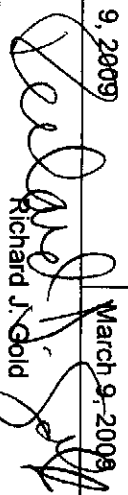




OFFICE OF CHILDREN, YOUTH AND FAMILIES BULLETIN
COMMONWEALTH OF PENNSYLVANIA * DEPARTMENT OF PUBLIC WELFARE

NUMBER: 3130-09-01	ISSUE DATE: March 9, 2009	EFFECTIVE DATE: March 9, 2009
SUBJECT: Implementation of the Indian Child Welfare Act of 1978	BY:  Richard J. Gold Deputy Secretary for Children, Youth and Families	

SCOPE:

County Children and Youth Social Service Administrators
Private Children and Youth Social Service Agencies
County Children and Youth Solicitors
County Chief Probation Officers
County Commissioners
Juvenile Court Judges

PURPOSE:

The purpose of this bulletin is to establish policy requirements relative to the protection of Indian children as required in the Federal Indian Child Welfare Act of 1978 (ICWA) (P.L. 95-608). For the purposes of this bulletin, the term 'Indian children' encompasses children who are referred to as American Indian, Native American or Alaskan Native children.

BACKGROUND:

The preservation of families, through the prevention of unnecessary foster care placement, and the safe reunification of children with their families when a placement is necessary, is a critical concern of the child welfare system. These are also vital and ongoing concerns of the American Indian Community. In recognition of, and in an attempt to redress the "alarming high percentage of Indian families broken up by removal", the United States Congress legislatively mandated the proactive protection and preservation of Indian families through ICWA.

Like the Adoption and Safe Families Act of 1997 (ASFA) (P.L. 105-89), ICWA established a clear responsibility to focus energies toward supporting and preserving families, whenever possible, and to create other, preferred permanent alternatives for children if family preservation/reunification cannot be achieved. Unlike ASFA, however, the intent of ICWA is focused solely on the protection of Indian children, and the promotion of stability in Native American families. Through the execution of this intent, ICWA preserves and maintains the integrity of tribal government and Native American cultures.

COMMENTS AND QUESTIONS REGARDING THIS BULLETIN SHOULD BE DIRECTED TO:
Regional Directors

Origin: Grace E. Gross, OCYF, P.O. Box 2675, Harrisburg, PA 17105-2675 717-705-2908, ggross@state.pa.us

Under ICWA, Indian tribes were granted extensive jurisdiction in child welfare cases involving Indian children, recognizing “that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children”. ICWA established “minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture”. The Howard M. Metzenbaum Multiethnic Placement Act of 1994 (MEPA) (P.L. 103-382) and the Small Business Job Protection Act (P.L. 104-188) do not impact ICWA provisions.

According to the 2000 U.S. Census Bureau data, the most recent available, there were 12,281,054 people living in Pennsylvania at that time, with 18,348 identified as Native American or Alaskan Native. The Indian population is widely scattered throughout the entire Commonwealth with small concentrations in the northwestern section of Pennsylvania and in the large urban areas of Philadelphia and Pittsburgh. They originate from various tribes and nations throughout the entire United States and Canada. While there are no federally-recognized tribes in Pennsylvania, there are Indian organizations, most notably The Council of Three Rivers American Indian Center, Inc., located in Pittsburgh, and the Lenape Nation in Southeastern Pennsylvania. As of September 30, 2008, there were 44 children noted in the Adoption and Foster Care Analysis and Reporting System (AFCARS) as Native American or Alaskan Native.

DISCUSSION:

Through ICWA, Congress expressed clear intentions: 1) to keep Indian children with their families, by establishing higher standards for court findings in removals; 2) to defer to tribal judgment on matters concerning the custody of Indian children, through notification for intervention and jurisdictional transfer opportunities; and 3) to place Indian children who must be removed from their homes with their own families or Indian tribes, through a preferred placement hierarchy.

If a court has reason to believe that a child involved in any child custody proceeding is an Indian, the court has a responsibility to seek verification of the child's status from the child's identified tribe. ‘Custody proceedings’, as defined in 25 U.S.C. 1902 (1) of ICWA, include any foster/adoptive home placement or termination of parental rights. A written notice of Indian child custody proceedings must be sent to the parents and/or Indian custodians and to any tribes identified as having a possible affiliation with the child and family; the notice must be sent by registered mail with return receipt requested. The intent of the notice is to provide opportunity for jurisdictional intervention by the tribe, if the child and/or parent is determined to be a member of the tribe.

The determination by a federally-recognized tribe that a child is or is not a member, is or is not eligible for membership, or that the biological parent is or is not a member, is final. In the absence of an identified tribe, the Bureau of Indian Affairs must be consulted. The federal government recommends that state courts routinely inquire of the participants in child custody proceedings whether the child has any Native American heritage.

Unless there are extraordinary circumstances, if the court takes temporary emergency custody, it shall not be continued for more than 90 days without a determination by the court, supported by clear and convincing evidence and the testimony of at least one qualified expert witness, that custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. Moreover, the court needs to make a determination that the agency petitioning for dependency made ‘active efforts’ to avoid the child's removal. If at any time

the court finds that the petitioner is responsible for the improper removal or retention of an Indian child, the child shall be immediately returned to his or her parents or Indian custodian.

ICWA applies to Pennsylvania residents even though there are no federally-recognized tribes/nations within the Commonwealth. There may be instances in which action must be taken with respect to a child who, while physically located off a reservation, is subject to exclusive tribal jurisdiction, at the tribe's discretion. Per 25 U.S.C. 1911 (b) of ICWA, the parent(s), the Indian custodian or the Indian child's tribe may request the court to transfer the child custody proceedings to the tribal court of the child's tribe. The transfer request must be made promptly after receiving notice of the proceeding. The court is only authorized to refuse to transfer a case for 'good cause' or, in voluntary proceedings, if the parent or Indian custodian declines the transfer of jurisdiction. However, notification must still occur.

POLICY AND PROCEDURES

Since ICWA was established over 30 years ago, most child welfare workers are familiar with at least some portions of the Act's requirements. Many have received training on the law through the Department of Public Welfare's (DPW) collaboration with The Pennsylvania Child Welfare Training Program and have, in fact, been provided with the "Pennsylvania Indian Child Welfare Handbook" that was developed through those collaborative efforts. The handbook provides a detailed historical overview, basic facts, practice implications and resources for child welfare agencies to use when dealing with an identified Indian child or family. The challenge for practitioners in Pennsylvania is to remain aware of ICWA requirements in the face of infrequent opportunity to apply them. Despite that infrequency, practitioners need to remember that ICWA applies to all Indian children, no matter where they live, as long as they are members of, or eligible to be members of, a federally-recognized tribe.

Therefore, through this bulletin, the Office of Children, Youth and Families (OCYF) establishes minimum expectations of agencies to ensure consistent adherence to ICWA provisions throughout the Commonwealth. The bulletin and the ICWA handbook should be used in tandem to implement best practice in regard to ICWA requirements.

Intake Procedure:

Agencies must insure that demographic information collected during the intake process includes information about whether or not the child and/or the child's parent(s) claim any Native American or Alaskan Native heritage and, if so, if they can identify the tribe/nation/clan. *This information must be specifically requested of the family.* It is not sufficient to ask the child or parent to identify his or her race or ethnicity. Many individuals who may identify themselves as Caucasian, African-American or Mexican, for example, may not include American Native heritage in their initial self-identification. If such information is revealed at a later critical juncture, the agency may face significant timeliness delays in any custody proceedings.

Per 25 U.S.C. 1902 (4) of ICWA, a child will qualify as an Indian child if he or she is unmarried, under 18 years of age and is either (a) a member of an Indian tribe or (b) eligible to be a member of an Indian tribe as the biological child of a tribal member. In many cases, a parent may claim affiliation with a tribe, but be unsure of membership. While it is up to the identified tribe to determine membership, the following guidelines will be helpful to the worker when interviewing the child/parent:

1. length of residence on/near the reservation of and frequency of contact with the tribe;
2. child's participation in activities of the tribe;
3. child's fluency in the language of the tribe;
4. whether or not there has been a previous adjudication of the child by a tribal court;
5. residence on or near the tribe's reservation by the child's relatives; and
6. the child's/parent's self identification.

Notification:

If the agency plans to petition the court for any child custody proceeding, that involves any child who has been identified as, or may be, Native American, the agency must insure the identified tribe or nation receives proper notification. (Notification of any such proceeding involving a juvenile for any status offense(s) is also required.)

The Department of the Interior, Bureau of Indian Affairs, maintains a list of 'Designated Tribal Agents for Service of Notice'. It is a comprehensive listing of over 500 federally-recognized tribes throughout the United States, by Region, with contact information for the individual tribes, as well as each regional office, included. This listing may be accessed at the following link: <http://www.doi.gov/bia/docs/ICWA%20Tribal%20Agents%2008-02.pdf>.

If the tribal affiliation is unknown, the agency needs to send the notice to the Regional Office (if known) of the Department of the Interior, who will then have 15 days to get the notice to the appropriate tribe or nation. If the region is not known, use the address below:

U.S. Department of Interior
Bureau of Indian Affairs
1849 C Street, NW
Washington, D.C. 20240

Sample notification letters are attached. If an agency chooses to develop its own notification letter, it must include the following information:

1. the name, date and place of birth of the Indian child;
2. his or her known or possible tribal affiliation;
3. the names, dates and places of birth of the child's parents, including mother's maiden name;
4. a copy of the petition, complaint or other document by which the proceeding was initiated;
5. the name of the petitioner and the name and address of the petitioner's attorney;

6. a statement of the right of the biological parents or Indian custodians and the Indian child's tribe to intervene in the proceedings;
7. a statement that if the parents or Indian custodians are unable to afford counsel, counsel will be appointed to represent them;
8. a statement of the right of the biological parents or Indian custodians and the Indian child's tribe to have, on request, twenty days (or such additional time as may be permitted under state law) to prepare for the proceedings;
9. the location, mailing address and telephone number of the court;
9. a statement of the right of the parents or Indian custodians or the Indian child's tribe to petition the court to transfer the proceeding to the Indian child's tribal court;
10. the potential legal consequences of an adjudication on future custodial rights of the parents or Indian custodians; and
11. a statement in the notice to the tribe that since child custody proceedings are usually conducted on a confidential basis, tribal officials should keep confidential the information contained in the notice concerning the particular proceeding and not reveal it to anyone who does not need the information in order to exercise the tribe's right under the Act.

Per 25 U.S.C. 1912 (a) of ICWA, the following minimum time limits for proceedings to begin:

1. ten days after the parent or Indian custodian has received notice;
2. ten days after the Indian child's tribe has received notice;
3. thirty days after the parent or Indian custodian has received notice, if the parent or Indian custodian has received an additional twenty days to prepare for the proceedings; and
4. thirty days after the Indian child's tribe has received notice, if the tribe has requested an additional twenty days to prepare for the proceedings.

Note: While notification is absolutely required in any non-voluntary proceeding, OCYF recommends notification in all cases with potential child custody proceedings that may result in placement or loss of parental rights. Per 25 U.S.C.1911 (c) of ICWA, the child's tribe has the right to intervene at any point in any such proceeding, with no reference to whether it is voluntary or involuntary; intervention is not possible without notification. Moreover, agencies may find it helpful to provide notification at the earliest possible date, regardless as to whether or not a custody proceeding is being considered, since many tribes may have resources or assistance to offer directly to assist the family, thereby avoiding possible placement. Additionally, the services of a Qualified Expert Witness will need to be arranged in any custody proceeding.

Removal Standards:

Per 25 U.S.C. 1912 (d) of ICWA, when an agency petitions the court for removal of an Indian child from his or her parent(s) or Indian guardian(s), the court must make a judicial determination that the agency has made *active efforts* to provide remedial and rehabilitative services to the family, and that these efforts failed to prevent the removal. The court may only order placement if the court has determined by *clear and convincing evidence* that the child will be at risk for physical or emotional harm if the child remains in the home. Moreover, in court proceedings for termination of parental rights, the court must determine *beyond a reasonable doubt* that the child will be at risk for serious physical or emotional harm if the child is returned to the parent or Indian guardian.

To these ends, the testimony of a *qualified expert witness* is required. Both removal of an Indian child from his or her family, and termination of parental rights must be based on competent testimony from one or more experts qualified to speak specifically to the issue of whether continued custody by the parent(s) or the Indian custodian(s) is likely to result in serious physical or emotional damage to the child. The following guidelines should be used to determine if an individual qualifies as an expert for purposes of Indian child custody proceedings:

- 1) a member of the tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices;
- 2) a lay expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe; or
- 3) a professional person having substantial education and experience in the area of his or her specialty, preferably, as it pertains to Native American families.

Placement Preference:

Just as there is a hierarchy of permanency options that must be followed under ASFA, eliminating each 'most preferred' option before moving on to the next one, there is also a hierarchy of preferred placements that must be followed, *absent good cause* (to be determined by the court), when placing an Indian child in foster care, or for adoption.

Per 25 U.S.C. 1915 (b) of ICWA, placement preferences for foster care are as follows:

- 1) a member of a child's extended family;
- 2) a resource home approved or licensed by the tribe;
- 3) an Indian resource home of another tribe, licensed by the appropriate agency; and
- 4) a tribal-approved institutional placement for children that is suitable to the child's needs.

Per 25 U.S.C. 1915 (a) of ICWA, placement preferences for adoptive placements are:

- 1) a member of the child's extended family;
- 2) other members of the child's tribe;
- 3) members of other tribes; and
- 4) a non-Indian family.

(Note: a child's tribe may establish a different order of placement preference.)

Given Pennsylvania's Kinship Policy, established in OCYF Bulletin #00-03-03, further reinforced by relative notification requirements in the new federal law, "Fostering Connections to Success and Increasing Adoptions Act" (P.L. 110-351), agencies should already be exploring relative/kin placement options prior to any removal of a child. This practice implementation will facilitate following the placement preference options established by ICWA.

Transfer of Jurisdiction:

Once a tribe has been notified of an impending custody proceeding regarding an Indian child, and has made the determination that the child is a member or eligible for membership, the tribe may choose to petition the court for transfer of the custody proceeding, or may simply indicate a wish to be kept informed on the case. The child's parent or Indian guardian may also petition to have the case transferred to the tribe; however, the tribe may decline to take jurisdiction. If the tribe accepts jurisdiction, the court *must* transfer the case, unless the parent or Indian guardian objects to the transfer, or the court can show *good cause not to do so*. Even in such cases, the tribe must be notified, and retains the right to intervene at any time in the court proceedings.

Good cause is not defined in ICWA, but OCYF offers the following criteria for agencies to consider when making recommendations to the court for transfer determination:

- 1) the proceeding was at an advanced stage when the petition to transfer was received, and the petitioner did not file the petition promptly after receiving the petition;
- 2) the Indian child is over twelve years of age and objects to the transfer; and
- 3) the evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or to the witnesses.

Voluntary Proceedings:

Per 25 U.S.C. 1913 (a) of ICWA, in any proceeding in which a parent or Indian custodian voluntarily consents to placement of an Indian child in foster care or voluntarily consents to termination of parental rights, if the court or petitioning agency has reason to believe that a parent or Indian custodian is not likely to understand the contents of the notice due to a language barrier, the court or agency shall arrange to have the notice explained to that person in the language that he or she best understands. While ICWA addresses language barriers in this subsection only, *at all times*, agencies must be mindful of their responsibility to follow applicable requirements for dealing with children and families with limited English. Please refer to OCYF Bulletin #00-02-09, "Title VI of the Civil Rights Act of 1964 as it Pertains to Persons with Limited English Proficiency (LEP)".

Per the same cite, no consent for an adoption of an Indian child may be given prior to, or within **10 days after birth**. (Note: the time period is only 72 hours in the Adoption Act at §2711(c); the ICWA standard is a 'higher' standard than applies to non-Indian children.)

Per 25 U.S.C. 1913 (b), a voluntary consent to a foster care placement may be withdrawn at any time, and the Indian child must be returned to the parent or Indian custodian.

Per 25 U.S.C. 1913 (c), a voluntary consent to terminate parental rights or to adoption may be withdrawn **at any time**, for any reason, prior to the entry of a final decree of adoption. (Note: the time period for consent revocation is only 30 days in the Adoption Act at §2711(c)(1) so, again, a higher standard under ICWA.)

Per 25 U.S.C. 1913 (d), an adoption of an Indian child can be overturned anytime **within the first two years** after the final decree if fraud or duress is proved. *(Note: the time period to challenge the validity of a consent by alleging fraud or duress is only up to 30 days after the final decree is issued, per the Adoption Act at §2711(c)(3).)*

A voluntary consent by the parent(s) or Indian guardian(s) of an Indian child must be done in writing and recorded in court before a judge; there must be certification presented that the parent(s) or Indian guardian(s) understood what the consent signifies.

Access to Records:

Indian children who were adopted, and who have reached the age of 18, have the unique right, established by ICWA, to request information from their adoption records, including tribal affiliation, parents' names and any other information that will protect their rights as a tribal member. The individual needs to apply to the court that granted the adoption decree for access to these records.

(Agency Letterhead)

(Use this letter when the identity or location of the child's tribe is **KNOWN**, and a petition has already been drawn up or filed; the letter must be sent by registered mail.)

(Date)

RE: (Name of Indian child)

Dear:

Pursuant to the Indian Child Welfare Act of 1978, please accept this letter as your notice that (your agency name) is petitioning the court for (foster care placement of or termination of parental rights to) the child named above, born on (Date of birth) in (City/State). We believe this child to be enrolled in or eligible for enrollment in the (Indian tribe).

Attached is information contained in the record or otherwise known to the agency, regarding the child's Indian lineage, as well as any known familial and custodial relationships. This information may not be complete, but it represents all that the agency knows at this time.

Enclosed, please find a copy of the petition by which the aforementioned proceeding is to be initiated. This proceeding may result in the loss of (parental custody or parental rights) to the child named above. The proceeding is scheduled to be held at (name/address of court). The phone number for the court administrator is (number).

The child's parents, Indian guardians and tribe have an absolute right to intervene in these proceedings, and to request up to twenty (20) additional days to prepare. The same parties have the right to petition the court for the transfer of the proceedings to the tribal court, absent objection by either parent. Such transfer shall be subject to declination by the tribal court. If the parents or guardians are unable to afford counsel, and the state has determined indigence, counsel will be appointed.

Should you have any questions regarding this notice, please contact me at (number). Thank you for your time and consideration.

Very truly yours,

(Caseworker/agency representative and title)

Cc: (Regional director, parents or Indian guardians, agency attorney)

Enclosures: (Copy of petition, copy of information from family/child record/interviews)

(Agency letterhead)

(Use this letter when the identity or location of the child's tribe is **UNKNOWN**, and a petition has already been drawn up or filed; the letter must be sent by registered mail.)

(Date)

U.S. Department of Interior
Bureau of Indian Affairs
1849 C Street, NW (or Regional Office and address if known)
Washington, D.C. 20240

RE: (Name of Indian child)

Dear:

Pursuant to the Indian Child Welfare Act of 1978, please accept this letter as notice that (your agency name) is petitioning the court for (foster care placement of or termination of parental rights to) the child named above, born on (Date of birth) in (City/State).

We believe this child to be enrolled in or eligible for enrollment in an Indian tribe; however, we have not been able to determine the specific tribal affiliation. Attached is information contained in the record or otherwise known to the agency, regarding what is known about the child's Indian lineage, as well as familial and custodial relationships. While this information may not be complete, it is all that is known at this time.

Enclosed, please find a copy of the petition by which the aforementioned proceeding is to be initiated. This proceeding may result in the loss of (parental custody or parental rights) to the child named above. The proceeding is scheduled to be held at (name/address of court). The phone number for the court administrator is (number).

The child's parents, Indian guardians and tribe have an absolute right to intervene in these proceedings, and to request up to twenty (20) additional days to prepare. The same parties have the right to petition the court for the transfer of the proceedings to the tribal court, absent objection by either parent. Such transfer shall be subject to declination by the tribal court. If the parents or guardians are unable to afford counsel, and the state has determined indigence, counsel will be appointed.

In addition to the requisite notification to the court, if within fifteen (15) days of receipt of this letter, you are unable to verify that the child meets the criteria of an Indian child, please notify me in writing. In your response, please indicate whether additional time is needed to establish tribal affiliation or, whether despite reasonable documented efforts, the child's tribal affiliation cannot be determined.

