



INDIAN CHILD WELFARE ACT

Past ∞ Present ∞ Future

Court Improvement Initiative Meeting, Jekyll Island August 11-12, 2022

Government Indian School, Main Building, Tomah, Wis.



PAST



PRESENT



FUTURE



US History with Native American Children and Families

US Government legislation and policies that impacted Native American families and children:

- Indian Civilization Fund Act 1819
- Boarding School Policy 1869
- Indian Adoption Project of 1958
- Indian Child Welfare Act of 1978

Indian Civilization Fund Act 1819

- In March 1819, Congress enacted the Indian Civilization Fund Act to encourage benevolent societies to provide missionary schools for Native American children and thereby “civilize” Native American children.
 - Schools taught Native American children to read and write in English, and about Anglo-American culture
 - Schools were usually located in or near tribal communities. Hence Native American children were able to retain their culture and language because they went home after lessons.
- In 1824 the Bureau of Indian Affairs (BIA) was created for the purpose of administering the money from the Civilization Fund to the churches.

Boarding School Policy 1869

- As a part of President Ulysses S. Grant's "Peace Policy" in 1869, management of Indian reservations was distributed to various Christian denominations, including Catholics, Methodists, Baptists, and Quakers. Grant's Peace Policy also included a federal boarding school policy that served two goals:
 - 1) the replacement of corrupt government officials, called the "Indian Ring," with religious men, nominated by churches to oversee the Indian agencies on reservations; and
 - 2) to "Christianize" the Native tribes and eradicate their culture and religion, primarily through removal of the children from reservation settings.

Boarding School Conditions

- Boarding schools were designed to separate children from their families, culture, language and reservation.
 - Implemented systemic militarized and identity-altering methodologies
 - School rules were enforced with corporal punishment and physical abuse
 - Use of Native languages was prohibited and subject to punishment
 - Physical, sexual, and emotional abuse were common
 - Due to overcrowding, children were often neglected and malnourished

Indian Adoption Project

- The Child Welfare League of America, with funds from the Bureau of Indian Affairs and the US Children's Bureau, administered the Indian Adoption Project in 1958 for the specific purpose of placing Native American children with non-native adoptive families.
 - From 1958 until 1967, the Indian Adoption Project placed 395 Native children with non-native families.
 - These practices continued until the 1970s.

Indian Child Welfare Act of 1978

- In recognition of the sovereignty of tribes to protect their children and families and in response to outrage and criticism about the long history of government-backed displacement and maltreatment of Native children, Congress passed the Indian Child Welfare Act (ICWA) in 1978.
- ICWA protects the best interests of American Indian and Alaska Native children and promotes the stability and security of Indian tribes by:
 - Establishing minimum federal jurisdictional, procedural, and substantive standards for state removals and adoptions involving Indian children
 - Providing assistance to tribes in the operation of child and family service programs.

ICWA Federal Regulations 2016

- Due to inconsistent application of ICWA and because the ICWA guidelines were only advisory, the US government implemented the Indian Child Welfare Act Federal Regulations effective December 2016.
 - Guidelines are *advisory* and focus more on state agencies and best practices
 - Regulations are *binding* and focus more on courts and legal requirements



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ICWA Overview

- Referred to as the Gold Standard of Child Welfare policy that should be provided for all children because it:
 - Promotes efforts to keep children connected to their families, communities and cultural heritage
 - Requires the Implementation of Active Efforts
 - Prioritizes upon preferred placements

When Does ICWA Apply

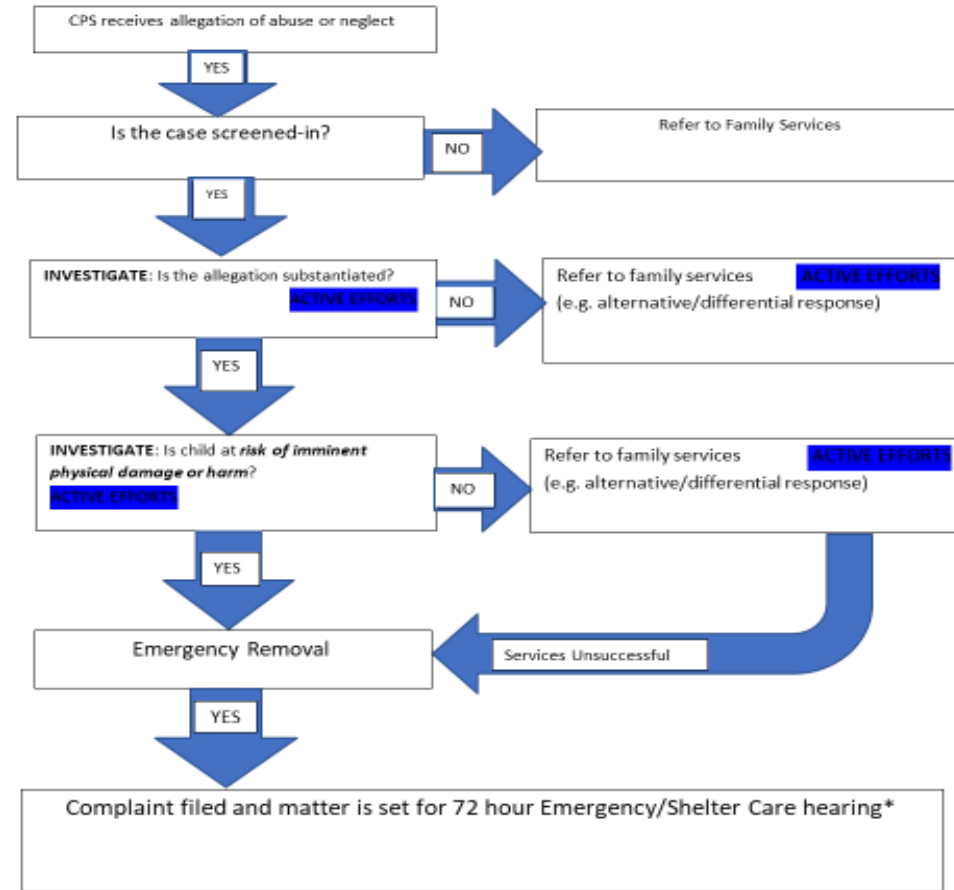
- ICWA applies in state courts when there is an emergency removal or child-custody proceeding involving an Indian child who is:
 - Unmarried and
 - Under 18 years of age (if proceeding commences before 18th birthday, ICWA will continue to apply)
 - Who is either a
 - Member or citizen of a Tribe or
 - Eligible for membership or citizenship in an Indian Tribe and the biological child of a member or citizen of an Indian Tribe. **25 CFR § 23.103***

***See 25 CFR § 23.109 if member of or eligible for membership in more than one tribe**

CPS Flowchart for ICWA Case

BEST PRACTICES: Before an Indian child is removed, the state agency should be employing Active Efforts to return the Indian child safely to their family.

FLOWCHART OF ICWA CASE: FROM CPS TO EMERGENCY REMOVAL



From *Understanding ICWA* presentation, June 7, 2022 by National Indian Child Welfare Association
*Modified to reflect Georgia Juvenile Procedure 08/05/2022

Emergency Removals

- A petition for emergency removal should contain a statement of:
 - The imminent risk of physical damage or harm to the Indian child AND
 - Evidence that the emergency removal continues to be necessary to prevent such imminent physical damage or harm to the child.
- In addition to identifying information about the Indian child and their parents and Indian custodians, the petition should also contain the following:
 - Steps taken to provide notice to the child's parents, custodians, and tribe
 - Efforts made to contact the Tribe and transfer the child to the Tribe's jurisdiction where the Tribe has exclusive jurisdiction.
 - A statement of the efforts that have been made to assist the parents or Indian custodians so the Indian child can be safely returned to their custody. **25 CFR § 113**

Before emergency removal can be granted, the court must:

- Find that the emergency removal is necessary to prevent imminent physical damage or harm to the child; and
 - Promptly hold a hearing on whether the emergency removal continues to be necessary if new information indicates that the emergency has ended
- An emergency proceeding regarding an Indian child must terminate once the court finds that removal is no longer necessary to prevent imminent risk of physical damage or harm to the child.**
- If new information indicates that the emergency has ended, the court must promptly hold a hearing on whether the emergency removal continues to be necessary.
- An emergency proceeding regarding an Indian child should not be continued for more than 30 days unless the court finds 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 proceeding to the jurisdiction of the appropriate Tribe
 - It has been impossible to initiate the “child-custody” (Adjudication) proceeding. **25 CFR § 113**

Active Efforts

Affirmative, active, thorough and timely efforts intended primarily to maintain or reunite an Indian child with their family. Active Efforts should be provided in a manner consistent with 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 members, Indian custodians, and Tribe.

Reasonable Efforts

- Referral for services
- Regular case management
- Mainstream service providers

Active Efforts

- Actively assisting family with services
- Specifically tailored case management
- Culturally appropriate providers

Notice Requirements

- Where court knows or has reason to know that the subject of an involuntary foster care placement or termination of parent rights is an Indian child, the court must ensure that notice must be sent by registered or certified mail with return receipt requested to:
 - Each tribe where the child may be a member or is eligible for membership
 - The child's parents; and
 - The child's Indian custodian if applicable.
- If the identity or location of the child's parents, Indian custodian, or Tribe(s) cannot be ascertained, notice must be sent to the Bureau of Indian Affairs, Regional Director. **25 USC § 1911; 25 CFR § 23.111**

Jurisdiction

- If Tribal Court has ***exclusive jurisdiction*** then the state case must be dismissed and the case will proceed in Tribal Court. Tribal Court has ***exclusive jurisdiction*** when:
 - Child is domiciled on tribal lands and no federal law modifies jurisdiction, OR
 - Child is a ward of the tribal court. 25 USC § 1911
- If Tribal and state courts have ***concurrent jurisdiction***, cases may proceed in state court with tribal notice. Tribal Court has ***concurrent jurisdiction*** when:
 - A child is domiciled off reservation and tribe asserts jurisdiction
 - A child lives on tribal lands, but a federal law states that jurisdiction is shared.
- Either parent, Indian custodian, or the tribe may request **at any time**, orally or in writing, to transfer the proceeding to the jurisdiction of the child's tribe. 25 CFR § 23.115(a)

Standards of Proof

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- **FOSTER CARE PLACEMENT:** an Indian child cannot be placed in foster care unless *clear and convincing evidence*, that includes the testimony of one or more Qualified Expert Witnesses, is presented to demonstrate:
 - That the parent or Indian custodian's continued custody of the Indian child is likely to result in serious emotional or physical damage to the child.
 - Must find a causal relationship between the conditions for removal and the likelihood that continued custody will result in serious emotional or physical damage to the child.
25 CFR § 23.121(a),(c)
 - **TERMINATION OF PARENTAL RIGHTS:** A court cannot terminate parental rights for an Indian child unless evidence *beyond a reasonable doubt* is presented that includes testimony of a Qualified Expert Witness demonstrating:
 - That the parent or Indian custodian's continued custody is likely to result in serious emotional or physical damage to the child. **25 CFR § 23.121(b)**

Qualified Expert Witnesses

- The court or any party may request the assistance of the Indian child's tribe in locating persons to serve as Qualified Expert Witnesses (QEW).
- The tribe may designate a Qualified Expert Witness (QEW)
- The case manager or social worker assigned to the case may not serve as a Qualified Expert Witness (QEW) in proceedings for that child. A Qualified Expert Witness (QEW) must be qualified to testify about:
 - Whether the parent or Indian custodian's continued custody of the child is likely to result in serious emotional or physical damage to the child
 - And as to prevailing social and cultural standards of the Indian child's tribe.

25 CFR § 23.122

Placement Preferences

- An Indian child's placement in foster care, where the Indian child's tribe hasn't established a different order of placement preference, must be given in descending order:
 1. Member of the Indian child's extended family
 2. Foster home that is licensed, approved or specified by the Indian child's tribe
 3. An Indian foster home licensed or approved by an authorized non-Indian licensing authority
 4. 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. **25 CFR § 23.131**
- Departure from the placement preference order can only be done by a showing of clear and convincing evidence that there is good cause to depart. **25 CFR § 23.132**

Rights of Parents, Custodians and Tribes

- In any state court proceedings for foster care or termination of parental rights for an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene **at any point** in the proceeding. **25 USC § 1911(c)**.
- Parents and Indian custodians have the right to appointed counsel . **25 CFR § 23.111(g)**
- Parents, Indian custodians, and Tribes have right to request, orally or in writing, that matter be transferred, or object to such transfer. **25 CFR § 23.115**
- Parents, Indian custodians, and Tribe have right to additional time to prepare for proceedings. **25 CFR § 112.**



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Brackeen v. Haaland

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- US Supreme court granted cert in February 2022. 36 Amicus briefs and 4 petitions for cert were filed with the US Supreme Court Arguments will be heard on November 9, 2022.
 - Constitutional challenges against ICWA were based on:
 - Administrative Procedures Act
 - Tenth Amendment
 - Full Faith and Credit Clause and Equal Footing Doctrine
 - Indian Commerce Clause
 - Fourteenth and Fifteenth Amendment
 - Spending Clause
 - Non-delegation doctrine

Post-Brackeen

- Codification of Georgia ICWA Legislation by adding to the Juvenile Code
 - Clarify how ICWA applies in Georgia
 - DFCS policy cannot serve as guidance for juvenile courts
 - Ensure consistent application throughout the state
 - Extend ICWA protections to children of state-recognized tribes in Georgia
 - Georgia can set higher standards
- Create Tribal-state agreements, if none are in place

States with ICWA Statutes

States can provide greater protections for Native American children and families. An increasing number of states have codified their own versions of ICWA that mirror the requirements of ICWA or grant additional protections for Native children.

- Iowa
- Michigan
- Minnesota
- Nebraska
- New Mexico
- Oklahoma
- Oregon
- Washington
- Wisconsin

Best Practice Tips

- Ask parent about Native Heritage BEFORE complaint is filed and ask extended family members for additional information
- Implement *Active Efforts* before child comes into care
- Notify and maintain contact with tribe, or the Bureau of Indian Affairs
- Speak with parent or custodian about extended family members for placement, whether extended family are tribal members or not

Useful Resources

- **Indian Child Welfare Act-Indian Affairs, U.S. Department of the Interior**
<https://www.bia.gov/bia/ois/dhs/icwa>
- **Native American Rights Fund**
<https://www.narf.org/>
- **National Indian Child Welfare Association**
<https://www.nicwa.org/>
- **National Child Welfare Resource Center for Tribes**
<http://www.nrc4tribes.org/index.cfm>
- **Georgia Council on American Indian Concerns**
<https://georgiaindiancouncil.com/>
- **Federal Indian Boarding School Initiative Investigative Report** [Federal Indian Boarding School Initiative Investigative Report \(bia.gov\)](#)
- **Turtle Talk**
[state ICWA laws – Turtle Talk](#)
- **Association on American Indian Affairs** [Indian Child Welfare Act - Association on American Indian Affairs \(indian-affairs.org\)](#)
- **25 USC §§ 1901-63** [25 USC Ch. 21: INDIAN CHILD WELFARE \(house.gov\)](#)
- **25 CFR § 23** [eCFR :: 25 CFR Part 23 -- Indian Child Welfare Act](#)
- **Georgia Division of Family and Children Services**
Child Welfare Policy Manual, chapter 1.6 [Online Directives Information System - ODIS \(ga.gov\)](#)
- **NCSL, Federal and State Recognized Tribes**, [List of Federal and State Recognized Tribes \(ncsl.org\)](#)



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