

**DEPARTMENT OF HUMAN RESOURCES
SOCIAL SERVICES ADMINISTRATION
311 W. SARATOGA STREET
BALTIMORE MARYLAND 21201**

DATE: January 10, 2008

CIRCULAR LETTER: SSA Circular Letter # 08-8

TO: Directors, Assistant Directors of Services and Supervisors of Local
Departments of Social Services,

FROM: Cathy F. Mols
Executive Director
Social Services Administration

RE: Providing Services to Native American Children

PROGRAMS AFFECTED: In Home Services and Out-of- Home Placement Services
(Foster/Kinship Care/Adoption)

ACTION REQUIRED OF: In-Home Services and Out-of-Home Placement Staff

ACTION DUE DATE: Immediate

CONTACT PERSON: Stephanie Pettaway
Director, Child Welfare Practice and Policy
410-767-7506

Purpose

This circular is to provide guidance to child welfare staff for delivering services to Indian Children and their families.

Background

The Indian Child Welfare Act 1978 established minimum federal jurisdictional, procedural and substantive standards aimed to achieve the dual purposes of protecting the rights of an Indian child to live with an Indian family, as well as, stabilizing and fostering continued tribal existence. The thrust of the Act ensured that US courts and agencies recognize Indian membership and heritage in two ways: Native American tribes, wherever possible will have jurisdiction over child custody proceedings; and legal safeguards are established when child custody proceedings remain with the district court. There are the five major requirements in ICWA that the State must address when placing an American Indian child:

1. Identification of Indian children by the State Child Welfare services agency;
2. Notification of Indian parents and Tribes of State proceedings involving Indian children and their right to intervene;
3. Special placement preferences for Indian children;
4. Active efforts to prevent the breakup of the Indian family; and
5. Use of Tribal courts in child welfare matters; Tribal right to intervene in State proceedings or transfer proceedings to the jurisdiction of the Tribe.

The Act outlines requirements and procedures to be followed when serving Indian children. It includes Protective custody; out-of-home care placements, pre-adoptive and adoptive placements, and actions to terminate parental rights. It does not include services extended in the process of a child abuse and neglect investigation, the dissolution of marriage, voluntary placements or the provision of any protective child welfare services where there have been no custody proceedings.

However a foster care placement of an Indian child may not be made unless the court is satisfied that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proven unsuccessful. The act requires “active efforts” which have been defined by, The Supreme Court of Alaska:

We cited the distinction between “active efforts” and “passive efforts” drawn by Craig J. Dorsay, The Indian Child Welfare Act and Laws Affecting Indian Juveniles Manual 157-58 (1984). According to Dorsay, passive efforts entail merely drawing up a reunification plan and requiring the “client” to use “his or her own resources to [] bring [] it to fruition.” Dorsay at 157-58. Active efforts, on the other hand, include taking the client through the steps of the plan rather than requiring the plan to be performed on its own”. Id. A.M. v. Alaska, 945 P.2d 296, 306 (Alaska 1997).

The scope of “active efforts,” and how they compare to “reasonable efforts,” is a legal matter currently under review by Maryland’s highest court.

Eligibility

The ICWA specifically covers any unmarried child under eighteen who is either a member of an Indian tribe, or eligible for membership and the biological child of a member. Federally recognized tribes are listed each year in the Federal Register. Maryland does not have any federally recognized tribes. However, any child with American Indian heritage must have the opportunity to connect with their Native American heritage.

Identification of the child as being of American Indian heritage

Children and parents must be asked if they are of American Indian heritage. Relatives shall also be asked about Indian ancestry if one or both parents are unavailable or unwilling to provide the needed information. This must occur and be documented at intake, placement, and any time the permanency plan is changed. Other circumstances when American Indian heritage may be identified:

- 1) Any party to the case, Indian tribe, Indian organization or public or private agency informs the local department that the child is an Indian child.
- 2) Any public or state-licensed agency involved in child protection services or family support had discovered information which suggests that the child is an Indian child
- 3) The child who is the subject of the proceeding gives the court reason to believe he or she is an Indian child
- 4) The residence or domicile of the child, his or her biological parents, or the Indian custodian is known by the local department to be or shown to be a predominantly Indian community, or presents reasonable indicia of a connection to the Indian community.
- 5) An officer of the court involved in the proceedings has knowledge that the child may be an Indian child.

All available information will be reviewed for any indication of Indian Heritage. If there is any indication that the child has American Indian heritage the following must occur:

- 1) Parents and child will be provided with information on the Indian Child Welfare Act, a tribal ICWA contact person, American Indian advocates available in the community, services and resources available
- 2) Notification of Services to an Indian Child must be sent to the identified Indian tribe.
- 3) The local department must inform the court of any indication that the child may be of American Indian heritage.

The ICWA regulations must be followed for any child who is believed of Native American heritage until a final determination has been made. Such early identification is necessary to ensure that the Indian child is not traumatized by culturally inappropriate and/or illegal placements that must be interrupted at a later date to comply with the placement requirements of the ICWA.

If any indication of Indian ancestry is made, a diligent search shall immediately be initiated for the child's tribal affiliation. The National Tribal Enrollment office of the identified tribe should be contacted directly. The following site offers contact information for federally recognized tribes: www.doi.gov/bureau-indian-affairs.html. If a specific tribe has been named, the child's tribe should be contacted within 24 hours. Document efforts made to contact the child's tribe. Written notice shall be sent to the tribe by certified mail with return receipt within 7 days. When no specific tribe can be ascertained but ICWA eligibility is possible, the Bureau of Indian Affairs as agent for the federal department of the Interior should be notified by certified letter, return receipt requested.

The local department should be prepared to provide information on "how" this child is of American Indian descent (mother is Indian, grandfather is Indian, etc.) and to inform the Tribe of the status of the child's proceedings. It is important that the Tribe and the local department identify a contact person for information and services regarding the child.

The Tribe determines whether the child is an enrolled member or is eligible to be enrolled. Enrollment means that the child is/would be a recognized member of the tribe and privy to any services or benefits of membership. Because each tribe has different standards of "relatedness", the Tribe should be notified of any child with American Indian blood to determine if the child meets the related qualifications. Any child for whom the local department has knowledge of American Indian heritage must receive ICWA consideration. The National Indian Child Welfare Association (NICWA) is available to help with any concerns that you may have. They may be reached by phone at (503) 222-4044 or www.nicwa.org.

Tribal Rights and Responsibilities

Once the Tribe determines that a child is enrolled or is eligible for enrollment, it has the right to:

- Be informed of all progress and proceedings regarding the child
- Determine placement (tribal home)
- Allow the placement of the child by the local department
- Intervene in CINA, TPR, and adoption proceedings

The Tribe is to notify the local department of:

- The intent to take custody and commitment of the child under ICWA
- The intent to allow placement of the child in an American Indian heritage foster home within the state
- The intent to allow the state to place the child with non-American Indians
- The intent to consent to state proceedings to terminate parental rights and place for adoption.

(All notification should be received in writing.)

The local department is to proceed with the child's case while awaiting a decision from the tribe. The local department must continue to keep the Tribe informed of the child's status and any proposed changes.

Should the Tribe decide to take custody and commitment of the child, the local department will work with the tribe to transfer jurisdiction of the court and to physically place the child with the Tribe. Alternately the Tribe may direct that the child be placed in any American Indian heritage home within the state, maybe within the child's community. Therefore, it is important that foster home recruitment efforts include the recruitment of American Indian families.

Active Efforts to Prevent Family Breakup

The prevailing standard of the tribe should guide all services and decisions on a case. The agency must make active efforts to provide services to the family after the investigation and prior to a decision to remove the child. The scope of "active efforts," and how they compare to "reasonable efforts," is a legal matter currently under review by the State's highest court. "Active efforts" as we are defining it at this time, means not just an identification of the problems or solutions, but actual concrete efforts showing an active attempt to resolve the conditions.

Examples of Active Efforts:

- Tribal representative is invited to participate at the earliest possible point in case planning and their advice is actively solicited.
- Tribe has been/is given full access to social service records.
- Advice is sought from American Indian advocates involved with the case.
- An expert is consulted with substantial knowledge of prevailing social and cultural standards and child-rearing practices within the tribal community
- Evaluation of the family's circumstances.
- Develop case plan with parent/custodian that uses tribal and American Indian community resources.
- Concrete services such as financial assistance, food, housing, etc. are provided if needed.
- If the child is not with a parent, visitation agreements (including transportation assistance) keep the child in close contact with parents, siblings, and other relatives.
- Parents and children are referred to American Indian agencies for services.
- Extended family members are contacted as resource for child.
- If there is difficulty working with the family, assistance is sought from agency expertise in working with American Indian families.

Placement of Indian Children

Preference of Placement

Any Indian child accepted for foster care placement must be placed in the least restrictive setting which most approximates a family in which their special needs, if any may be met. The child shall be placed within reasonable proximity to their home, taking into account any special needs they may have. Preference shall be given, in absence of a good cause to the contrary, to a foster care placement with:

- 1) a member of the Indian child's extended family
- 2) a foster home 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 Indian child's needs

In the adoptive placement of an Indian child, a preference shall be given, in the absence of good cause to the contrary, to a placement with:

- 1) a member of the child's extended family
- 2) other members of the Indian child's tribe
- 3) other Indian families

Placement preferences must be strictly followed. Placement of an Indian child into a non-Indian home is the last option or alternative after all other options have been exhausted. "Good cause" not to follow the placement preferences is a legal concept and cannot be used without court approval. When appropriate the preference of the Indian child or parent shall be considered. Parental preference alone is not sufficient reason for not following the ICWA placement requirements. If the local department believes that good cause exists for not placing the child in a higher preference placement the local department should seek approval of the tribe. The tribe may effect change in placement preference by order of resolution. When the tribal resolution is received by the local department or court effecting the placement of an Indian child, the local department shall follow the changed order of preference so long as the placement is the least restrictive setting appropriate to the particular needs of the child.

Emergency Removal

Nothing in the ICWA shall be construed to prevent the emergency removal of an Indian child in order to prevent imminent damage or harm to the child. Diligent efforts should be made to place a child in a home of first preference. Only if that is not possible may a child be placed in a home of the next preference category. The local department shall ensure that the emergency removal or placement terminates immediately when it is no longer necessary to prevent imminent damage or harm to the child. The local department

shall expeditiously proceed with child custody proceedings, transfer the child to the jurisdiction of the appropriate Indian tribe, or return the child to the parent or Indian custodian, as appropriate.

Remedial services and rehabilitative programs; preventive measures

CPS, Continuing CPS, Families Now, and Intensive Family Preservation are examples of rehabilitative programs providing remedial services. An Indian child under ICWA may not be placed in foster care unless the local department can satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, and that these efforts have proved unsuccessful.

Foster care placement

A foster care placement may not be ordered in a court proceeding without a determination supported by clear and convincing evidence and the testimony by a qualified expert witness, stating that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Adoptive placement

An adoptive placement may not be ordered in a court proceeding without a determination supported by evidence beyond a reasonable doubt and the testimony by a qualified expert witness, stating that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Court Proceedings

In any involuntary proceeding in Maryland court, where the court knows or has reason to know that an Indian child is involved, the local department must notify the parent or Indian custodian and the Indian child's tribe, by certified mail with return receipt, of the pending proceedings and their right of intervention. If the identity or location of the parent or custodian is unknown and the tribe cannot be determined, notice shall be given to the Secretary of the Interior in the same manner. The Secretary will have 15 days after the receipt to provide notice to the parent or Indian custodian and the tribe. No court proceeding may be held until at least 10 days after receipt of notice by the parent or Indian custodian and the tribe or Secretary. Upon request the parent, Indian custodian or the tribe may be granted up to 20 days to prepare for the proceeding.