] FAQ page suggests otherwise:

'Question: Must foster family homes approved through the tribal process meet the same standard as homes licensed by the state?

Answer: The definition of "foster family home" at 45 CFR 1355.20 gives tribal licensing or approval authorities the jurisdiction to license or approve homes that are on or near Indian reservations. This is consistent with ICWA at section 1931(b) which states that for purposes of qualifying for funds under a federally-assisted program, **licensing or approval of foster or adoptive homes or institutions by an Indian tribe is equivalent to licensing or approval by a state.** The authority to license or approve includes the authority to set standards' [emphasis added.]"<sup>55</sup>

**For purposes of qualifying for funds under a federally-assisted program, licensing or approval of foster or adoptive homes or institutions by an Indian tribe is equivalent to licensing or approval by a state. The authority to license or approve includes the authority to set standards.**

*- Department of Health and Human Services  
Administration for Children and Families  
FAQ page - referring to ICWA at section 1931(b).*

<sup>55</sup> Wexler, Richard; "The Schumacher-Matos Report on NPR's Coverage of Child Welfare in South Dakota: A Case Study in an Ombudsman Gone Awry"; P. 16: [www.nccpr.org/reports/NPRombudsman.pdf](http://www.nccpr.org/reports/NPRombudsman.pdf). Also: Health and Human Services Department, Children's Bureau:

[http://www.acf.hhs.gov/cwpm/programs/cb/laws\\_policies/laws/cwpm/policy\\_dsp.jsp?citID=145#693](http://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=145#693).

Note: It may occur to some that the Adoption and Safe Families Act (ASFA), passed in 1997, contains licensing restrictions on placements for a child that trump ICWA's preferential placement mandates, contained in Section 1915(b). However, this false. At least one ruling by the South Dakota Supreme Court undermines this hypothesis. That case dealt with whether or not ASFA trumps ICWA concerning the requirement by ICWA that states make active efforts to reunite Indian families before terminating parental rights. The Court found in favor of ICWA's requirements, writing: "[N]o provision in ASFA specifically purports to modify ICWA. It would seem illogical that ASFA would implicitly leave unchanged certain ICWA provisions...while modifying others...[Furthermore] when interpreting a statute pertaining to Indians, the United States Supreme Court has stated, 'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" Source: *The People of the State of South Dakota in the Interest of J.S.B., JR., Minor*

It would appear that Schumacher-Matos, following the inherently biased counsel of the DSS, completely ignores the fact that there are tribally-licensed, Indian foster homes—perfectly legal places for the state to place children—sitting empty in the state of South Dakota. Worse, he impugns NPR for highlighting this fact.

There is additional evidence to erode the claim that there exists a shortage of Native foster homes in South Dakota, even if the false standard according to which the state refuses to accept tribally-licensed foster homes is taken into account. An email communication from the Department of Social Services to the Lakota People's Law Project in July 2011<sup>56</sup> stated that as of 2011, there were 65 state-licensed Native American foster homes, of which 12 requested not to be considered for placements

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and 15 would accept placements of relatives only. This left 38 state-licensed Native foster homes willing and able to receive all Native children assigned to their custody. Meanwhile, as of 2011, there were 440 Native American children in family run foster homes in South Dakota, but only 59 of these children, or 13%, were placed in 24 state-licensed Native American foster

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*Child and Concerning J.S.B., Sr. and O.L.J., Respondents*; first paragraph of case brief:

<http://www.narf.org/icwa/state/southdakota/case/jsb.html>. Additional note: *Native Village of Stevens v. Smith* also affirms our position that states have the legal right to place children into tribally-licensed homes without there having to be a formal licensing agreement between state and tribe. In that 9<sup>th</sup> Circuit case, the ruling is clear that, due to ICWA's 1978 mandate that tribally-licensed homes are equivalent to state-licensed ones, the much older (1935) Social Security Act U.S.C. § 672's requirement that licensing agencies for the state have formal agreements with the state is *met* when a tribe is the one who licenses a foster home. The court wrote: "Congress clearly intended by [ICWA's 25 U.S.C. § 1931(b)] that tribal approval be recognized as equivalent to state licensing or approval...Therefore, contrary to the district court's determination, a tribally approved foster home is the equivalent to and substitute for state approval or licensing. Section 672(c) [of the Social Security Act] has been complied with, since the tribal council approved [the] foster home placement." Source: <http://www.narf.org/icwa/federal/appeals/stevens.html>.

<sup>56</sup> Email from South Dakota Department of Social Services, 2011



homes. This left between 14 and 29 Indian foster homes completely empty,<sup>57</sup> despite the fact that 381 Native American foster children, or 87%, lived in non-Indian environments at the time.

Moreover, the argument by DSS that there is a shortage of Native foster homes, even if it were as true as DSS says it is, would be inadequate to justify DSS' failure to place Native children consistently with federal law. This is because both ICWA and the Multi-Ethnic Placement Act (a component of the Federal Civil Rights Act) expressly require that states *go the distance* to license safe, qualifying homes. The Multi-Ethnic Placement Act mandates that states "provide for the **diligent recruitment** of prospective foster/adoptive parents who reflect the race and ethnicity of children currently in the state foster care system for whom homes are needed [emphasis added]."<sup>58</sup> It is the state's responsibility, as noted by Schumacher-Matos's source, Jill E. Thompkins,<sup>59</sup> to discover ways to license more Native American homes when the state perceives a shortage of them.

Next, Schumacher-Matos falsely claims that tribal courts are directly responsible for placing Native children with White families and group homes at similar or higher rates than state authorities, when the truth is that many of the primary courts in question have delegated placing authority to DSS. Schumacher-Matos writes, on page 61 of his report:



"Tribal courts are largely sovereign and are not 'the state.' The actions of tribal courts, moreover, offer valuable context for just what the placement numbers mean and whether they support the broad argument of cultural bias... the tribal courts place Indian children in white foster families or group centers at similar or even higher rates

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<sup>57</sup> It is impossible to tell how many of those families who were only willing to take in their relatives actually took in children. If all 15 of them did, this means that the number of unutilized foster homes was 29; if none of them did, it lowers the number of unutilized homes to 14.

<sup>58</sup> Health and Human Services Department; Office for Human Rights; "ENSURING THE BEST INTERESTS OF CHILDREN Through Compliance with The Multiethnic Placement Act of 1994, as amended, and Title VI of the Civil Rights Act of 1964"; P. 19:

<http://www.hhs.gov/ocr/civilrights/resources/specialtopics/adoption/mepatraingppt.pdf>

<sup>59</sup> Schumacher-Matos, Edward; "Indian Foster Care in South Dakota: A Case Study in Investigative Storytelling Gone Awry"; 8/9/13; P. 71:

<http://www.npr.org/assets/blogs/ombudsman/South%20Dakota%20Foster%20Care.pdf>

than state courts."<sup>60</sup> ... Some 40 percent of...placements are made by the tribes' own independent judges on the reservations, not by state judges."<sup>61</sup>

As background, all the nine tribes in South Dakota have tribal courts, but only some have their own Child Protective Services (CPS) programs, i.e. Pine Ridge, Sisseton, Standing Rock, and Flandreau. These four tribes' CPS programs—which have jurisdiction only on their own reservations—are funded by Title IV-E monies from the Health and Human Services Department *via* contracts the tribes have with the state of South Dakota. Concerning ICWA cases, therefore, these four tribes have a decent amount of control over the placement of their own children, because they have quasi-independent, tribal social workers. However, the remaining five tribes who rely exclusively upon DSS to conduct removals and placements of children (i.e. all the rest in South Dakota), have little choice but to defer to DSS on a whole range of issues—the existence of their tribal courts notwithstanding. Schumacher-Matos entirely ignores this.

Richard Wexler goes a great distance to explode Schumacher-Matos's attempt to blame tribal courts for the 87% placement rate of Indian foster children into non-Native environments. Wexler does this by highlighting the pressure that tribal court judges on reservations [*without* CPS programs] face to accept the determinations of the DSS in child custody proceedings.<sup>62</sup> If a tribal court judge—who completely lacks the resources to properly investigate the appropriateness of a particular DSS determination re

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<sup>60</sup> Schumacher-Matos, Edward; "Indian Foster Care in South Dakota: A Case Study in Investigative Storytelling Gone Awry"; 8/9/13; P. 61:

<http://www.npr.org/assets/blogs/ombudsman/South%20Dakota%20Foster%20Care.pdf>

<sup>61</sup> Schumacher-Matos, Edward; "Indian Foster Care in South Dakota: A Case Study in Investigative Storytelling Gone Awry"; 8/9/13; P. 8:

<http://www.npr.org/assets/blogs/ombudsman/South%20Dakota%20Foster%20Care.pdf>

<sup>62</sup> Wexler, Richard; "The Schumacher-Matos Report on NPR's Coverage of Child Welfare in South Dakota: A Case Study in an Ombudsman Gone Awry"; P. 9, 19-20: [www.nccpr.org/reports/NPRombudsman.pdf](http://www.nccpr.org/reports/NPRombudsman.pdf)

removal and placement—were to reject a DSS determination, and the child were to later be found abused or neglected in the home recommended by the court, the publicity for the court would be devastating. Naturally, tribal courts cannot operate as Child Protective Services programs, and hence they face an inherently coercive pressure to allow DSS to remove and place Native children according to DSS’ own determinations.

What is more, by and large, judges for tribes who do not have their “own” CPS programs (we use scare quotes because DSS still controls the funding for the several tribal CPS programs) *don’t even review* DSS determinations concerning placement of Indian children. B.J. Jones, South Dakota tribal judge, ICWA expert, and University of North Dakota law professor, explains: “Most tribal court orders on Rosebud, Crow Creek, Cheyenne River and Yankton award placement rights to DSS, and tribal courts usually play little role in placement decisions unless a family member is asking for placement and DSS is contesting.”<sup>63</sup> It is, therefore, a gross distortion for Schumacher-Matos—taking his cues from the DSS—to assert as proof for his attacks on Sullivan and Walters “that some 40 percent of...placements are made by the tribes’ own independent judges on the reservations, not by state judges.”<sup>64</sup>

We do not know all the details of what the non-Native tribal court placement numbers would be if we were to exclude those tribes without their own CPS programs, but it is certain that placements into non-Indian environments would plummet drastically below the figures given by Schumacher-Matos. This is to say, those tribes with a reasonable amount of control over their placement process use Native homes much more frequently than those that don’t. For example, Judge B.J. Jones’ tribe, Sisseton-Wahppeton—which largely cuts DSS out of the placement process—*achieves a nearly 90% placement rate of children into Lakota homes.*<sup>65</sup>



<sup>63</sup> Jones, BJ; Email communication with LPLP; 9/2/13

<sup>64</sup> Schumacher-Matos, Edward; “Indian Foster Care in South Dakota: A Case Study in Investigative Storytelling Gone Awry”; 8/9/13; P. 8:  
<http://www.npr.org/assets/blogs/ombudsman/South%20Dakota%20Foster%20Care.pdf>

<sup>65</sup> Jones, BJ; Email communication with LPLP; 9/3/13

And, importantly, according to our conversations with a CPS worker at Sisseton, the explanation for this reduces to a single word: *grandmothers*<sup>66</sup> (hence Sullivan and Walters' heavy reliance on interviews of grandmothers in their reporting—another aspect of the NPR series that Schumacher-Matos erroneously attacks<sup>67</sup>). These facts taken together lay bare Schumacher-Matos' gross distortion of the role of tribal courts in placing Indian children in South Dakota.

In addition to the practical arguments above concerning the lack of capacity of tribes to control their own CPS processes, there is also a powerful *legal* reason which undermines Schumacher-Matos' argument about tribal court liability for non-Indian placements. B.J. Jones, again, explains that DSS has a rock-solid legal obligation—under ICWA—to abide by the federal law's



preferential placement standards *even when tribal courts are substantially involved in proceedings*. This is because, so long as DSS conducts removals and placements of Native children, ICWA requires explicit approval by the tribe that preferential placement standards can be set aside before DSS may vitiate federal requirements. In other words, simply because a tribal court “touches” an ICWA case doesn’t mean that the tribe “takes it over,” and therefore ICWA is moot. Jones writes:

Unless a Tribe has, by resolution or law, altered the foster care placement preferences requirement, DSS should be abiding by the foster care placement preferences of ICWA or seeking tribal court determinations of good cause to deviate from those placement preferences. This is not happening in the tribal courts (Rosebud, Cheyenne River, Crow Creek, and Yankton Sioux) where state DSS provides child protection services to on-reservation Native children.<sup>68</sup>

<sup>66</sup> Interview by LPLP of CPS worker at Sisseton-Wahpeton; July, 2013

<sup>67</sup> Schumacher-Matos, Edward; “Indian Foster Care in South Dakota: A Case Study in Investigative Storytelling Gone Awry”; 8/9/13; P. 67

<sup>68</sup> Coalition of Children & Families; “Reviewing the Facts: An Assessment of the Accuracy of NPR’s *Native Foster Care: Lost Children, Shattered Families*”; Footnote #32; pg. 10.



## Conclusion

The Lakota People's Law Project considers Edward Schumacher-Matos' effort to debunk award-winning and history-making reporting by Laura Sullivan and Amy Walters for National Public Radio to be a major injustice to the Lakota people of South Dakota.



As detailed above, Schumacher-Matos' faulty analysis and transparent factual errors are so pervasive that we believe biased intent and purposeful avoidance of critically important information were at the root of the false and damaging conclusions reached by his report. On the basis of the evidence presented here, Schumacher-Matos' effort to excuse South Dakota's illegal practice of stripping extraordinary numbers of Native children from their communities must be rejected.

Current South Dakota state practices too closely mimic hundreds of years of policy in the United States, both federal and state, to wantonly and often intentionally destroy the culture of Indian people through forced removal and assimilation of their children. Removals such as those occurring in South Dakota (a state that "flunked" a government audit in 2005 concerning ICWA compliance<sup>69</sup>) today qualify as cultural genocide under the Genocide Convention Implementation Act of 1987<sup>70</sup>, to which the United States is a signatory.

South Dakota's tribes—along with all other federally recognized American Indian tribes—possess sovereign rights to govern their own affairs, including the right to raise their own children. ICWA was designed to enforce this right, but South Dakota is not complying with it. Many casual observers of Indian country, meanwhile, fail to appreciate that the run-away ICWA violations in South Dakota—and, indeed, across the United States—are not only a human rights concern, but an attack on the sovereign political status of American Indians. Along with the best interests of thousands of Native children, it is this tribal sovereignty, established by law as a prophylactic against the forced dissolution of the Sioux Nation, that is at stake in defending

<sup>69</sup> Sullivan, Laura & Walters, Amy; National Public Radio; "Incentives and Cultural Bias Fuel Foster System"; 10/25/11; <http://www.npr.org/2011/10/25/141662357/incentives-and-cultural-bias-fuel-foster-system>.

<sup>70</sup> Genocide Convention Implementation Act of 1987: <http://www.law.cornell.edu/uscode/text/18/1091>.

Sullivan and Walter's stories, refuting Schumacher-Matos' ideological and ignorant critique, and redressing with all deliberate speed the serious wrongs being perpetrated by South Dakota's state government against Native people.

***\*This report can be downloaded at: [www.LakotaLaw.org/watching-the-watchdog](http://www.LakotaLaw.org/watching-the-watchdog).***