

SECTION 8: HOW CHILD WELFARE WORKS WITH AMERICAN INDIAN FAMILIES



WHAT IS THE INDIAN CHILD WELFARE ACT (ICWA)?

The purpose of the Indian Child Welfare Act (ICWA) is "...to protect the best interest of Indian Children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children and placement of such children in homes which will reflect the unique values of Indian culture..." (25 U.S. C. 1902). ICWA provides guidance to States regarding the handling of child abuse and neglect and adoption cases involving Native children and sets minimum standards for the handling of these cases.

WHAT DOES THE INDIAN CHILD WELFARE ACT DO FOR TRIBES?

Under ICWA the tribe is the authoritative source on whether a child is a member, or the parent is a member and if the child is eligible for membership, and the rule directs the State court to defer to the Tribe as a source in determining whether the child is an Indian child for purposes of the child-custody proceeding. (Final Rule: Indian Child Custody Proceedings – 25 CFR 23) Tribes, state agencies, and state courts do not always agree on what the best plan is for American Indian children in foster care.

HOW DOES THE DEPARTMENT OF CHILD SAFETY KNOW WHEN ICWA APPLIES?

To find out if you or your child is an American Indian, the DCS Specialist working with your family will ask you if you are a member of a federally recognized tribe, or if you believe your family has American Indian ancestry. Sometimes, when parents are not available to give this information, the DCS Specialist may decide that the ICWA applies to your family if they learn that your family has connections to an American Indian tribe, if the child's residence is on a reservation where the Tribe exercises exclusive jurisdiction, if you belong to an Indian organization, or receive Indian Health Services. ICWA defines an "Indian child" as:

- Unmarried;
- Under age eighteen; and
- Either a member of an Indian tribe OR is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe (25 U.S.C. Section 1903)

However, individual tribes have the right to determine eligibility, membership or both in the Tribe.

The best information about your tribal enrollment comes from you. Without your help, DCS Specialists will have to look for clues about your American Indian heritage, and it will delay the notice to your tribe about your family's situation.

WHAT RIGHTS DOES THE INDIAN CHILD WELFARE ACT GIVE INDIAN TRIBES AND FAMILIES, AND WHAT RESPONSIBILITIES DOES IT GIVE THE DEPARTMENT OF CHILD SAFETY?

ICWA requires that the Indian child's Tribe (and parents or Indian custodians) must receive clear and understandable notice, by registered or certified mail, return receipt requested, of an involuntary proceeding. The court clerk will check to ensure there is proof that the notice was given and will not hold a foster-care-placement or TPR (Termination of Parental Rights) proceeding until at least 10 days after receipt of the notice of that particular proceeding (with extensions allowed at the option of the parent or Tribe). The Indian child's Tribe has the right to be granted, upon request, up to 20 additional days to prepare for the child-custody proceeding.

Before DCS can remove an Indian child from their families, the state requires the agency to make "active efforts" to help keep the Indian child at home. "Active efforts" requires more effort than a "reasonable effort". For example, instead of giving an Indian family contact information for parenting classes, the DCS Specialist signs the family up for parenting classes at a local Native American health center and arranges transportation to and from their classes.

It is very important that you notify your DCS Specialist as soon as possible if you are a member of a federally recognized tribe or have reason to believe ICWA applies to your family. The sooner your DCS Specialist is aware of your family's circumstances, the sooner notification can occur.

Additionally, the Indian child's Tribe (and parents or Indian custodians):

- May request a transfer to Tribal jurisdiction at any time.
- Have the right to intervene in State-court proceeding at any time.
- Have a qualified expert witness testify before a foster-care placement or TPR can be ordered.
- Establish placement preferences.
- Have the right to examine documents.
- Have the right to request access to accommodations, alternative methods of participation.
- Have the right to petition to invalidate an action in a state court.
- Have the right to obtain placement records within 14 days of a request.

If your tribe decides not to intervene, ask your DCS Specialist about services and programs available in the area for American Indian families that can help you and your family.

As an American Indian parent or custodian, you, and your tribe, must receive "notice" by registered mail of all of the legal proceedings involving your child. If your child must be removed from the home for safety reasons, the Department of Child Safety and state court must notify you and your child's tribe(s). This must occur whenever a tribal member is involved in a child welfare proceeding. The notice must be sent to you and your tribe by registered mail. No hearings can be held until 10 days after you and your tribe receive the notice. Then you and the tribe can request up to 20 additional days to get ready for the proceeding.

If you are not able to afford legal counsel, under ICWA, you have the right to legal counsel appointed by the court.

WHAT HAPPENS IF AN INDIAN CHILD IS PLACED IN OUT-OF-HOME CARE?

If your Indian child is placed into foster care, the first priority is that your child be placed with a relative. If a relative is not available, the Indian child must be placed with a foster family who is a member of the child's tribe. If no foster family from the child's tribe is available, DCS will then seek placement with an American Indian foster family who is a member of another tribe. The Indian child's Tribe may establish, by resolution, an order of preference for placements that is different from the list in ICWA and which will then supersede the ICWA order of preference. Tribes may assist in identifying placements for the child. American Indian children are sometimes placed with non-Indian foster families while the tribe works towards identifying an American Indian foster family.

WHAT HAPPENS IF MY TRIBE GETS INVOLVED?

ICWA gives the Tribe the right to intervene, at any time, in a State court proceeding for the foster-care placement of, or TPR to an Indian child. It is required that DCS will cooperate with the tribe.

The Tribe may also request to transfer a child's case to tribal court, even if the Tribe is in another state. A transfer to Tribal jurisdiction will not occur if either parent objects, the Tribal court declines the transfer, or good cause exists for denying the transfer. The reasons for denying a request to transfer must be on the record.

WHAT HAPPENS IF MY TRIBE DOES NOT GET INVOLVED?

Sometimes the child's Tribe does not become involved in Indian Child Welfare Act cases. The child's Tribe may choose not to transfer jurisdiction of the child's case to Tribal court. The child's Tribe may also decide not to intervene at all.

Whether or not the child's tribe becomes involved in your situation, the Indian Child Welfare Act will still apply if your child is enrolled or eligible for membership with the tribe. DCS must still comply with all requirements of the Indian Child Welfare Act described earlier in this section.

PRACTICAL TIPS FOR FAMILIES

- Tell your DCS Specialist immediately if you are a member of a federally recognized tribe.
- Ask the DCS Specialist if they have notified the child's Tribe about your family's situation.
- Contact your Tribe's social service program to find out if they know about your involvement with the Department of Child Safety.

- If you are not sure of your tribal heritage, give the DCS Specialist as much information as possible about your family heritage: your parent's names, where they live and what you know about tribal connections.
- If your child is to be placed in foster care, give the agency worker the names of family members who might be able to care for your child.
- If you do not have relatives nearby, ask if your child will be placed with an Indian foster family.
- Attend all court hearings for your child.
- Ask to visit your child regularly while they are in foster care.
- Ask for help if you need assistance in following your case plan. This plan will describe why your child is involved with the Department of Child Safety, your family's strengths and needs, your child's and family's goals, actions you and the Department of Child Safety are to take, services you and your child are to receive and participate in, and a time period of working on these things.
- Make sure you get a written copy of your case plan.
- The Department of Child Safety must make an "active effort" not a "reasonable efforts" to prevent the breakup of the Indian family.
- If available, seek help from tribal or off-reservation Indian programs to help you with your case plan.