

ALABAMA DEPARTMENT OF HUMAN RESOURCES
SOCIAL SERVICES DIVISION
ADMINISTRATIVE CODE

CHAPTER 660-5-36
INDIAN CHILD WELFARE ACT (ICWA)

TABLE OF CONTENTS

660-5-36-.01	Purpose And Applicability
660-5-36-.02	Working With Indian Children And Their Families
660-5-36-.03	Jurisdiction Of Tribal Court And State Courts
660-5-36-.04	Out-Of-Home Placement Of Indian Children
660-5-36-.05	ICWA And The Interstate Compact For The Placement Of Children
660-5-36-.06	Confidentiality And Access Of Information On ICWA Cases
660-5-36-.07	Definition Of Terms

660-5-36-.01 Purpose And Applicability.

(1) Purpose - The best interests of Indian children are realized by promoting the stability and security of Indian families and tribes. This is accomplished by including the child's Indian tribe in decision-making regarding the future of tribal children. Placement guidelines for Indian children are set by ICWA to protect the integrity of Indian tribes and assure that DHR child welfare practices acknowledge the vital role that the child's cultural heritage and tribal community must play in child welfare decision making for Indian children.

(2) Applicability - ICWA applies to all Indian children and their families who are members of a federally recognized Indian tribe or an Alaskan native village that come under the jurisdiction of State courts. Indian children and their families who are members of non-federally recognized Indian tribes are treated by the Department as any other United States citizen.

Author: Margaret Livingston

Statutory Authority: 25 United States Code, Chapter 21 §1901 - 1923.

History: New Rule: Filed December 20, 2007; effective January 24, 2008.

660-5-36-.02 Working With Indian Children And Their Families.

(1) Safety Needs of Indian Children: DHR accepts child abuse and neglect reports on children with possible Indian/Alaskan Native heritage who reside off of a reservation. Assessments on these children are conducted by county DHR child welfare staff according to Child Protective Services Policy and Procedures, Safety Assessment. In addition, DHR shall meet the immediate safety needs of Indian/Alaskan native children in the following circumstances:

(a) Indian children are residents of or are domiciled within an Indian reservation but are temporarily located off the reservation and safety threats have been identified.

(b) Regardless of whether a child is a ward of the tribal court or the tribe has exclusive jurisdiction, DHR shall provide protection and meet Indian children's immediate safety needs.

(2) Determining Whether ICWA is Applicable: DHR determines whether a child meets the ICWA definition of a child. DHR ascertains from tribes whether a child is a member of an Indian tribe.

(a) Contact of Child's Tribe: If the child's tribe is known, a contact with the Social Services Program of the identified tribe is made by registered mail with return receipt requested, within five working days of having established the child's tribe.

(b) Child's Tribe is Unknown: If the child's tribe is unknown and there is pending legal proceedings, notification is sent to the Secretary of Interior by registered mail with return receipt requested. The Secretary has fifteen (15) days after receipt of the notification to provide the required notice to the parents or Indian custodian and the tribe. An additional twenty (20) days may be granted by the court for the tribe to prepare for legal proceedings.

Author: Margaret Livingston

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660-5-36-.03 Jurisdiction Of Tribal Courts And State Courts.

(1) Active Efforts to Keep an Indian Family Together: Prior to initiating court proceedings to remove Indian children from their homes, active efforts are made to provide remedial services and rehabilitative programs to prevent placement.

(2) Jurisdiction of State and Tribal Court: When the assessment is that an Indian child living off the reservation needs to come into care, the State Court has jurisdiction.

(a) Exclusive Tribal Jurisdiction: Tribal Courts have exclusive jurisdiction over child custody proceedings, as defined in ICWA, that involve Indian children who reside on the reservation or are "domiciled" within the reservation. Tribes determine whether a child is domiciled on the reservation and this is afforded "full faith and credit" by state courts. A tribe's right to intervene in certain proceedings is absolute as specified in 25 United States Code, Chapter 21 §1901 - 1923.

(b) Tribal Court Ward: Tribal Courts have exclusive jurisdiction in cases that involve an Indian child who is a ward of the tribal court. The state court shall contact the tribal court to determine whether the child is a ward of the tribal court.

(c) Emergency Removal -DHR Authority: The Department has authority to take custody and assure the safety of an Indian child who is in imminent danger and who resides on an Indian reservation, is domiciled on a reservation or is a ward of the Tribe but is temporarily off the reservation. DHR is relieved of emergency custody when removal is no longer necessary to prevent imminent danger or the tribe assumes jurisdiction over the child.

(3) Jurisdiction of State Courts in Indian Child Welfare Cases: State courts are responsible for transferring jurisdiction to tribal courts upon the petition of either parent, the Indian custodian or Indian tribe, absent good cause or absent the objection of either parent. It is the responsibility of the trial court to determine good cause not to transfer jurisdiction to the tribal court of a case involving an Indian child who is a member or eligible to become a member of an Indian tribe. "Good cause to the contrary" has been interpreted by the United States Bureau of Indian Affairs, Department of Interior to include the following:

(a) The proceeding was at an advanced state when the petition to transfer was received because the petition was not

filed promptly by the parents, Indian custodian or the tribe after having received timely notification of the proceedings;

(b) The Indian child is over the age of twelve (12) years old and has personal objections to the transfer;

(c) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses and parties; or

(d) The parents of an Indian child over age of five years of age are not available, and the child has had little or no contact with the child's tribe or members of the child's tribe.

(4) Qualified Expert Witness: Before an Indian child is placed in foster care or termination of parental rights is ordered, except for emergency removals to prevent harm to an Indian child, testimony of a qualified expert witness is required. A qualified expert witness can include a member of the child's tribe, a lay expert having substantial experience in services to Indians, or a professional person having substantial education and experience in his or her specialty.

Author: Margaret Livingston

Statutory Authority: 25 United States Code, Chapter 21 §1901 - 1923.

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660-5-36-.04 Out Of Home Placement Of Indian Children

(1) ICWA Placement Requirements: When an Indian child or Alaskan Native child is removed from his/her home ICWA requires that the child be placed with extended family members, other tribal members, or other Indian families. When this is not possible, the Indian child must be placed in a foster home approved or specified by the Indian child's tribe; an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or a children's institution approved by the tribe or one that is tribally operated.

(2) Deviation from Placement Preferences:

(a) U. S. C. A. Title 25, Chapter 21 §1915 (c) provides for tribal resolution for different order of preference, personal preference considered; and anonymity in application of preferences. If the Indian child's tribe establishes a different

order of preference by resolution, the Department shall follow such order as long as the placement is the least restrictive and appropriate to the particular needs of the child.

(b) Guidelines for State Courts developed by the Bureau of Indian Affairs provide considerations for not following the order of preference.

1. The request of the biological parents or the child when the child is of sufficient age;

2. The extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness; or

3. The unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria.

(3) ICWA Placement Categories: There are two placement categories for Indian children needing out-of-home placement.

(a) Foster Care/Pre-adoptive Placement includes a member of the child's extended family; a foster home licensed, approved or specified by the child's 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 tribe.

(b) Adoptive placements include a member of the child's extended family; other members of the Indian child's tribe; or other Indian families.

(4) Consent for Voluntary Placement of Indian Children: Indian parents or custodians may consent to voluntarily place an Indian child in foster care.

(a) Such consent is valid only if executed in writing and occurring at least ten days after the birth of the Indian child.

(b) The written consent must be recorded before a judge of a court of competent jurisdiction, accompanied by that judge's certificate that the terms and consequences of the consent were fully explained and fully understood by the parent or Indian custodian and interpreted into a language that the parent or Indian custodian understood.

(5) Withdrawal of Voluntary Consent for Foster Care: Any Indian parent or Indian custodian may withdraw the consent for foster care placement under State law at any time and upon such withdrawal, the child shall be returned to the parent/Indian custodian.

(6) Involuntary Foster Care and Adoptive Placement: When an Indian child is being placed into foster care or termination of parental rights is being considered, clear and convincing evidence and in the case of termination of parental rights beyond reasonable doubt, and expert witness testimony must be presented to the court that the Indian child is likely to experience serious emotional or physical harm if custody remains with the parent or Indian custodian. No order for foster care placement, excluding emergency removals, or termination of parental rights may be entered without the clear and convincing evidence, and in the case of termination of parental rights beyond reasonable doubt and qualified expert witness testimony that continued custody by the Indian parent or custodian will likely result in the serious emotional or physical harm to the child.

(7) Required Notifications For Involuntary Foster Care/Adoptive Placements: In cases of involuntary placement of an Indian child in foster care or termination of parental rights of an Indian parent/custodian, the Department must notify the child's parents or Indian custodian and the Indian tribe of pending legal proceedings. Notification is by registered mail with return receipt requested. Except for emergency removals, no foster care placement or termination of parental rights proceedings may occur until at least ten days after notice has been received by the parents/custodian and tribe.

(8) Information Required At Time of Transfer of Placement and Care Responsibility of an Indian child to a Tribal Title IV-E Agency or a Tribe with a IV-E Agreement: Placement and care responsibility means that the title IV-E agency or a tribe with a IV-E agreement is legally accountable for the day-to-day care and protection of the child who has come into out of home care through either a court order or a voluntary placement agreement. Placement and care responsibility allows the title IV-E agency to make placement decisions about the child, such as where the child is placed and the type of placement most appropriate for the child. Certain information is required to be provided to a tribe when there is a transfer of placement and care responsibility of an Indian child from the Department to an Indian tribe approved as a title IV-E agency or a tribe with a IV-E agreement with the state title IV-E agency in which the tribe is located.

(a) The child's title IV-E eligibility status must be determined prior to transfer and provided to the Tribal IV-E agency or an Indian tribe with a IV-E agreement.

(b) Essential documents and information necessary to continue a child's eligibility for IV-E and Medicaid must be provided to the Tribal IV-E agency or an Indian tribe with a IV-E agreement. This includes, but is not limited to the following:

1. All judicial determinations to the effect that continuation in the home from which the child was removed would be contrary to the welfare of the child and that reasonable efforts as required by Department policies have been made;

2. Any permanency hearing orders required to establish on-going title IV-E eligibility;

3. Other documentation the Department may have that relates to the child's title IV-E eligibility for foster care maintenance payments or adoption subsidy payments;

4. Information and documentation available to the Department regarding the child's eligibility or potential eligibility for other Federal benefits.

5. The child's Individualized Service Plan (ISP) maintained by the Department which includes the health and educational records that are required elements of the ISP;

6. Information and documentation of the child's placement settings, including a copy of the most recent provider's license or approval.

(c) County departments need to be relieved of legal custody of the Indian child in the transfer process.

(d) Medicaid for a title IV-E eligible Indian child continues as long as the child receives title IV-E foster care or title IV-E adoption assistance payments. The Indian child is eligible for Medicaid in the State where the child actually resides.

Author: Margaret Livingston

Statutory Authority: 25 United States Code, Chapter 21 §1901 - 1923; 45 Code of Federal Regulations §1356.67..

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660-5-36-.05 ICWA And The Interstate Compact For The Placement Of Children.

(1) Five areas are considered with the Department's involvement with Indian children placed across state lines.

(a) Applicability: ICPC policies and procedures apply to ICWA cases. The extent of involvement that a county DHR has in an ICPC/ICWA case depends on whether the placement originates on a reservation or is destined to a reservation.

(b) Responsibility: Tribal authorities hold financial and service delivery responsibility when the tribe assumes jurisdiction pursuant to ICWA. For ICPC cases, the tribe is the "sending agency."

(c) Placement Supervision: The supervision of interstate placements of Indian children is determined by the extent of the Indian tribe's involvement in the planning of the placement. If the tribe only consents to the sending agency's placement plan, the Department's ICPC policies apply for both the sending and receiving state. DHR can also be the "sending agency" for placement of Indian children.

(d) Jurisdiction: Sending agencies, including Indian tribes, have jurisdiction per ICPC Article V (a) when children are validly placed with families on Indian reservations.

(e) Reports: If tribes function as "receiving states" or as agents for receiving states, they can be required to submit supervisory reports.

Author: Margaret Livingston

Statutory Authority: 25 United States Code, Chapter 21 §1901 - 1923.

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660-5-36-.06 Confidentiality And Requests For Case Information In ICWA Cases.

(1) Statutory provisions and DHR policies regarding confidentiality and the release of information from DHR case records apply to all cases involving Indian children and families.

(2) DHR shall provide to any federally recognized tribe or the Secretary of Interior, upon written request, information concerning placement of Indian children that provides evidence of the Department's efforts to comply with the order of placement preference.

Author: Margaret Livingston

Statutory Authority: 25 United States Code, Chapter 21 §1901 - 1923.

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660-5-36-.07 Definition Of Terms. There are certain terms used in the Indian Child Welfare Act (ICWA) that have different meanings from their use in other child welfare programs.

(1) Child Custody Proceeding - There are four types of child custody proceedings defined and covered in ICWA.

(a) Foster Care Placement is any action removing an Indian child from its parent or Indian custodian for temporary placement in out-of-home care and the parent or Indian custodian cannot have the child returned upon demand, but parental rights have not been terminated.

(b) Termination of Parental Rights is any action resulting in the termination of the parent-child relationship.

(c) Pre-adoptive Placement is the temporary placement of an Indian child in out-of-home care after the termination of parental rights, but prior to or in lieu of adoptive placement.

(d) Adoptive Placement is the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

(2) Domicile - For adults, "domicile" is established by physical presence in a place with intent to remain there. For Indian children "domicile" is established by their parents' "domicile." Indian children can be domiciled within a tribe's reservation without ever having been physically present on the reservation. When paternity is not established, the domicile of the mother is taken by the Indian child. The child's tribe will determine whether an Indian child is domiciled on the reservation.

(3) Extended Family Member is any person defined by law or custom of the Indian child's tribe or in the absence of

law or custom, any person who has reached the age of 18 and 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.

(4) Federally Recognized Indian Tribes are those tribes acknowledged by the Bureau of Indian Affairs, Department of Interior, as Indian tribes by virtue of their government-to-government relationship with the United States.

(5) Indian child is unmarried; under the age of eighteen (18); a member of a federally recognized Indian tribe, or eligible for membership in a federally recognized Indian tribe and the biological child of a member of a federally recognized Indian tribe.

(6) Indian Child's Tribe is the Indian tribe in which an Indian child is a member or eligible for membership or in the case of an Indian child being a member or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts.

(7) Indian Custodian is a person who has legal custody of an Indian child under tribal law or custom or under State law, or any Indian person to whom temporary physical care, custody and control has been transferred by the parent of such child.

(8) Parent is the biological parent of an Indian child or any Indian person who has lawfully adopted (includes tribal law or custom) an Indian child. Biological parent does not include the unwed father where paternity has not been established or acknowledged.

(9) Qualified Expert Witness is any person who, based on their level of education and experience with Indian people and culture, are recognized by courts of law to be experts on Indian culture.

(10) Reservation is Indian country defined in the United States Code and any lands, not covered under such section, title to which is either 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.

(11) Tribal Court is 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 which is vested with authority over child custody proceedings.

Author: Margaret Livingston

Statutory Authority: 25 United States Code, Chapter 21 §1901 - 1923.

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