

West Virginia Department of Health and Human Resources

# Indian Child Welfare Act Policy

Bureau for Social Services

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## SECTION 1 - INTRODUCTION

### 1.1 Introduction and Overview

In 1978, Congress recognized the relationship between the United States and the Indian Tribes and their members and the Federal responsibility to Indian people. [\*The Indian Child Welfare Act of 1978\*](#) (ICWA) recognized that there was “no resource more vital to the continued existence and integrity of Indian tribes than their children” and that protection for Indian children who are members of or were eligible for membership in an Indian Tribe needed to be protected. This protection was essential due to a high percentage of Indian families being separated by the removal of their children from them by public and private agencies as well as the high percentage of Indian children being placed with non-Indian foster and adoptive homes and institutions.

By enacting ICWA, Congress declared the policy of protecting the best interests of Indian children and promoting the stability and security of Indian Tribes and families by establishing minimum federal standards for the removal of Indian children from their families and placement of children in foster or adoptive homes. It also provided for assistance to Indian Tribes in the operation of child and family service programs. Congress recognized that foster and adoptive homes should reflect the unique values of Indian culture. ICWA confirms Tribal jurisdiction over child welfare cases involving Indian children.

ICWA regulations affect several pieces of policy for the West Virginia Department of Health and Human Resources (the department), Bureau for Social Services (BSS), including Child Protective Services Policy, Youth Services Policy, Foster Care Policy, and Adoption Policy. This policy is designed to support the department’s existing child welfare policies and to provide guidance when child welfare staff become involved with a child and family with Tribal affiliation or eligibility for Tribal membership, as well as to ultimately ensure that the child and family’s rights are protected through ICWA.

### 1.2 Definitions

| <b><i>Terms</i></b>   | <b><i>Definitions</i></b>  |
|---|--|
| <b>Active Efforts</b>   | Affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with their family.   |
| <b>Bureau of Indian Affairs</b>                               | The Bureau of Indian Affairs (BIA) is part of the Department of the Interior. Information related to the BIA can be found at <a href="http://www.bia.gov">www.bia.gov</a> .  |
| <b>Child Welfare Proceedings</b>                              | Child welfare proceedings include court proceedings for Child Protective Services and Youth Services, and then Adoption.   |
| <b>Comprehensive Child Welfare Information System (CCWIS)</b> | A Comprehensive Child Welfare Information System (CCWIS) is a case management system designed to support social workers’ needs to organize and record quality case information about the children and families receiving child welfare services. |
| <b>Continued Custody</b>                                      | Physical custody or legal custody or both, under any applicable Tribal law or Tribal custom or State law, that a parent or Indian custodian already has or had at any point in the past.   |

| <b>Terms</b>                    | <b>Definitions</b>  |
|---------------------------------|---|
| <b>Custody</b>                  | Physical custody or legal custody or both, under any applicable Tribal law or Tribal custom or State law. A party may demonstrate the existence of custody by looking to Tribal law or Tribal custom or State law.  |
| <b>Emergency Proceeding</b>     | Any court action that involves the emergency removal or emergency placement of an Indian child.   |
| <b>Extended Family Member</b>   | Defined by the law or custom of the Indian child's Tribe or, in the absence of such law or custom, is a person who has reached age 18 and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent. <i>It is not limited to Tribal citizens or Native American individuals.</i>   |
| <b>Indian</b>                   | Any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 7 of the Alaska Native Claims Settlement Act, <a href="#">43 U.S.C. §1606</a> .<br><br><i>Note: that this term includes only those individuals who are members of "Indian Tribes" (i.e., federally recognized Tribes) and members of Alaska Native Claims Settlement Act regional corporations.</i>  |
| <b>Indian Child</b>             | Any unmarried person who is under age 18 and either: (1) is a member or citizen of an Indian Tribe; or (2) is eligible for membership or citizenship in an Indian Tribe and is the biological child of a member/citizen of an Indian Tribe. The definition is based on the child's political ties to a federally recognized Indian Tribe, either by virtue of the child's own citizenship in the Tribe, or through a biological parent's citizenship and the child's eligibility for citizenship. |
| <b>Indian Child's Tribe</b>     | The Indian Tribe in which an Indian child is a member or eligible for membership.   |
| <b>Indian Child Welfare Act</b> | <a href="#">The Indian Child Welfare Act of 1978</a> (P. L. 95-608) mandates that the placement of American Indian children be governed by their tribe, whose authority was legislated by the United States government. By this act, tribes are given the authority to care for Indian children, to intervene in court cases regarding adoptive placement of Indian children, and to place Indian children with tribal members or with members of other tribes.                                   |
| <b>Indian Custodian</b>         | Any Indian who has legal custody of an Indian child under applicable Tribal law or custom or under applicable state law, or to whom temporary physical care, custody, and control has been transferred by the parent of such child. An Indian may demonstrate they are an Indian custodian by looking to Tribal law or Tribal custom, or state law.   |
| <b>Indian Foster Home</b>       | A foster home where one or more of the licensed or approved foster parents is an "Indian" as defined by <a href="#">25 U.S.C. § 1903(3)</a> .   |

| <b>Terms</b>                     | <b>Definitions</b>  |
|----------------------------------|---|
| <b>Indian Organization</b>       | Any group, association, partnership, corporation, or other legal entity owned or controlled by Indians or a tribe, or a majority of whose members are Indians.  |
| <b>Indian Tribe</b>              | <p>Any Indian tribe, band, nation, or other organized group or community of Indians federally recognized as eligible for the services provided to Indians by the Secretary of the Department of the Interior, because of their status as Indians, including Alaska Native village.</p> <p><i>*Note that "Indian Tribe" under ICWA includes only federally recognized Tribes. States may have a more inclusive definition of "Indian Tribe" that includes State-recognized or other groups; however, the Federal ICWA statute and rule do not apply to those groups.</i></p> |
| <b>Involuntary Proceeding</b>    | A court proceeding involving a child or children in which the parent does not consent of their free will to the foster care, pre-adoptive, or adoptive placement or termination of parental rights or in which the parent consents to the foster care, pre-adoptive, or adoptive placement under threat of removal of the child by a court or the department.   |
| <b>Parent or Parents</b>         | Any biological parent or parents of an Indian child, or any Indian who has lawfully adopted an Indian child, including adoptions under Tribal law or custom. It does not include an unwed biological father where paternity has not been acknowledged or established.   |
| <b>Qualified Expert Witness:</b> | An individual in an ICWA case who is qualified to testify regarding whether the child's continued custody by the parent or Indian custodian is likely to result in the serious emotional or physical harm to the child and should be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe. A person may be designated by the Indian child's Tribe as being qualified to testify to the prevailing social and cultural standards of the Indian child's Tribe.   |
| <b>Reservation</b>               | Any lands which are held by the United States in trust for the benefit of any Indian Tribe or individual or held by any Indian Tribe or individual subject to a restriction by the United States against alienation.  |

| <b>Terms</b>                 | <b>Definitions</b>   |
|------------------------------|--|
| <b>Status Offender</b>       | <p>A juvenile who has been adjudicated as one:</p> <p>(A) Who habitually and continually refuses to respond to the lawful supervision by his or her parents, guardian or legal custodian such that the juvenile's behavior substantially endangers the health, safety or welfare of the juvenile or any other person;</p> <p>(B) Who has left the care of his or her parents, guardian, or custodian without the consent of such person or without good cause; or</p> <p>(C) Who is habitually absent from school without good cause.</p> <p>See, <a href="#">W. Va. Code §49-1-202</a></p>  |
| <b>Tribal Court</b>          | <p>A court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian Tribe, or any other administrative body of a Tribe vested with authority over child custody proceedings.</p> <p><i>Note that the definition includes any other administrative body of a Tribe vested with authority over child welfare proceedings in recognition that a Tribe may have other mechanisms for making child welfare decisions (e.g., the Tribal council may preside over child welfare proceedings).</i></p>  |
| <b>Upon Demand</b>           | <p>The parent or Indian custodian can regain custody simply upon verbal request, without any formalities or contingencies.</p> <p>This definition is important for determining whether a placement is a “foster care placement” (because the parent cannot have the child returned upon demand) and therefore subject to requirements for involuntary proceedings for foster care placement. Placements where the parent or Indian custodian can regain custody of the child upon demand are not subject to ICWA.</p> <p><i>Examples of formalities or contingencies are formal court proceedings, the signing of agreements, and the repayment of the child’s expenses.</i></p> |
| <b>Voluntary Proceedings</b> | <p>A child welfare proceeding that is not an involuntary proceeding, such as a proceeding for foster care, pre-adoptive, or adoptive placement that either parent, both parents, or the Indian custodian has, of their free will, without a threat of removal by the department consented to for the Indian child, or a proceeding for voluntary relinquishment of parental rights.</p>  |

## **SECTION 2 – INTAKE AND ASSESSMENT**

### **2.1 Intake Process**

#### ***Child Protective Services***

When a report of child abuse and neglect is made, the intake worker gathers as much information about the family as possible from the reporter. It is also imperative that during the intake process, as detailed in *Section 3.2 of Child Protective Services Policy*, that the intake worker also ask the reporter about any Tribal affiliation the family may have. Any information regarding a family and children with Tribal affiliation should be documented in the Intake Assessment screens, specifically under the Race/Ethnicity section of a client's demographic information and should be included in the Referral Narrative.

#### ***Youth Services***

When a Request to Receive Services for Youth Services is taken, the intake worker or child welfare worker taking the referral should ask the referent for demographic information of the identified youth in need of Youth Services and their family, and at that time, inquire if the referent knows if the youth or family has any Tribal affiliation. If the family does, the information should be documented specifically under the Race/Ethnicity section of a client's demographic information, and in the Referral Narrative under Family Functioning.

### **2.2 Initial Contact with the Family**

When conducting interviews with families for Initial Assessments or the FAST, child welfare workers should ask about Tribal membership or eligibility for the family as well as for the children in the home. This step is necessary and should be a part of the interview process regarding demographic information. Once a child welfare case is opened for services, there are several steps that the child welfare worker should take, especially if a child is removed from the home. Once a child welfare worker has gathered the information, it should be documented in the client screens regarding ethnicity and should be documented in the case contact.

For youth services cases, ICWA applies to placements resulting from a child's status offense. All notifications and verifications must then be completed by the child welfare worker regarding the child who was removed and placed. ICWA, generally, does not apply in a delinquency proceeding regarding a criminal act that is not a status offense. In any case where a parent cannot request their child remain in their home or return to their home, ICWA guidelines could apply, and child welfare worker should initiate verification and notification to the Tribe.

Tribal membership and eligibility will need to be established even for cases where services are being provided in the family's home so child welfare workers can utilize active efforts in case planning. Active efforts are a higher standard than reasonable efforts to prevent removal. See *Section 4* for information regarding active efforts.



## SECTION 3 – ICWA DETERMINATION

### 3.1 Determining if a child is an Indian Child under ICWA

The child welfare worker is not the person who makes the determination if a child is an Indian child under ICWA guidelines. The child welfare worker is responsible for obtaining information from the family regarding Tribal affiliation, such as the name of the Tribe; ancestral group; and enrollment information for child, parents/Indian custodian, or grandparents. See also Section 3.4 for more types of information to gather. Once the information is obtained, the child welfare worker must make notifications and request verifications regarding the child's membership or eligibility for membership in a Tribe.

When a child welfare case has court proceedings initiated, the child welfare worker must gather information on whether the child or children involved in the case could be members of a Tribe. The child welfare worker must inform the court as there is a process that must be followed regarding contacting the Tribe(s) to determine if the child or children are Indian child(ren).

**Delays in identifying if a child is an Indian child in an abuse and neglect or juvenile proceeding can cause unnecessary delays in the court process.**

*Note: While ICWA becomes a paramount point in the removal of a child and the abuse and neglect or juvenile proceedings, child welfare workers must also understand that ICWA's regulations regarding active efforts are important in case planning **prior** to the removal of a child from their parents or Indian custodian.*

### 3.2 Identifying the Tribe

When gathering information from the family regarding Tribal affiliation, the child welfare worker needs to ask the parents and extended family what Tribe or tribal ancestral group with whom they may be affiliated. If a specific Tribe is indicated, the child welfare worker then needs to determine if the Tribe is listed as a federally recognized Indian Tribe at [www.bia.gov](http://www.bia.gov). Some Tribes are also recognized by States but not by the Federal Government. ICWA *only* applies if the Tribe is a federally recognized Indian Tribe.

If only the Tribal ancestral group (for example: Cherokee) is indicated by the family, the child welfare worker should contact each of the Tribes in that ancestral group to identify whether the parent or child is a member of any of the Tribes. If the child welfare worker is unsure if all the relevant Tribes have been contacted regarding the removal of the child, the child welfare worker should contact the BIA Regional Office for assistance.

#### ***Identifying the Tribe of Jurisdiction if There is More than One Tribe***

A child may be a member or eligible for membership in more than one Tribe. If the child meets the definition of "Indian Child" through more than one Tribe, a Tribe may defer membership to the Tribe in which the Indian child is already a member. If the child meets the definition of "Indian Child" for more than one Tribe because the child is a member of or is eligible for membership in more than one Tribe, the Tribes will determine for the Indian child the appropriately designated Tribe.

ICWA provides further guidance for the court if the Tribes cannot reach an agreement:

- taking into consideration the preference of the parents for membership of the child;
- length of past residence on or near the reservation of each Tribe;
- Tribal membership of the child's custodial parent or Indian custodian;
- interest asserted by each Tribe in the proceedings;
- whether there has been a previous adjudication with respect to the child by a Tribal court; and
- self-identification by the child if they are of sufficient age and capacity to meaningfully self-identify.

### **3.3 Contacting the Tribe**

The child welfare worker will need to contact the Tribe in writing to provide notice of the abuse and neglect or juvenile proceedings, obtain information, or to verify Tribal membership of the child. Many Tribes designate an agent for receipt of ICWA notices, and a list can be found at [www.bia.gov](http://www.bia.gov). If the Tribe does not have a designated agent, the child welfare worker can contact the Tribe and request to be directed to the appropriate person. The worker should also contact the Tribe by telephone to facilitate open communication and coordinate services that may be available to support the family. The contacts should then be documented in the case record. If a Tribe cannot be reached, the child welfare worker can contact the BIA to request assistance.

Instructions for notifications and verifying Tribal members are more thoroughly explained in Sections 3.4 and 3.5.

### **3.4 Verifying Tribal Membership**

The Tribe makes the determination whether the child is a member or eligible for membership. Tribes have the exclusive authority to determine their political citizenship and their eligibility requirements. If there is reason to believe the child may be an Indian child, the child welfare worker must use due diligence to work with the relevant Tribe(s) to obtain verification regarding whether or not the child is a citizen or a biological parent is a citizen and the child is eligible for citizenship. The child welfare worker's efforts to identify and work with the Tribe must be documented in the case record and in the court record as well. Written verification from the Tribe is preferred but a Tribal representative may also provide testimony during a court hearing regarding whether the child is a citizen, or the biological parent is a citizen and the child is eligible for citizenship.

#### ***Request for Verification***

When sending letters requesting verification to the Tribe, the child welfare worker should include sufficient information regarding the child and family so that the Tribe can make a determination as to whether the child is a member, or the parent is a member and the child is eligible for Tribal citizenship. Providing sufficient information in the letter requesting verification early in an abuse and neglect or juvenile proceeding also helps prevent any delays or disruptions in those court proceedings. The following information should be listed in the letter requesting verification of Tribal membership or eligibility for a child:

- Genograms or ancestry/family charts for both parents.
- All known names of both parents (maiden, married, and former names or aliases), including possible alternative spellings.

- Current and former addresses of the child's parents and any extended family.
- Birth dates and places of birth (and death if applicable) of both parents.
- All known Tribal affiliation (or Indian ancestry if Tribal affiliation is unknown) for all family members listed on the ancestry/family charts; and
- The address of the child, child's parents, or Indian custodian, and whether the residence is on an Indian reservation or in an Alaska Native village.

As with the notices of abuse and neglect or juvenile proceedings discussed in *Section 3.5*, the verification and notice can be done at the same time but must be done by registered or certified mail and should also be well documented in the child and family's case record with the department and the court. It is imperative for the child welfare worker to work closely with the prosecuting attorney regarding the verifications and notifications. If the prosecuting attorney will not assist the child welfare worker with verifications and notifications, the child welfare worker must consult with their supervisor. The supervisor will contact the Child Welfare Consultant, Regional Program Manager, and seek consultation with the Regional Assistant Attorney General.

The court can make a finding that a child is an Indian child *only* for the purposes of applying ICWA to the proceedings, but it cannot establish the child's membership in a Tribe or eligibility for any Federal programs or benefits. The BIA also does not make any determinations as to Tribal citizenship or eligibility for citizenship.

### 3.5 Requirements of Notice

It is important to provide prompt notice of an Indian child's removal to the parent, Indian custodian, and Tribe. Providing prompt notice gives the parent, Indian custodian, and Tribe the opportunity to respond to any allegations in the case, to intervene, or to seek transfer of the jurisdiction of the case to the Tribe. It also helps facilitate early identification of preferred placements (see *Section 6*) as well as the provision of Tribal services to the family.

When a child enters foster care, ICWA requires that the department notify the parents, Indian custodians, and the child's Tribe **by registered or certified mail with return receipt requested**. Copies of these notices must be sent to the appropriate [Regional Director of the BIA](#) by registered or certified mail with return receipt requested as well. The notification letter requires the following information:

- Child's name, birthdate, place of birth.
- All names known (including maiden, married, and former names or aliases) of the parents, the parents' birthdates and birthplaces, and Tribal enrollment number if known.
- If known, the names, birthdates, birthplaces, and Tribal enrollment information of other direct lineal ancestors of the child, such as grandparents.
- The name of each Indian Tribe in which the child is a member (or may be eligible for membership if a biological parent is a member); and
- Statements setting out:
  - o a copy of the petition and information about any hearing being scheduled including the date, time, and location of the hearing.
  - o the name of the petitioner/child welfare worker, telephone number, and address of the department.
  - o The name of the Prosecuting Attorney and their address and telephone number.

- o If the petition was filed by another individual, then their name, telephone number, and address as well as that of their attorney should be provided.
- o the right of any parent or Indian custodian of the child if not already a party to intervene in the proceedings.
- o the Indian Tribe's right to intervene at any time in the proceeding for the foster care placement of, or termination of parental rights to, an Indian child.
- o that if the child's parent or Indian custodian is unable to afford counsel based on a determination of indigency by the court, the parent or Indian custodian has the right to court-appointed counsel.
- o the right to be granted, upon request, up to 20 additional days to prepare for the abuse and neglect or juvenile proceedings.
- o the right of the parent or Indian custodian and the Indian child's Tribe to petition the court for transfer of the foster care placement or termination of parental rights proceedings to the Tribal court.
- o the mailing address and telephone numbers of the court and information related to all parties to the abuse and neglect or juvenile proceeding and individuals notified under this section.
- o the potential legal consequences of the abuse and neglect or juvenile proceedings on the future parental and custodial rights of the parent or Indian custodian.
- o that all parties notified must keep confidential the information contained in the notice and the notice should not be handled by anyone not needing the information to exercise rights under ICWA.

*Notice and Verification of Tribal membership are separate concepts but can be accomplished through the same letter.*

An original or copy of each notice sent with the return receipts or proof of services must also be filed with the court. Child welfare workers should also scan copies of return receipts or proof of services, upload into the CCWIS file cabinet of the case, document the receipt of such items in a contact, as well as store photocopies in the paper record.

Providing notice to the Tribe is not just done at the initial removal of the child but is required throughout the case. The child welfare worker or court should also ensure the following notices are provided to the parents, Indian custodian, and Tribe:

- notice of each hearing,
- any change in placement for the child,
- any change to the child's permanency plan or concurrent plan, and
- any transfer of jurisdiction to another state or receipt of jurisdiction from another state.

### ***Confidentiality regarding the Notice***

Although the petition contains confidential information, providing a copy of the petition with notice to the Tribes is a government-to-government exchange of information that is necessary for the government agencies to perform their duties. The petition provides necessary information to allow the parents, Indian custodian, and Tribe to effectively participate in the court proceedings.

### ***Time limits of notice***

No foster care placement or termination of parental rights proceedings may be held until at least 10 days after receipt of the notice by the parent or Indian custodian and by the Tribe. Each have a right, upon request, to be granted up to 20 additional days from the date upon which the notice was received to prepare for participation in the proceeding.

### ***Lack of response to notices***

If a Tribe does not respond to the notice or responds that it is not interested in participating in the proceeding, the court or the department must still send the Tribe notices of subsequent hearings for which notice is required, especially a disposition hearing where a parent may have their parental rights terminated.

If a Tribe does not confirm receipt of the required notice or otherwise does not respond, the child welfare worker should follow up by telephone and document the attempts.

The Tribe may decide to intervene or participate at a later point even if they have previously indicated they were not interested in participating.

## **3.6 Unascertainable Information**

If the identity or location of the child's parents or Indian custodian, or the Tribe in which the child is a member or eligible for membership cannot be ascertained, notice of the abuse and neglect or juvenile proceedings must be sent to the appropriate [BIA Director](#). The BIA will not determine Tribal membership but may be able to identify the Tribe for the child welfare worker and court to contact.

## **3.7 Facilitating Tribal Membership**

ICWA recommends the facilitation of a child becoming a Tribal member. The child welfare worker can assist with filing a Tribal membership application for the child by contacting the Tribe and requesting the application forms and information about the process. Each Tribe has their own process for facilitating membership. Tribal citizenship allows the child more access to services and programs that may be available. Tribal membership also provides other benefits for an Indian child in providing cultural connections and rights within a Tribe.

## **3.8 Determining if ICWA Applies to a Case**

ICWA provides very specific guidelines as to when it applies to a child welfare case and when it does not.

ICWA applies in abuse and neglect and juvenile proceedings including:

- Involuntary proceedings, such as when the department files a petition for relief due to abuse and neglect;
- An emergency proceeding, like a CPS removal due to emergency ratification.
- Voluntary proceedings, such as those instituted by a petition to review a voluntary placement agreement, that **could** prohibit the parent or Indian custodian from regaining custody of the child upon demand; and
- A proceeding involving status offenses or juvenile delinquency if any part of the proceeding results in the need for out of home placement of the child, including foster care, pre-adoptive, or adoptive placement, or termination of parental rights;

ICWA **does not** apply in the following situations:

- A Tribal Court proceeding;
- A juvenile proceeding regarding a delinquency charge that is not a status offense, unless the juvenile proceeding would prohibit the parent from their right to request the juvenile stay in the home or return to their home from placement;
- A juvenile delinquency proceeding resulting in the transfer of custody of the child to the Bureau for Juvenile Services;
- An award of custody of the Indian child to one of the parents including, but not limited to, an award in a divorce proceeding; or
- A voluntary placement that either parent, both parents, or the Indian custody has, of their free will, without a threat of removal by the department, chosen for the Indian child and that **does not** prohibit the child's parent or Indian custodian from regaining custody of the child upon demand.

*Note: In these proceedings, the court may not consider factors such as the participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and their parents, whether the parent ever had custody of the child, or the Indian child's blood quantum.*

If ICWA applies at the commencement of an abuse and neglect or juvenile proceeding, it **will not cease** to apply simply because the child reaches age 18 during the pendency of the case.

Also note that a non-Indian parent may be entitled to protections provided by ICWA if the child is an Indian child. This could include the same standards of evidence for court hearings regarding foster care placement and termination of parental rights, as well as the right to have active efforts used in case planning.

## SECTION 4 – CASE PLANNING

### 4.1 Active Efforts

ICWA requires active efforts be provided to the family prior to foster care placement of an Indian child and prior to termination of parental rights. Active efforts should be provided when a child welfare case is opened for services. Active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's Tribe and should be conducted in partnership with the Indian child and the Indian child's parents, extended family, Indian custodians, and Tribe. The provision of active efforts in maintaining the family or helping to reunify a family further helps to preserve the child and family's culture.

Active efforts are considered "the gold standard" of what services should be and require more information in the child's and family's case plans. Active efforts are a higher standard than reasonable efforts and must involve assisting the parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the requirements of the case plan. ICWA states that active efforts vary from case to case but should be:

- affirmative;

- active;
- thorough; and
- timely.

Determining the appropriate active efforts should be done **in discussion with the Tribe** to help determine culturally appropriate services that can be provided to the family. For example, these may include:

- trauma informed therapy that incorporates best practices in addressing Native American historical and intergenerational trauma
- pastoral counseling that incorporates a Native American holistic approach and focuses on spirituality;
- Tribal/native faith healers or medicine/holy men or women within the Tribe who use prayers, ceremonies, sweat lodges and other interventions; and
- the use of Positive Indian Parenting curriculum which is based on Native American beliefs and customs and is provided to clients to improve their parenting skills with a strong culture-based background.

Active efforts are tailored to the facts and circumstances of the case and may include but are not limited to the following:

- Conducting a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the goal;
- Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining the services;
- Identifying, notifying, and inviting representatives of the Tribe to participate in providing support and services to the parents in multidisciplinary team meetings, permanency planning, and resolution of placement issues;
- Conducting a diligent search of the child's extended family members and contacting and consulting with the extended family to provide family structure and support for the child and parents;
- Offering and utilizing all available culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the Tribe;
- Taking steps to keep siblings together when possible;
- Having regular visits with parents in the most natural setting possible as well as trial home visits of the child, consistent with the need to ensure health, safety, and welfare of the child;
- Identifying community resources including housing, financial, transportation, mental health treatment, substance use disorder treatment, peer support services and actively assisting the parents, and when appropriate the family, in utilizing and accessing those resources;
- Monitoring progress and participating in services;
- Considering alternative ways to address the needs of the child and parents, and where appropriate the family, if the optimum services do not exist or are not available; and,
- Providing post-reunification services and monitoring.

Active efforts should be provided to both parents and are not just making the services available to the parents, but **actively** connecting the family with substantive services that address the specific issues facing the family.

Providing active efforts must be done when a child welfare case is opened. When a case involves the court process, the court must ensure that active efforts were provided prior to an involuntary foster care placement. The court must make findings that active efforts were made to prevent the removal of the child, as well as findings must be made that active efforts were provided prior to termination of parental rights, and that those efforts were unsuccessful in remedying the situation that led to the removal.

When reunification with one parent is not possible, such as for reasons that include severe abuse of the child or incarceration for a long period of time, active efforts should still be provided to the other parent to assist in reunification.

## **4.2 Providing Active Efforts**

The court must document active efforts at specific times such as when foster care placement is ordered and when there is a termination of parental rights. Child welfare workers must include the status of the department in providing active efforts in their court reports and Multidisciplinary Treatment Team (MDT) summaries. There is no specific time frame on active efforts. If an abuse and neglect or juvenile proceeding is ongoing even after the return of the child, then active efforts are required before there may be a subsequent foster care placement or termination of parental rights.

## **4.3 Documenting Active Efforts**

The provision of active efforts must be documented in the court record. Active efforts must be a part of the case plan submitted to the court and should be discussed at MDTs as well and thoroughly documented in any court report and MDT summaries.

The department needs to include the following documentation of active efforts.

- The issues the family is facing that the Department is attempting to remedy with active efforts. These should be the same issues that lead to the removal of the child(ren);
- A list of active efforts the department and MDT determines would best address the issues and the reason those specific active efforts were chosen;
- Dates, persons contacted, and other details showing how the department provided active efforts; and,
- Results of the active efforts provided and, where the results were less than satisfactory, whether the department adjusted the active efforts to better address the issues.

## **4.4 Casework in Placement Cases**

When an Indian child is placed into foster care, child welfare workers must follow guidelines set forth in Foster Care Policy. In completing the “SS-FC-12 Birth Parents Background Information” as per *Foster Care Policy 2.6.2 (m)* within the first 30 days of placement of the child, the child welfare worker should ensure that the information about the Tribe is documented on the form. If information about the Tribe has not been previously gathered, the child welfare worker should make diligent efforts to gather this information, document it, and initiate verification and notifications to the Tribe and the BIA. Failure to do so could result in delays in the court proceedings.



## SECTION 5 – STANDARD PROCEDURES FOR EMERGENCY REMOVALS, TRIBAL JURISDICTION, AND TERMINATION OF PARENTAL RIGHTS

### 5.1 Emergency Removals

ICWA allows for the removal of a child from their parents or Indian custodian as part of an emergency ratification or petition only if the child faces “imminent physical injury or harm” which is consistent with W. Va. Code [Chapter 49](#). Emergency circumstances may also include a child who is immediately threatened with harm including an immediate threat to the safety of a child, a young child who is left without care or adequate supervision, or where there is evidence of serious ongoing abuse and imminent recurrence.

### 5.2 Jurisdiction of Tribe

The Tribe has exclusive jurisdiction if a child is removed from a residence or domicile on a reservation as well as in situations where the child is a ward of the Tribal Court. West Virginia does not have any reservations, but the child could still be a ward of the Tribal Court. During abuse and neglect or juvenile proceedings, the parent, Indian custodian, or the child’s Tribe may request at any time for the court to reassign the jurisdiction to the child’s Tribe. ICWA provides guidance to the court on how to contact the Tribal Court when a transfer petition is received. The transfer petition is a required written notification. Upon receiving the transfer petition from the child’s parents, Indian custodian, or Tribe, the court must reassign the proceedings unless either parent objects, the Tribal Court declines, or if there is good cause that exists for denying the transfer.

When determining good cause to deny the transfer of jurisdiction, the court **cannot** consider the following circumstances:

- Whether the abuse and neglect or juvenile proceedings are at an advanced stage if the parents, Indian custodian, or Tribe did not receive notice of the proceedings until an advanced stage.
- Whether there have been prior abuse and neglect or juvenile proceedings involving the child and no petition to transfer was filed.
- Whether the transfer affects the placement of the child.
- The child’s cultural connection with the Tribe or its reservations; and,
- Socioeconomic conditions, or any negative perception of Tribal or BIA social services or judicial systems.

The Indian Child Welfare Act allows for Tribes to petition for transfer of jurisdiction at **any** stage in the proceedings. Also, ICWA distinguishes between foster care proceedings and termination of parental rights proceedings as these two proceedings have different implications for the family and the Tribe. The parents and Tribe may have had reasons to not seek an earlier transfer of jurisdiction to the Tribe, such as efforts being made to reunify the child with the parent or Indian custodian. However, the Tribe may request transfer if termination of parental rights occurs.

It is inappropriate to take into consideration the effect of placement on the child, as a transfer to Tribal Court does not automatically mean a change in placement. Tribal Courts and agencies will consider each case on an individual basis and determine what is in the best interest of the child. A child's cultural connection to the Tribe, or the lack thereof, cannot be considered as a justified reason to deny transfer of jurisdiction. Negative perceptions of Tribal or BIA social services or judicial systems as well as socioeconomic conditions within the Tribe or reservation, can introduce bias into decision-making and should not be considered in decisions regarding transfer of jurisdiction.

Courts should allow Tribes to participate in the proceedings by telephone, videoconferencing, and other methods.

### ***Transferring to Tribal Court***

When a determination is made to transfer the case to Tribal Court, the court will provide all the records related to the court proceedings to the Tribal Court and the department will work with providing all the family's case records to the Tribal child welfare agency.

## **5.3 Standard of Evidence for Foster Care Placement and Termination of Parental Rights Proceedings**

The court must not order a termination of parental rights for an Indian child unless evidence beyond a reasonable doubt is presented, including testimony of one or more qualified expert witnesses. For foster care placement and termination of parental rights, the evidence must show a causal relationship between the particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical harm to the particular child who is the subject of the abuse and neglect or juvenile proceedings. Without a causal relationship identified, evidence that shows only the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance misuse, or nonconforming social behavior does not by itself constitute clear and convincing evidence or evidence beyond a reasonable doubt that continued custody is likely to result in serious emotional or physical injury to the child.

A person may be designated by the Tribe as being qualified to testify. The court, attorneys, or the department may request the assistance of the Tribe or the BIA office serving the Tribe in locating a person qualified to testify as an expert witness. The child welfare worker regularly assigned to the child may **not** serve as a qualified expert witness. Qualified expert witnesses that testify in an abuse and neglect or juvenile proceeding must be able to testify regarding whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical injury to the child and the qualified expert witness should be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe.

There is no requirement that the qualified expert witness be a citizen of the child's Tribe. The qualified expert witness should be able to demonstrate knowledge of the prevailing social and cultural standards of the child's Tribe or be designated by the Tribe as having such knowledge so that the testimony provided regarding the best interest of the child is in the context of the prevailing cultural and social standards of the Indian child's Tribe. However, ICWA recognizes that if the qualified expert witness is someone who is testifying regarding such things as sexual abuse, the qualified expert witness may not need to know the social and cultural standards of

the Tribe in order to testify regarding whether reunification is likely to result in serious emotional or physical harm to the child.

The qualified expert witness must be someone familiar with the particular child. If the expert makes contact with the parents, observes interactions between the parent(s) and child, and meets with extended family members in the child's life, the expert will be able to provide a more complete picture to the court. The court may request the assistance of the Indian child's Tribe or the BIA office serving the Tribe in locating a qualified expert witness to testify to the prevailing social and cultural standards of the child's Tribe. However, there is no requirement that the qualified expert witness be a citizen of the child's Tribe.

## **SECTION 6 - FOSTER CARE PLACEMENTS**

### **6.1 Emergency Placements**

In the need for an emergency placement for a child, the child welfare worker should try to identify family or other individuals with whom the child is already familiar for possible placement. If the child is an Indian child, the child welfare worker should try to follow ICWA's placement preferences (*See Section 6.2*) to help prevent further disruptions.

If a child is placed in a non-preferred placement due to the unavailability of a preferred placement at the time of removal, the child welfare worker should have a concurrent plan for placement as soon as possible with a preferred placement. Child welfare workers should make diligent efforts to identify and locate family.

The child welfare worker should notify the Tribe that the child was removed due to an emergency as the worker and Tribe can coordinate services and placement. The notification can be done by telephone and documented in the case record. If the Tribe is unknown at the time of the emergency removal, the child welfare worker should continue to explore the applicability of ICWA and document the information in the case record. Even during an emergency removal, the child welfare worker can begin working with the parents and the Tribe to ensure active efforts are being provided to reunify the family.

### **6.2 Foster Care Placement Preferences**

Best practice in child welfare cases encourages placement of children with extended family and ICWA regulations strongly align with this practice. ICWA lays out specific placement preferences for children in foster care placements that must be followed by child welfare workers, as well as be part of the findings in abuse and neglect or juvenile proceedings.

If an Indian child requires foster care or pre-adoptive placement, including any changes in foster care or pre-adoptive placements, the child must be placed in the least restrictive setting that:

- is the least restrictive family-like setting,
- considers the need for siblings to be placed together or facilitate sibling visitation
- meets the child's special needs (if any); and
- is in the closest proximity to the child's home, extended family, or siblings.

If an Indian child is placed in a foster care or pre-adoptive placement and the child's Tribe has not established a different order of preference, preference must be given in descending order as listed below:

- A member of the Indian child's extended family;
- A foster home that is licensed, approved, or specified by the Tribe;
- An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
- An institution for children approved by an Indian Tribe or operated by an Indian organization which has a program suitable to meet the child's needs.

If the child's Tribe has established, by resolution, a different order or preference than specified in ICWA, the Tribe's placement preference still applies, as long as the placement is the least restrictive setting appropriate for the child's particular needs. The court must consider, where appropriate, the preference of the Indian child or the parents.

### 6.3 Finding Preferred Placements

The child welfare worker should conduct a diligent search for placements that comply with the placement preferences. The search should be thorough, ongoing, and in compliance with child welfare best practices and should also involve:

- asking the parents for information about extended family, whether they are members of an Indian Tribe or not;
- contacting all known extended family, whether they are members of a Tribe or not;
- contacting all Tribes with which the child is affiliated for assistance in identifying placements;
- conducting diligent follow up with all potential placements; and
- contacting institutions for children approved or operated by Indian Tribes if other preferred placements are not available.

The child welfare worker needs to share enough information about the abuse and neglect or juvenile proceedings so the family wishing to serve as a placement resource can avail themselves of the preference. The child welfare worker will need to follow Foster Care Policy regarding referrals to Home Finding for a home study or initiate Interstate Compact for the Placement of Children (ICPC) requests for foster care home studies of families who may wish to provide placement and are not certified foster homes. Furthermore, ICWA encourages states and Tribes to work together to recruit Indian foster home resources for children. The fact that no federally recognized Tribe is located within a state where the abuse and neglect or juvenile proceeding occurs does not mean that there are no family members or members of Tribes residing in the state.

*Note: A preferred placement may not be excluded from consideration merely because the placement is not located in West Virginia. **At this point, the child welfare worker must initiate the proper procedures for the Interstate Compact on the Placement of Children (ICPC).*** The child welfare worker should have a conversation with the Tribal representative regarding the need for an ICPC. This conversation should include the reasons it is required and how an approved foster care home study of a relative, kin, or tribal member will help ensure monthly boarding care payments are received for the benefit of the child. Initiating a timely request for

an ICPC as well as keeping the Tribe engaged in the casework process, will help ensure the department is providing active efforts to the family as well.

The child welfare worker should cooperate with the Tribe in identifying placement preferences. If a child is placed in a non-preferred placement, the Tribe may require that action be taken to secure membership for the child and to maintain the child's Tribal affiliation.

#### **6.4 Good Cause to Depart from Placement Preferences**

Good cause to depart from placement preferences must be documented in the court proceedings for any foster care, pre-adoptive, or adoptive placement of an Indian child. The party recommending any departure from the placement preferences should prove by clear and convincing evidence that there is good cause. The court must determine good cause to depart from the placement preferences on the record and it should be based on one or more of the following considerations:

- The request of one or both parents, if they attest that they reviewed the placement options, if any, that comply with the order of preference.
- The request of the child, if the child is of sufficient age and capacity to understand the decision that is being made.
- The presence of a sibling attachment that can be maintained only through a specific placement.
- The existence of extraordinary physical, mental, or emotional needs of the child that require specialized treatment services that may be unavailable in the community where of the placement preference(s); or
- The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the preference criteria. For purposes of this analysis, the standards for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or maintain social and cultural ties.

There may be other extraordinary circumstances where there is good cause to not place an Indian child in one of the preferred placements. The court can consider any unique needs the child has.

If a child has been placed in a non-preferred placement in violation of ICWA and the rule, the court should not base good cause determination solely on the fact that the child has bonded with that placement.

*Note: As a best practice, in all cases, the department and the court should carefully consider whether the development of a relationship with a non-preferred placement outweighs the long-term benefits to a child of maintaining connections to family and the Tribal community. Where a child is in a non-preferred placement, it is a best practice to facilitate connections between the Indian child and extended family and other potential preferred placements. For example, if a child is in a non-preferred placement due to geographic considerations and to promote reunification with the parent, the department and/or court should promote connections and bonding with extended family or other preferred placements who may live further away. This*

*will allow the child to have the opportunity to develop additional bonds with these preferred placements that could ease a transition to that placement.*

### **Limits on Good Cause**

The fact that a preferred placement may be of a different socioeconomic status than a non-preferred placement, may **not** serve as the basis for good cause to depart from the placement preferences. Also, ordinary bonding that has occurred between an Indian child and a non-preferred placement provider in violation of ICWA is not a reason to invoke good cause for not placing a child in a preferred placement.

## **6.5 Record Keeping of Every Placement**

The department must maintain a record of every voluntary or involuntary foster care, pre-adoptive, and adoptive placement of an Indian child and make the record available within 14 days of a request by an Indian child's Tribe or the Secretary of the BIA. The record must contain at a minimum:

- the petition or complaint;
- all substantive orders entered in the abuse and neglect or juvenile proceeding;
- the complete record of the placement determination (including, but not limited to, the findings in the court record and the child welfare worker's statement); and,
- if the placement departs from the placement preferences:
  - detailed documentation of the efforts to comply with the placement preferences.

The department may be responsible for maintaining records of this information. The court or the department should notify the BIA whether these records are maintained within the court system or by the department.

## **SECTION 7 - VOLUNTARY PROCEEDINGS**

When a voluntary court proceeding occurs, such as when a petition is filed for continued custody due to a parent signing a voluntary placement agreement, the court must inquire if the child is an Indian child, or if there is reason to believe they are an Indian child. The child welfare worker must report to the court that all steps were taken to verify the child's status, including contacting the Tribe of which the child may be a member or eligible for membership and of which the biological parent is a member.

### **7.1 Placement Preference in Voluntary Proceedings**

Placement of an Indian child in a voluntary proceeding must comply with ICWA regulations regarding preferred placements. See *Section 6* for more information regarding preferred placements. The child welfare worker should inform the parents of ICWA's placement preferences and determine if there are any extended family or Tribal community members who may be available as a placement resource. The child welfare worker needs to document this information in the case record as well as in MDT reports and court summaries to the court so it can also be part of the court record.

## **7.2 Notice in Voluntary Proceedings**

The child welfare worker will need to verify the child's Tribe and provide notice of the voluntary court proceedings to allow the Tribe to participate. This will allow the Tribe to help identify preferred placements and to promote the child's continued connections to the Tribe. See *Section 6* for more information.

## **7.3 Contents of Consent for Voluntary Placement**

The voluntary placement agreement should contain:

- the name and date of birth of the Indian child the name of the Indian child's Tribe;
- the Tribal enrollment number for the parent and for the Indian child or some other indication of the child's Tribal membership;
- the name, address, and other identifying information of the consenting parent or Indian custodian;
- the name and address of the county department office who arranged the placement; and,
- the name and address of the prospective foster parents if known at the time.

## **7.4 Withdrawal of Consent**

The parent or Indian custodian of the Indian child may withdraw consent to voluntary foster care placement at any time. The parent or Indian custodian must file a written document with the court or testify before the court to withdraw the consent. When the consent for foster care is withdrawn, the Indian child should be returned to the parent or Indian custodian as soon as possible.

### ***Withdrawal of Consent for Termination of Parental Rights or Adoption***

A parent may withdraw consent for voluntary termination of parental rights at any time prior to the entry of a final order for the termination of parental rights. A parent may withdraw consent to a voluntary adoption prior to the entry of the final adoption order. To withdraw the consent prior to the entry of the final adoption order, the parent or Indian custodian must file a written document with the court or testify. The court must then let the department know to return the child to the parent or custodian.

## **SECTION 8 – ADOPTION**

### **8.1 Adoptive Placement Preferences**

ICWA provides regulations regarding the adoptive placement preferences for Indian children to help protect the needs and long-term welfare of Indian children and families, while providing flexibility to ensure the best interest of each Indian child can be addressed by the court. The following list of placement preferences must be considered in exact order of the most preferred placement preference to the least preferred.

- If any adoptive placement of an Indian child, where the child's Tribe has not established a different order of preference, preference must be given in descending order as listed below:
  1. A member of the Indian child's extended family;

2. Other members of the Indian child's Tribe; or
  3. Other Indian families.
- If the Tribe has established, by resolution, a different order of preference than specified in ICWA, the Tribe's placement preferences apply; or
  - The court, where appropriate, must also consider the placement preference of the child and parent. ICWA does not require the court to follow a child's or parent's preference but requires that it be considered where appropriate.

## 8.2 Final Adoption Order

In accordance with [25 U.S.C. § 1951](#), every final adoption order involving an Indian child must be transmitted to the Secretary of the BIA. The final adoption order should state that it must be shared with the BIA. When there is a final adoption order in a case involving any voluntary or involuntary Indian-child adoptive placement, a copy of the order must be sent by the child welfare worker, within 30 days, to the Bureau of Indian Affairs, Chief, Division of Human Services, 1849 C Street NW., Mail Stop 4513 MIB, Washington, DC 20240, along with the following information, in an envelope marked "**Confidential**."

1. Birth name and birthdate of the Indian child, and Tribal affiliation and name of the Indian child after adoption.
2. Names and addresses of the biological parents.
3. Names and addresses of the adoptive parents.
4. Name and contact information for any agency having files or information relating to the adoption.
5. Any affidavit signed by the biological parent or parents asking that their identity remain confidential.
6. Any information relating to Tribal membership or eligibility for Tribal membership of the adopted child.

## 8.3 Adoptions that are Vacated or Set Aside

If an Indian child has been adopted, the court (or in many cases, the department) must notify, by registered or certified mail with return receipt requested, the child's biological parent or prior Indian custodian and the Indian child's Tribe when;

1. a final order of adoption of the Indian child has been vacated or set aside; or,
2. the adoptive parent has voluntarily consented to the termination of their parental rights to the child.

The notice must state the current name, and any former name, of the Indian child, inform the recipient of the right to petition for return of custody of the child, and provide sufficient information to allow the recipient to participate in any scheduled hearings.

- A parent or Indian custodian may waive their right to such notice by executing a written waiver of notice and filing the waiver with the court under the following conditions:
  1. Prior to accepting the waiver, the court must explain the consequences of the waiver and explain how the waiver may be revoked.
  2. The court must certify that the terms and consequences of the waiver and how the waiver may be revoked were explained in detail in the primary language of the parent or Indian custodian and were fully understood by the parent or Indian custodian.



3. Where confidentiality is requested or indicated, execution of the waiver need not be made in a session of court open to the public but still be made before a court of competent jurisdiction in compliance with this section.
4. The biological parent or Indian custodian may revoke the waiver at any time by filing with the court a written notice of revocation.
5. A revocation of the right to receive notice does not affect any abuse and neglect or juvenile proceeding that was completed before the filing of the notice of revocation.

#### **8.4 Adult Adoptees' Access to Information about Their Tribal Affiliation**

Upon reaching the age of 18, an Indian child who was adopted may apply to the court that entered the final adoption order to obtain information regarding their Tribal affiliations. The Indian child may also request information regarding their biological parents' Tribal affiliations to protect any rights, including Tribal membership.

#### **8.5 Parties' Access to Case Documents**

Each party to an abuse and neglect or juvenile proceeding under State law involving an Indian child, has the right to a timely examination of all reports and other documents filed with the court upon which any decision with respect to such action may be based. States cannot refuse to provide a party to an ICWA proceeding, including a Tribe that is a party, access to information about the proceedings.