



# Office of Children and Family Services

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## Administrative Directive

<b>Transmittal:</b>	17-OCFS-ADM-08
<b>To:</b>	Commissioners of Social Services Executive Directors of Voluntary Authorized Agencies (or other specific types of agencies)
<b>Issuing Division/Office:</b>	Strategic Planning and Policy Development
<b>Date:</b>	July 31, 2017
<b>Subject:</b>	<b>Implementing Federal and Corresponding State Indian Child Welfare Act Regulations</b>
<b>Suggested Distribution:</b>	Special Assistant for Native American Services Directors of Social Services Child Protective Services Supervisors Child Welfare Supervisors Foster Care Supervisors Adoption Supervisors Staff Development Coordinators CONNECTIONS Implementation Coordinators
<b>Contact Person(s):</b>	<a href="#">See Section VI</a>
<b>Attachments:</b>	Attachment A: Notice of Child Custody Proceeding for Indian Child Attachment B: Mailing Addresses for New York State Tribes/Nations Attachment C: FAQs on the Indian Child Welfare Act

### Filing References

Previous ADMs/INFs	Releases Cancelled	NYS Regs.	Soc. Serv. Law & Other Legal Ref.	Manual Ref.	Misc. Ref.
03-OCFS-INF-10 06-OCFS-INF-07		18 NYCRR 431.18	25 U.S.C. §§ 1901-1923 25 CFR Part 23 SSL § 2(35) and (36) SSL § 39		

## I. Purpose

The purpose of this Administrative Directive (ADM) is to advise local departments of social services (LDSSs) and voluntary authorized agencies (VAs) of changes to federal and state regulations pertaining to the federal Indian Child Welfare Act (ICWA).

## II. Background

ICWA became law in 1978 (25 U.S.C. § 1901 et seq.). The underlying principle of ICWA is the protection of the best interests of Indian children by supporting their cultural identity in issues pertaining to foster care, termination of parental rights, emergency removals, and adoption proceedings. The law also promotes the stability and security of Indian tribes and families by the establishment of minimum federal standards for the removal of Indian children from their families. The ICWA standards promote the protection of the rights of native peoples.

Effective December 12, 2016, federal regulations set forth in 25 CFR Part 23 were amended to improve ICWA implementation. These regulatory changes address requirements for state courts in implementing ICWA in child custody proceedings, which include voluntary and involuntary foster care and termination of parental rights proceedings, emergency proceedings, and the voluntary relinquishment (surrender) of parental rights involving Indian children.<sup>1</sup> The amendments to the federal regulations also establish requirements for maintaining records, introducing new terminology, and revising existing definitions.

In addition to the federal regulatory changes, the New York State Office of Children and Family Services (OCFS) amended 18 NYCRR 431.18 to make New York State's regulations consistent with the federal regulatory changes.

## III. Program Implications

Federal statute and regulation define an Indian child as any unmarried person who is under 18 years of age and is either (a) a member or citizen of an Indian tribe/nation<sup>2</sup> or (b) eligible for membership or citizenship in an Indian tribe/nation, and the biological child of a member or citizen of an Indian tribe/nation.<sup>3</sup>

OCFS regulation defines an Indian child as an unmarried person who:

- is either under the age of 18 or is between the ages of 18 and 21, is in foster care and is a student attending a school, college or university, or is regularly attending a course of vocational or technical training, or is unable to live independently; and

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<sup>1</sup> ICWA does not apply to tribal court proceedings, juvenile delinquency proceedings, or divorce proceedings concerning custody.

<sup>2</sup> For the purposes of the federal ICWA standards, an Indian tribe is defined as any Indian tribe, band, nation or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary of the Interior because of their status as Indians, including any Alaska Native village as defined in the Alaska Native Claims Act. (43 USC 1602).

<sup>3</sup> 25 CFR § 23.2.

- is either a member of an Indian tribe/nation, or is eligible for membership, or is the biological child of a member of an Indian tribe/nation who resides on, or is domiciled<sup>4</sup> within the reservation of such tribe/nation.<sup>5</sup>

In every case where the child may be removed from the home, inquiries regarding the child's status as an Indian child must be made of the family and, depending on age and capacity, the child. The provisions of ICWA apply to a child even if there is only reason to know that the child is an Indian child. This means that if there is reason to know that the child is American Indian or Alaska Native, all protections afforded under ICWA to an Indian child apply until it has been determined by the court that the child does not meet the definition of an Indian child.<sup>6</sup>

Treating the child as an Indian child from the early stages of the case prevents delays and possible changes in foster care placement to comply with the ICWA placement preferences that could result from a later application of ICWA. ICWA does not apply simply based on a child or parent's Indian ancestry. The court's decision as to whether a child is an Indian child is dependent on tribal membership/citizenship or eligibility for such membership/citizenship. The Indian tribe/nation determines whether the child is a member/citizen or eligible for membership/citizenship in the tribe/nation. This determination is solely within the jurisdiction and authority of the tribe/nation.<sup>7</sup>

The Indian child could be a member of, or be eligible for membership/citizenship in, more than one Indian tribe/nation. Even if the Indian child's membership has not yet been established, each Indian tribe/nation in which the Indian child is a member/citizen or may be eligible for membership/citizenship if a biological parent is a member must be notified of a pending involuntary foster care placement or termination of parental rights proceeding.<sup>8</sup> The tribes/nations involved must be given reasonable opportunity to agree on which one should be designated as the Indian child's tribe/nation for the purposes of the hearing. If the tribes/nations are unable to reach an agreement, the court will designate a tribe/nation after considering the factors identified in federal and OCFS regulations.<sup>9</sup>

There are federally recognized and state-recognized tribes/nations in the United States. The federal statutory and regulatory standards limit application of ICWA only to Indian children who are members or citizens of federally recognized tribes/nations, or are eligible for membership or citizenship, and the biological child of a member or citizen of a federally recognized tribe/nation. New York State extends the application of most of the provisions of ICWA to children who are members/citizens of state-only recognized Indian tribes/nations.<sup>10</sup> While the tribe/nation of which the child is a member or eligible for membership could be any of the federally or state-recognized tribes/nations in any of the 50 states, it is probable that an Indian child in New York State would be a member or citizen

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<sup>4</sup> Domicile is a person's true, fixed, principal, and permanent home, even though the person may currently reside elsewhere. An Indian child's domicile is that of the Indian child's parent(s) or Indian custodian or guardian. In the case of an Indian child whose parents are not married to each other, the child's domicile is that of the Indian child's custodial parent. 25 CFR §23.2.

<sup>5</sup> 18 NYCRR 431.18(a)(1).

<sup>6</sup> 25 CFR § 23.107.

<sup>7</sup> 25 CFR § 23.108.

<sup>8</sup> 18 NYCRR 431.18(c); Social Services Law (SSL) § 384-b; Family Court Act (FCA) Articles 7, 10, and 10-C.

<sup>9</sup> 25 CFR § 23.109(c); 18 NYCRR 431.18(a)(3).

<sup>10</sup> 18 NYCRR 431.18(a)(2).

of a tribe/nation located within the state. There are eight federally recognized tribes/nations in New York State: St. Regis Mohawk Tribe, Cayuga Nation, Seneca Nation of Indians, Tuscarora Nation, Onondaga Nation, Tonawanda Band of Senecas, the Oneida Indian Nation, and the Shinnecock Indian Nation. There is one tribe recognized only by New York State: Unkechauq Nation.

It is necessary to determine at the outset of any court proceeding subject to ICWA whether ICWA applies to the child. This promotes stability for the Indian child and the family, and reduces the need for delays and disruptions in the placement decisions for the child. Any child believed to be an Indian child must be treated as such, unless and until it is determined that the child is ***not*** an Indian child.

If there is 'reason to know' in a child custody proceeding<sup>11</sup> that a child is a member or citizen of a tribe/nation, the LDSS must notify the Family Court of this in writing.<sup>12</sup> The LDSS then must notify by either certified or registered mail return receipt requested the tribe(s)/nation(s), parent(s), and, where applicable, any Indian custodian of the scheduled court proceeding and of their rights under ICWA (Attachment A, Notice of Child Custody Proceeding for Indian Child). A copy of this letter must also be sent to the Bureau of Indian Affairs' (BIA) eastern regional director.<sup>13</sup> If the identity or location of the parent, Indian custodian or the tribe/nation cannot be determined, the notice must also be sent to the OCFS Bureau of Native American Services.

This notification must include the following information prescribed by regulation:<sup>14</sup>

- The Indian child's name, date of birth, and place of birth
- The name of each Indian tribe/nation in which the child is a member/citizen or may be eligible for membership if a biological parent is a member/citizen
- All names known, including maiden, married, and former names or aliases of the parents (or Indian custodian, if applicable), the parents' birth dates and birth places, and tribal enrollment numbers if known
- If known, the names, birth dates, birth places, and tribal enrollment information of other direct lineal ancestors of the child (e.g., grandparents)
- A copy of the petition, complaint or other document filed with the court to initiate the child custody proceeding and, if a hearing has been scheduled, information on the date, time, and location of the hearing
- A statement setting out the name of the petitioning LDSS/Administration for Children's Services (ACS), and the name and address of the LDSS/ACS attorney
- A listing of the rights of the parents, Indian custodian, and tribe/nation, as well as the legal consequences of the hearing and the need for all information to remain confidential

The mailing addresses for the nine tribes/nations located within New York State are included in Attachment 2. To contact a federally recognized tribe/nation outside of New York State that has been named as a possible affiliation for a child, notice can be sent to the designated tribal address identified in the BIA website's [Tribal Leaders Directory](#). If

<sup>11</sup> SSL § 358-a or 384-b; FCA Articles 7, 10, or 10-C. SSL § 358-a is added to address voluntary placements under SSL § 384-a.

<sup>12</sup> 25 CFR § 23.11; 18 NYCRR 431.18(e).

<sup>13</sup> U.S. Department of the Interior, Eastern Regional Office, Bureau of Indian Affairs, 545 Marriott Drive, Suite 700, Nashville, TN 37214.

<sup>14</sup> 18 NYCRR 431.18 (c).

contact information is unavailable, or if the tribe/nation fails to respond to inquiries, assistance can be provided by the OCFS Bureau of Native American Services or the BIA eastern regional office.

No Indian child can be placed in foster care unless clear and convincing evidence exists that continued custody by the parent or Indian custodian is likely to result in serious physical or emotional harm to the child.<sup>15</sup> The parental rights of an Indian parent or custodian cannot be terminated without evidence beyond a reasonable doubt that continued placement with the parent or custodian is likely to result in serious emotional or physical harm.<sup>16</sup> Both foster care placements and termination of parental rights determinations require testimony by one or more qualified expert witnesses<sup>17</sup> affirming that the child's current placement with parents or Indian custodian is likely to result in serious physical or emotional harm. A qualified expert witness is an individual who may be designated by the child's tribe/nation as being qualified to testify as to the prevailing social and cultural standards of the tribe/nation.

Neither federal nor state law includes provisions that prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but is temporarily located off the reservation, from his or her parent(s) or Indian custodian(s) or the emergency placement of such child in a foster home or child care facility in order to prevent imminent physical damage or harm to the child.<sup>18</sup>

The federal regulations set forth standards for emergency proceedings involving an Indian child.<sup>19</sup> These standards include that an emergency proceeding, defined as any court action that involves the emergency removal or placement of an Indian child,<sup>20</sup> should not continue for more than 30 days unless:

- the court has determined that restoring the child to the parent or Indian custodian would subject the child to imminent physical damage or harm;
- the court has been unable to transfer the case to the jurisdiction of an appropriate Indian court; and
- it has not been possible to initiate a child custody proceeding.

In any case, the removal or placement must be terminated when it is no longer necessary to prevent imminent physical damage or harm to the child.

Federal statute and regulations allow a parent, Indian custodian, or a tribe/nation to intervene at any point in a proceeding, and to petition to have the court proceeding transferred to a tribal court.<sup>21</sup>

#### **IV. Required Action**

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<sup>15</sup> 25 U.S.C. § 1912; 18 NYCRR 431.18(b)(1).

<sup>16</sup> 25 U.S.C. § 1912; 18 NYCRR 431.18(b)(2).

<sup>17</sup> 18 NYCRR 431.18(a)(5).

<sup>18</sup> 25 U.S.C. § 1922; SSL § 39(5)(b).

<sup>19</sup> 25 CFR § 23.113.

<sup>20</sup> 25 CFR § 23.2; 18 NYCRR 431.18(a)(7).

<sup>21</sup> 25 U.S.C. § 1911 and 25 CFR § 23.115.

For every child involved in a child custody or emergency proceeding, there must be a determination made as to whether there is reason to know the child is an Indian child. Whenever a LDSS or VA is taking a surrender, a similar inquiry must be made. The caseworker must inquire of the biological parent(s), adoptive parent(s), extended family, where applicable, the Indian custodian and, depending on age and capacity, the child, whether there is reason to know the child is an Indian child. It must be further determined whether the child is a member or citizen, or eligible for membership in any tribe/nation, or is the biological child of a tribal member or citizen. New fields are being added to CONNECTIONS to accommodate the recording of this additional information. Until the enhancements to the system have been completed, workers must designate the Indian child's race as Native American or Alaska Native, and identify the child's tribe/nation in CONNECTIONS.

Caseworkers must consider several requirements when handling an ICWA case:

1. Active efforts must be made to prevent the removal of an Indian child from the home. These are defined in federal regulation as affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with that child's family.<sup>22</sup> Active efforts differ from reasonable efforts in that reasonable efforts, for example, may include referrals for services, whereas active efforts include arranging for the most culturally appropriate services to help families overcome obstacles to engaging in those services. They include such activities as assisting the parents or Indian custodian in accessing the resources necessary to satisfy the case plan. Caseworkers must work actively to involve the child's tribe/nation, parents, and extended family in the process, employing available and culturally appropriate family preservation strategies, and facilitating the use of remedial and rehabilitative services provided by the child's tribe/nation. Active efforts must be tailored to the facts and circumstances of the individual case.
2. Caseworkers must notify the Indian child's parents, the Indian custodian(s) (where applicable), and tribe/nation of the involuntary child custody proceeding seeking foster care placement or termination of parental rights using the Notice of Child Custody Proceeding for an Indian Child (Attachment A). This notice will be available to be generated from within CONNECTIONS in a future system release. Such notification is required at both the underlying involuntary foster care proceeding as well as any subsequent termination of parental rights proceeding involving an Indian child.
3. Finally, caseworkers must identify a foster care or pre-adoptive placement<sup>23</sup> that is appropriate within the mandates of the preference provisions set forth in statute and OCFS regulation.<sup>24</sup> In the absence of good cause to the contrary, an Indian child must be placed according to the following order of preference for foster care or pre-adoptive placements:
  - a. First preference is placement with a member/citizen of the Indian child's extended family as this term is defined by the law or custom of the child's

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<sup>22</sup> 25 CFR § 23.2.

<sup>23</sup> A pre-adoptive placement is a temporary placement of an Indian child in a foster home or child care facility after termination of parental rights, but prior to or in lieu of an adoptive placement.

<sup>24</sup> 18 NYCRR 431.18(f)(2).

tribe/nation. If such law or custom does not exist in the tribe/nation, this person is defined in federal and OCFS regulation as a person who has reached the age of 18 years and is the child's grandparent, aunt or uncle, brother or sister, brother-in-law/sister-in-law, niece or nephew, first or second cousin, or step-parent.

- b. Second, in a foster home licensed, certified, approved, or specified by the Indian child's tribe/nation.
- c. Third, with Indian foster parents who have been licensed, certified, or approved by an LDSS or VA to provide foster care services.
- d. Fourth, in a foster care facility for children approved by an Indian tribe/nation or operated by an Indian organization that has a program suitable to meet the needs of the child.

In instances where the Indian child is being placed for adoption, caseworkers must identify an adoptive placement that is appropriate within the mandates of the preference provisions set forth in federal statute and regulation and OCFS regulation.<sup>25</sup> In the absence of good cause to the contrary, an Indian child must be placed for adoption according to the following order of preference:

- a. First preference is placement with a member of the Indian child's extended family, as such term is defined by the law or custom of the child's tribe/nation. If such law or custom does not exist in the tribe/nation, this person is defined in federal and OCFS regulation as a person who has reached the age of 18 years and is the child's grandparent, aunt, uncle, brother or sister, brother-in-law/sister-in-law, niece or nephew, first or second cousin, or step-parent.
- b. Second preference is with other members of the Indian child's tribe/nation.
- c. Third preference is with other Indian families.<sup>26</sup>

If the child's Indian tribe/nation has established by resolution an order of preference for foster care, pre-adoptive or adoptive placements that differs from the above, the LDSS or VA must follow that order of preference as long as the placement is the least-restrictive setting appropriate to the particular needs of the Indian child.<sup>27</sup>

Good cause not to follow this order of preference for foster care, pre-adoptive or adoptive placements must be based on one or more of the following considerations:

1. Request of one or both biological parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference
2. Request of the child if the child is of sufficient age and capacity to understand the decision being made
3. The extraordinary physical, mental, or emotional needs of the Indian child require specialized treatment services that may be unavailable in the community where families who meet the placement preferences reside
4. The unavailability of a suitable placement after a diligent search has failed to locate any placement meeting the preference criteria set forth above
5. The presence of a sibling attachment that can be maintained only through a particular placement<sup>28</sup>

<sup>25</sup> 25 U.S.C. § 1915, 25 CFR § 23.130; 18 NYCRR 431.18(g)(1).

<sup>26</sup> 25 U.S.C. § 1915, 25 CFR § 23.130; 18 NYCRR 431.18(g)(1).

<sup>27</sup> 25 U.S.C. § 1915, 25 CFR §§ 23.130 and 23.131; 18 NYCRR 431.18(f)(4) and (g)(3).

<sup>28</sup> 18 NYCRR 431.18(f)(3) and (g)(2).

Federal statute and regulations allow a parent, Indian custodian, or a tribe/nation to intervene at any point in a foster care or termination of parental rights proceeding, and to petition to have the court proceeding transferred to a tribal court.<sup>29</sup>

## V. Systems Implications

Several changes are pending for CONNECTIONS to reflect the new federal and state requirements for reporting. Until these CONNECTIONS changes are released, the steps taken to comply with ICWA standards must continue to be recorded in CONNECTIONS in the same manner as was in place prior to the issuance of this release. This includes recording the Indian child's race as either Native American or Alaska Native, as applicable, and identifying the tribe/nation of which the Indian child is a member/citizen or eligible for membership/citizenship. Other relevant information must be recorded in progress notes.

## VI. Contacts

Any questions concerning this release should be directed to the appropriate regional office, Division of Child Welfare and Community Services:

Buffalo Regional Office-Amanda Darling (716) 847-3145

[Amanda.Darling@ocfs.ny.gov](mailto:Amanda.Darling@ocfs.ny.gov)

Rochester Regional Office-Karen Buck (585) 238-8201

[Karen.Buck@ocfs.ny.gov](mailto:Karen.Buck@ocfs.ny.gov)

Syracuse Regional Office-Sara Simon (315) 423-1200

[Sara.Simon@ocfs.ny.gov](mailto:Sara.Simon@ocfs.ny.gov)

Albany Regional Office-John Lockwood (518) 486-7078

[John.Lockwood@ocfs.ny.gov](mailto:John.Lockwood@ocfs.ny.gov)

Spring Valley Regional Office-Yolanda Désarmé (845) 708-2498

[Yolanda.Desarme@ocfs.ny.gov](mailto:Yolanda.Desarme@ocfs.ny.gov)

New York City Regional Office-Ronni Fuchs (212) 383-1676

[Ronni.Fuchs@ocfs.ny.gov](mailto:Ronni.Fuchs@ocfs.ny.gov)

Native American Services-Heather LaForme (716) 847-3123

[Heather.LaForme@ocfs.ny.gov](mailto:Heather.LaForme@ocfs.ny.gov)

## VII. Effective Date

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<sup>29</sup> 25 U.S.C. § 1911 and 25 CFR § 23.115.



Federal regulations became effective December 12, 2016. New York State regulations became effective February 28, 2017.

*/s/ Thomas R. Brooks*

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**Issued By:**

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Title: Deputy Commissioner

Division/Office: Strategic Planning and Policy Development