

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Child and Family Services Agency



Administrative Issuance: CFSA-13-02

TO: All CFSA Staff

FROM: Wanda Tolliver, Acting Deputy Director for Program Operations
Cory Chandler, Deputy Attorney General

DATE: November 24, 2014

RE: Compliance with the Indian Child Welfare Act

The federal Indian Child Welfare Act (ICWA) of 1978 was implemented in part because of the failure of states to recognize the importance of tribal relationships and the specific cultural and social standards existing within individual tribal communities. ICWA therefore expresses a clear preference for preserving an American Indian child's ties to the tribal community, even if the child never had a previous relationship with the tribe. ICWA further enumerates the minimum federal standards for the removal of American Indian children from their family home and subsequent placement in the foster care system. Lastly, ICWA grants tribes the right to intervene in involuntary custody proceedings.

This issuance outlines the procedures that the District of Columbia as a whole, including the Court, the AAG and CFSA, must take to maintain compliance with ICWA, particularly in regards to inquiry into a child's possible American Indian heritage and the subsequent responsibility of the District to notify the child's tribe if an American Indian child and/or family should come to the District's attention. Additionally, the issuance provides information related to the Family Court proceedings that are required by ICWA, as well as the responsibilities of the District of Columbia Office of the Attorney General (OAG) and the Assistant Attorney Generals assigned to ensure the District's compliance, as well as transfer of a child to a tribal agency.

Reminder: pursuant to the Adoption and Safe Families Act of 1997, CFSA shall at all times exercise its discretion to protect the health and safety of children in individual cases, particularly whenever a child is at imminent risk of harm and in immediate need of a safe and stable placement in a family-based foster home. Additionally, pursuant to the Fostering Connections to Success and Increasing Adoptions Act of 2008, if there is imminent risk of a child's removal from their home (whether the child is an American Indian child or not), CFSA shall at all times ensure notification to any identified adult relatives.

If you have any questions regarding this issuance, please contact the Office of the Attorney General.

Applicability

ICWA shall apply when all of the following conditions exist:

1. The matter before the Family Court is a CFSA-involved child welfare proceeding that includes foster placement, termination of parental rights, pre-adoptive placement, permanent guardianship, or adoption. *Note: ICWA does not apply to custody disputes in divorce proceedings.*

2. Pursuant to ICWA's definition of an Indian child, the child involved must be an unmarried person under age 18 who fulfills either of the following qualifications:
 - a. Currently a member of an Indian tribe that is recognized by the federal government.
 - b. Eligible for membership in a federally-recognized tribe because s/he is the biological child of a tribal member.
3. The American Indian tribe must be federally registered as a tribe, band, or nation in accordance with 25 USC § 1903(8).

Inquiries Regarding Identification as American Indian Child

As is the obligation for all inquiries regarding race identification, CFSA and CFSA-contracted social workers must inquire of a family member and/or a child whether s/he self-identifies as an American Indian, or whether there is a suggestion that s/he is an American Indian. Official determination of membership in a tribe is made solely by the tribe or the Bureau of Indian Affairs (BIA). No determinations shall be made by appearance only.

Note: Different standards of tribal membership may exist for each tribe. A tribe's determination of eligible membership is conclusive, even if it conflicts with the above definition. For example, a tribe may consider membership for a child who has been adopted by a tribal member, even though the child has no biological relationship to the member. Children may also have eligibility for more than one tribe, in which case individual tribal eligibility requirements will apply.

Preliminary inquiries shall be made during the Child Protective Services investigation process and if the child is taken into custody, or any time there is a suggestion that the child may be an American Indian. If a removal is necessary, the Court is obligated by law to inquire during the initial or disposition hearing. Inquiries shall seek the following information:

1. Does the child have known or suspected American Indian heritage?
2. Is the child the biological or adopted child of American Indian parents?
3. Have any family members received services from BIA or Indian Health Services?
4. Has the child attended an American Indian school?
5. Did the child ever reside on a trust land or reservation?
6. Has the child ever participated in any American Indian community events?

Guidelines for CFSA and CFSA-Contracted Social Workers

If upon inquiry (or based upon available documented information), there is a suggestion of an American Indian heritage, the assigned social worker (e.g., the investigative or ongoing social worker) shall be responsible for following activities:

1. Gathering the following information, as available:
 - a. Name of the American Indian child, the child's birth date, and birthplace
 - b. Reasons why there is a suggestion that the child is an American Indian
 - c. Name of the American Indian tribe(s) in which the child is enrolled or may be eligible for enrollment
 - d. Names and addresses of each member of the child's biological American Indian family, including maternal or paternal family members or American Indian custodians

2. Submitting the information to the Office of the Attorney General (OAG) via email within two business days of receiving responses to the inquiry. OAG will then contact the tribe or the BIA in order for them to determine the child's membership in a federally-registered tribe. *Note: If the child is not removed, no notice is required, and thus there is no need to notify the OAG's office. If, however, there is a suggestion that the child is American Indian, the information shall nonetheless be documented in FACES and the child's case record as with any other race identification.*
3. Documenting the child's American Indian heritage on any applicable reports (e.g., FTM reports or complaint forms).

Mandatory Notification to Parents and a Tribe Regarding Family Court Hearings

Notification to the parents and tribe, or BIA, is the responsibility of OAG. The following directions are provided for social workers as information only.

If it is suggested that the child is an American Indian child, notice of the Court proceedings to the tribe is required even if the issue of American Indian heritage is raised late in the proceedings.

1. Parents and all possible tribal affiliations must be notified by the District of Columbia at least 10 days before a hearing occurs in relationship to a child's entry into foster care. If notification is sent to BIA, then the hearing cannot occur until 15 days after the notice is received. (See # 4 below.) This notice must take place by registered mail with a return receipt requested. (*For purposes of this issuance, a parent is defined as any biological parent or any person who has adopted an American Indian child, including adoption under tribal law or custom. This does not include, however, a non-Indian adoptive parent or an unwed father where paternity has not been acknowledged or established in accordance with District law.*)
2. Notice under ICWA cannot be waived by a parent.
3. If the District cannot ascertain the identity of the parent or the tribe, notice shall be given to the Secretary of the Interior via the BIA. The notice must provide the following information, if known, in accordance with BIA regulations (25 CFR 23.11):
 - a. Name, birth date, and birthplace of the American Indian child
 - b. Name of the American Indian tribe(s) in which the child is enrolled or maybe eligible for enrollment
 - c. All names known, and current and former addresses of the American Indian child's biological mother and father, maternal and paternal grandparents, great-grandparents, or American Indian custodians, including the mother's maiden name, and married or former names or aliases of all of the aforementioned individuals, birth dates, places of birth and death, tribal enrollment numbers, and any other identifying information.
 - d. A copy of the petition, complaint or other document by which the proceeding was initiated
 - e. The name of the petitioner and the name and address of the petitioner's attorney
 - f. A statement of the absolute right of the biological parents, the child's American Indian custodians and the child's tribe to intervene in the proceeding
 - g. A statement that if the American Indian parents or custodians are unable to afford counsel, counsel will be appointed to represent them
 - h. A statement of the right of the American Indian parents or custodians and the child's tribe to be granted upon request up to an additional 20 days to prepare for the proceedings
 - i. The location, mailing address, and telephone number of the court, as well as all parties notified pursuant to this section

- j. A statement on the right of the American Indian parents or custodians and the child's tribe to petition the court to transfer the proceeding to the American Indian child's tribal court, absent objection by either parent, and provided that such transfer shall be subject to declination by the tribal court of said tribe
 - k. The potential legal consequences of the proceedings on future custodial and parental rights of the American Indian parents or custodians
 - l. A statement that since child custody proceedings are conducted on a confidential basis, all parties, including tribal officials shall keep confidential the information contained in the notice concerning the particular proceedings and the notice shall not be handled by anyone who does not need the information in order to exercise the tribe's right under the Act
4. The Secretary of the Interior, or designee, shall have 15 days after receipt of notification to notify the child's tribe and American Indian parents or custodians.
 5. Failure to notify may cause reversal of any decisions related to the child's entry into care.
 6. A copy of the notice, the return receipt, and any other relevant correspondence shall be filed with the Family Court. The Family Court should not hold a hearing prior to the expiration of the 10 days (or 15 days if BIA is notified, see # 4 above).

Transfer of a Child to a Tribal Agency

As a state agency, CFSA has established and maintains the procedures in this issuance for the transfer of responsibility for the placement and care of a child to a Tribal Title IV-E agency or an Indian Tribe with a Title IV-E agreement. CFSA acknowledges and understands that there are operational distinctions between Tribal Title IV-E agencies and Indian Tribes with Title IV-E agreements with Title IV-E single state agencies, and CFSA will work with such agencies (and the appropriate state Title IV-E agencies, where applicable) to ensure that practice and procedure with respect to case transfers adhere to applicable governance.

In the event that a child in CFSA custody is a member of a federally recognized Indian Tribe that is outside of the District, and is to be transferred to that Tribe's custody, CFSA will consult with that Tribe to develop and maintain formal case transfer protocols for the applicable case and for all future cases involving transfers of care and custody between CFSA and the Tribe in question.

At present, there are no established Indian tribes within the District of Columbia. While consultation on Tribe-specific case transfer procedures will occur with a federally-recognized Indian Tribe at the time of case transfer, at a minimum the case transfer process will adhere to the following core requirements:

1. Procedures in this issuance do not affect a child's eligibility, receipt of services, or payment under Title IV-E or the medical assistance program operated under Title XIX.
2. At the time of transfer, CFSA shall ensure that each child's eligibility for Title IV-E funds is established, and that all essential documents are provided to the Tribal Title IV-E agency or Indian Tribe with a Title IV-E agreement, including but not limited to the following information:
 - a. All judicial determinations to the effect that continuation in the home from which the child was removed is contrary to the welfare of the child and that reasonable efforts described in section 471(a)(15) of the Social Security Act (the Act) have been made (i.e., the child's health and welfare are of paramount consideration).
 - b. Other documentation that relates to the child's Title IV-E eligibility under sections 472 and 473 of the Act has been provided to the Tribal Title IV-E agency or the Indian Tribe with a Title IV-E agreement.

- c. Information and documentation available to CFSA regarding the child's eligibility or potential eligibility for other Federal benefits is also provided.
- d. The case plan, developed pursuant to section 475(1) of the Act, including health and education records of the child pursuant to section 475(1)(C) of the Act) is provided.
- e. Information and documentation of the child's placement settings, including a copy of the most recent provider's license or approval, is also provided.

As federal regulations change and tribal transfer requirements are modified, CFSA will consult with the Navajo Nation, which will provide high-level and recommendations to address new federal regulatory requirements and incorporate them into Agency policy.

Placement of American Indian Children

If a finding is made that an American Indian child must be placed in out-of-home care, based on imminent risk to the child's safety and well-being, the following guidelines must be followed:

1. Foster Care and Pre-adoptive Placements – American Indian children must be placed in the following order of preference (unless there is good cause to the contrary):
 - a. A member of the extended family (as defined by the tribe), including but not limited to grandparents, aunts, uncles, adult siblings, nieces, nephews, siblings' spouses, stepparents, and first and second cousins
 - b. A foster home, licensed or approved by the American Indian child's tribe
 - c. An American Indian foster home, licensed by an authorized non-Indian licensing agency
 - d. A children's institution that has been approved by an American Indian tribe or operated by an American Indian organization that has a program suitable to meet the American Indian child's needs

Note: if there are any questions regarding licensure of a foster home for an American Indian child, the social worker placing the child shall consult with his or her supervisor, CFSA's Family Licensing Division and the Office of General Counsel (OGC).

2. Adoptive Placements – American Indian children must be placed in the following order of preference (unless there is good cause to the contrary):
 - a. A member of the child's extended family
 - b. Other members of the child's tribe
 - c. Other American Indian families
3. If the above-cited ICWA preferences in #1 and #2 above cannot be met for either pre-adoptive or adoptive placements, the District of Columbia Family Court must demonstrate a "good cause" finding at the initial hearing and every subsequent hearing for a child remaining in a non-ICWA placement, based on one or more of the following considerations:
 - a. The biological parent(s) or age-appropriate child makes a request for a non-Indian placement due to the extraordinary physical or emotional needs of the child (as established by testimony of a qualified expert witness).
 - b. A diligent search has been completed and there is no available suitable family meeting the ICWA placement preference criteria.

Note: Diligent but fruitless efforts to comply with placement requirements constitute "good cause". The social worker should consult with his or her supervisor and the OGC.

Hearings and Evidence

OAG is responsible for presenting evidence at all hearings. The following information is provided for general consideration.

1. No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence (including testimony of qualified expert witnesses) that the continued custody of the American Indian child by the American Indian parent or custodian is likely to result in serious emotional or physical damage.
2. No termination of parental rights may be ordered in such proceeding in the absence of a determination supported by evidence beyond a reasonable doubt (including testimony of qualified expert witnesses) that continued custody of the American Indian child by the American Indian parent or custodian is likely to result in serious emotional or physical damage.
3. If non-compliance with ICWA occurs at any point from the disposition hearing onward, the tribe has the right to have all the proceedings vacated and the matter returned to the dispositional hearing, regardless of where the case is in the proceedings. The determination of whether a child is an American Indian child is an ongoing obligation of the assigned CFSA social worker. If the social worker is informed that that the child is an American Indian child, the social worker shall notify the Assistant Attorney General as outlined above under **Guidelines for CFSA Social Workers**.
4. The Court must determine that clear and convincing evidence was presented at the disposition hearing that continued custody of the American Indian child by the parent or custodian is likely to result in serious emotional or physical damage to the child. *ICWA requires that expert testimony is necessary before removing the child at disposition.* The expert testimony can be in the form of a letter but the qualified expert must meet one or more of the following criteria:
 - a. A tribal member, knowledgeable in family organization and child rearing
 - b. A lay person with experience in American Indian child and family services, as well as knowledgeable of the social and cultural standards of the child's tribe
 - c. A professional person having substantial education and experience in the area of his or her specialty
5. District regulations require "reasonable efforts" on the part of a social worker to complete certain activities related to family stabilization. Pursuant to ICWA, the term "active efforts" is commensurate and applies as soon as the child is identified as an American Indian. CFSA is thereby required to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, including but not limited to the following activities:
 - a. Helping the caregiver identify resources for paying utility bills
 - b. Arranging homemaker services
 - c. Providing service referrals, e.g., HFTC Collaboratives, day care, parenting classes, housing, and substance abuse treatment
 - d. Helping the caregiver apply for TANF (Temporary Assistance to Needy Families) and any other public benefits for which the caregiver and family may be eligible
6. Each and every time the Family Court makes an order that an American Indian child is to remain in an out-of-home placement, the Family Court must find by clear and convincing evidence that continued custody with the parent is likely to cause the child serious emotional or physical damage. Further, at each and every review hearing, the Family Court must make an active efforts finding as defined above.
7. The Family Court must make a finding that is beyond a reasonable doubt and based upon expert testimony (*see # 3.a above*) that continued custody of the child by the parent will likely result in

serious emotional or physical damage to the child. The expert testimony is the same as the testimony required at the disposition hearing.

8. A tribe may petition to invalidate a finding, including invalidation of a court's termination of parental rights, upon a showing that the order violated any provisions of ICWA. If there is a showing that the tribe's rights were violated pursuant to any of the rights listed under ICWA, the invalidation shall be mandatory.