

10. Indian Child Welfare Act (ICWA)

10.0 PURPOSE: The following procedures apply only to children of American Indian descent who are removed from their homes due to harm or threat of harm of abuse or neglect (not divorce or other custody proceedings).

10.1 AUTHORITY

- | | | |
|----|---------------------------|---|
| A. | P.L. 94-257 | Indian Child Welfare Act of 1978 modified by final ICWA rule; effective 12/12/16; published in the Federal Register on 6/14/16 (81 Fed. Reg. 38778) |
| B. | P.L. 96-272 | Adoption Assistance and Child Welfare Act of 1980. |
| C. | P.L. 105-89 | Adoption and Safe Families Act of 1997 |
| D. | CFR 1340.14 (d-i) | Investigations, institutional child abuse and neglect, emergency services, guardian ad litem, prevention and treatment services, confidentiality. |
| E. | CHAP 587, HRS | Child Protection Act |
| F. | CHAP 350, HRS | Child Abuse |
| G. | CHAP 346, HRS
(Part I) | Department of Human Services
(General and Administrative Provisions) |

10.2 OVERVIEW OF THE INDIAN CHILD WELFARE ACT

The Indian Child Welfare Act of 1978 provides federal guidelines to states for the definition and identification of American Indian children as well as protocols that **must** be followed in the event a child, who is removed from his/her home due to allegations as abuse or neglect (not divorce cases), is later determined to be an American Indian child.

The purpose of the Indian Child Welfare Act is to protect the best interest of American Indian children and to promote the stability and security of American Indian tribes and families by the establishment of minimum standards for **1)** the removal of American Indian children from their

families; and **2)** the placement of American Indian children in foster or adoptive homes, with preference being given to placement with extended family or other American Indian families.

10.3 IDENTIFICATION GUIDELINES

10.3.1 Definition of an American Indian child

An American Indian child is an unmarried person, less than 18 years of age, who is: a member of an American Indian tribe; or eligible for membership in an American Indian tribe, or the biological child of a member of an American Indian tribe. An "American Indian tribe" is a tribe recognized as eligible for services by the U.S. Secretary of the Interior.

10.3.2 How to identify an American Indian child

A child should be identified as an American Indian child as quickly as possible, subsequent to the acceptance of an intake for investigation. Identification should be completed prior to filing a petition or opening a case for services by the department, if possible. Determine a child's possible status as an American Indian child by asking the reporter, parent, caretakers, or relatives of the child if the child is an American Indian child.

A child is to be considered an American Indian child if any one of the following criteria is met:

- A. Any party to the case, an American Indian tribal organization, tribal court, or any public or private agency, informs the CWS social worker that the child is an American Indian.
- B. The reporter, the child, the parents, the caretaker or relatives inform the CWS social worker that the child is an American Indian child.
- C. Any information is obtained that indicates the child is an American Indian child.

10.3.3 How to verify the child's American Indian status

If a child is identified as an American Indian child, verify the child's status by:

- A. A birth certificate indicating American Indian background.

B. If the child's tribe is known, contact the tribe by phone, followed by a confirmation letter. If the child is affiliated with more than one tribe, contact each of the known tribes.

C. If the child's tribe is unknown, contact:

Department of the Interior
Interior Building
C Street, N.W.
Washington D.C. 20240
Bruce Babbit, Secretary of the Interior
Telephone (202) 208-7351

OR:

The Bureau of Indian Affairs
Portland Area X Offices
The Holladay Federal Bldg. -
N.E. Holladay St.
Box 3785
Portland, OR 97232-4182

For assistance in Hawaii In determining the proper tribe:

The American Indian Center
1641 S. Beretania Street, Suite 303
Honolulu, Hawaii 96826
Telephone: 947-3206

10.4 REMOVAL PROCEDURES FOR AMERICAN INDIAN CHILDREN

When an American Indian child is at risk of harm and needs to be removed from his/her parent ("parent" does not include the alleged father of the child who has not established paternity) or an Indian custodian, the CWS social worker must follow the Indian Child Welfare Act in regards to notice to the proper tribal jurisdiction as well as court intervention. An "Indian custodian" is a person of Indian descent who has the temporary custody of an Indian child through tribal law or custom or by consent of the legal parent.

10.4.1 Notification Procedures

A. If a Temporary Foster Custody petition is being filed because the child was involuntarily removed from the home, as soon as

the CWS social worker is aware that the child is a possible American Indian child, even without proper verification, the CWS social worker is to notify the Deputy Attorney General (DAG) assigned to the case of the child's possible status. The DAG is to notify, by registered mail, the known tribe or the American Indian Center in Hawaii, of the court proceedings.

- B. If the child, over the age of ten days, has been removed through a voluntary foster placement agreement, (DHS 1568, Voluntary Foster Custody Agreement), the CWS social worker must notify the proper tribe or the American Indian Center, through a written letter, of the child's removal. The letter is to be sent registered mail, return receipt requested.

The CWS social worker is to also immediately file a petition for Foster Custody as a voluntary foster custody consent is only valid when executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the judge's certification that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian.

The court is also to certify that the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood.

10.4.2 Placement Options

As soon as a child is identified as a possible American Indian child, the Act is to be followed in regards to placement. Prior to any placement in a non-American Indian home, the order of placement preferences, with consideration to the child's special needs, if any, are as follows:

- A. A member of the child's extended family;
- B. A foster home licensed, approved or specified by the child's tribe or representative;
- C. An American Indian foster home licensed or approved by an authorized non-Indian licensing authority;
- D. An institution for children approved by an American Indian tribe or operated by an American Indian organization which has a program able to meet the American Indian child's needs.

10.5 RIGHTS OF THE TRIBE

In the event a child is identified as an American Indian child, the child's identified tribe has the following rights:

- A. They must be notified of the court proceedings and may become parties to the court case. They are entitled to copies of all documents submitted to court. If they do not wish to become parties to the court action, they must obtain written consent from the child's parents/legal caretakers or through a court order, permission to allow the department to disclose requested information.
- B. They have the right to intervene in any State court proceeding involving an American Indian child where the issue before the court is foster placement or termination of parental rights, pre-adoptive placements or adoptive placements.
- C. They have the right to request that jurisdiction over the proceedings that involves foster placement or termination of parental rights be transferred to an appropriate tribal court unless:
 - 1. One of the parents objects;
 - 2. The tribe has declined to handle the matter;
 - 3. The state court finds "good cause" not to transfer the case.
- D. If the jurisdiction is transferred to a tribal court, the tribal court will assume complete jurisdiction and responsibility for the case. Any legal status awarded to the department will cease and the CWS social worker will provide case documentation to the tribal court and terminate its CPS involvement.
- E. The Indian Child Welfare Act grants exclusive jurisdiction to Indian tribes over child custody proceedings involving American Indian children residing on tribal reservations. Presently there are no American Indian reservations in the State of Hawaii and any tribal representative who desires exclusive jurisdiction over an American Indian child must petition the court for such jurisdiction.

10.6 LEGAL FINDINGS NEEDED FOR AMERICAN INDIAN CHILDREN

In the event an American Indian child is placed in foster custody or termination of parental rights is being requested, the following must be demonstrated to the court and be reflected in the orders issued by the court.

- A. Active efforts have been made to provide remedial services and rehabilitative programs to prevent the breakup of the family. A finding in State court of "reasonable efforts" will satisfy this requirement.
- B. In the event an American Indian child is removed from the home a determination has been made, which is supported by clear and convincing evidence which includes testimony of qualified expert witnesses, that the continued custody of the child by his/her parents or caretakers is likely to result in serious emotional harm to the child.
- C. In the event termination of parental rights is being requested a determination is made, which is supported by evidence beyond a reasonable doubt which includes testimony of qualified expert witnesses that the continued custody of the child by the parents or caretakers is likely to result in serious emotional harm to the child.
- D. A voluntary consent for foster care placement or termination of parental rights is not valid if given within 10 days prior to or subsequent to a child's birth.

This requirement means that voluntary foster placement consents for newborns, less than 10 days old, who are American Indian, are not valid. Thus a TFC petition must be generated in those cases. (Refer to Chapter III, Section 6, LEGAL INTERVENTION.)

- E. In any child custody (CPS) case involving an American Indian child in which the court determines the Indian parent/caretaker is indigent, the parent/caretaker has the right to court appointed counsel.

** Although this requirement is normally met through HRS 587, the CWS social worker needs to assist the parent/caretaker in making the request to the court for counsel. The CWS social worker needs to assure that the parent/caretaker has adequate counsel.

The court may also appoint a separate counsel for the child upon finding that such an appointment is in the best interest of the American Indian child.

** This is also covered in HRS 587.

10.7 ADOPTION CONCERNS

- A. When a child who is an American Indian is in need of an adoptive home, placement preferences shall be:
 - 1. A member of the child's extended family.
 - 2. Other members of the child's tribe.
 - 3. Other American Indian families.

10.8 INDIAN CHILD WELFARE ACT (1978)

- A. Transfer of a Title IV-E American Indian Child to a Tribal Agency
 - 1. When transferring responsibility for placement and care of an American Indian child, as defined under the ICWA, under a state Title IV-E plan to a Tribal Title IV-E agency or American Indian Tribe with a Title IV-E agreement, the Department shall ensure the following:
 - i. In consultation with the tribes, CWS will ensure that transfer proceedings are established and maintained as evidenced by these documented efforts:
 - a. Caseworker will contact the American Indian Tribal representative or Tribal consultant regarding the placement of the American Indian child.
 - b. Caseworker will discuss with the Tribal representative or consultant the best efforts to provide for the American Indian child's well being and compliance under the ICWA;
 - ii. CWS will ensure that the child's case transfer shall not affect the American Indian child's eligibility, receipt of services, payment under Title IV-E and the medical assistance program pursuant to Title XIX;

- iii. CWS FC-IM unit will prioritize the eligibility determination of the American Indian child, and quickly establish the Title IV-E eligibility preferably before or at the time of transfer;
- iv. CWS worker will provide the American Indian tribe the necessary documentation and information to continue the American Indian child's eligibility for Title IV-E and Medicaid to the Tribal Title IV-E agency or an American Indian Tribe with a Title IV-E agreement. This documentation shall include, but is not limited to the following:
 - a. All judicial determinations (Family Court Orders that have "Contrary to the Welfare of the Child" language) that continuation in the home from which the American Indian child was removed would be contrary to the welfare of the child and that reasonable efforts were made;
 - b. Other documentation that relates to the American Indian child's Title IV-E eligibility such as payments made to the child and or family from the tribe, if any, in the month of AFDC linkage.
 - c. Information and documentation available regarding the American Indian child's eligibility or potential for eligibility for other federal benefits;
 - d. The American Indian child's case plan, (SFHR, FSP) including the health, education and psychological records, progress notes, and other relevant information.
 - e. Brief narrative information and documentation of the American Indian child's current placement settings;
 - f. A copy of the most recent or current placement setting license or approval.

Sources for Indian Welfare Act (1978)

PDF from <http://www.nicwa.org/policy/law/icwa/ICWA.pdf>

More informative site with Q and A:

http://www.nicwa.org/Indian_Child_Welfare_Act/

Indian Child Welfare flow charts: <http://www.icwlc.org/flowcharts.html>

Table of Contents

- § 1901. Congressional findings
- § 1902. Congressional declaration of policy
- § 1903. Definitions

SUBCHAPTER I—CHILD CUSTODY PROCEEDINGS

- § 1911. Indian tribe jurisdiction over Indian child custody proceedings
- § 1912. Pending court proceedings
- § 1913. Parental rights; voluntary termination
- § 1914. Petition to court of competent jurisdiction to invalidate action upon showing of certain violations
- § 1915. Placement of Indian children
- § 1916. Return of custody
- § 1917. Tribal affiliation information and other information for protection of rights from tribal relationship; application of subject of adoptive placement; disclosure by court
- § 1918. Reassumption of jurisdiction over child custody proceedings
- § 1919. Agreements between States and Indian tribes
- § 1920. Improper removal of child from custody; declination of jurisdiction; forthwith return of child: danger exception
- § 1921. Higher State or Federal standard applicable to protect rights of parent or Indian custodian of Indian child
- § 1922. Emergency removal or placement of child; termination; appropriate action
- § 1923. Effective date

SUBCHAPTER II—INDIAN CHILD AND FAMILY PROGRAMS

- § 1931. Grants for on or near reservation programs and child welfare codes
- § 1932. Grants for off-reservation programs for additional services
- § 1933. Funds for on and off reservation programs
- § 1934. "Indian" defined for certain purposes

SUBCHAPTER III—RECORDKEEPING, INFORMATION AVAILABILITY, AND TIMETABLES

- § 1951. Information availability to and disclosure by Secretary
- § 1952. Rules and regulations

SUBCHAPTER IV—MISCELLANEOUS PROVISIONS

- § 1961. Locally convenient day schools
- § 1962. Copies to the States
- § 1963. Severability of provisions

http://www.tribal-institute.org/lists/chapter21_icwa.htm

Indian Child Welfare Act of 1978 (25 U.S.C. §§ 1901-63)

§ 1901. Congressional findings

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds--

1. that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;
2. that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;
3. that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;
4. that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and
5. that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families. (Pub. L. 95-608, § 2, Nov. 8, 1978, 92 Stat. 3069.) Short Title Section 1 of Pub. L. 95-608 provided: "That this Act [enacting this chapter] may be cited as the 'Indian Child Welfare Act of 1978'."

§ 1902. Congressional declaration of policy

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote 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 and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs. (Pub. L. 95-608, § 3, Nov. 8, 1978, 92 Stat. 3069.)

§ 1903. Definitions

For the purposes of this chapter, except as may be specifically provided otherwise, the term--

1. "child custody proceeding" shall mean and include--
 - i. "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;
 - ii. "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;
 - iii. "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and
 - iv. "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption. Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

2. "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen 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;
3. "Indian" means 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 1606 of title 43;
4. "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;
5. "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;
6. "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;
7. "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;
8. "Indian tribe" means 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 because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of title 43;
9. "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;
10. "reservation" means Indian country as defined in section 1151 of title 18 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. "Secretary" means the Secretary of the Interior; and (12) "tribal court" means 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. (Pub. L. 95-608, § 4, Nov. 8, 1978, 92 Stat. 3069.) Section Referred to in Other Sections This section is referred to in sections 1727, 3202, 3653, 4302 of this title; title 12 section 4702; title 26 section 168.

§ 1911. Indian tribe jurisdiction over Indian child custody proceedings

a. Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

b. Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe.

c. State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termination of parental rights to, 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.

d. Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity. (Pub. L. 95-608, title I, § 101, Nov. 8, 1978, 92 Stat. 3071.) Section Referred to in Other Sections This section is referred to in sections 1914, 1918, 1923 of this title.

§ 1912. Pending court proceedings

a. Notice; time for commencement of proceedings; additional time for preparation

In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: Provided, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

b. Appointment of counsel

In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.

c. Examination of reports or other documents

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

d. Remedial services and rehabilitative programs; preventive measures

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall 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.

e. Foster care placement orders; evidence; determination of damage to child

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, 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.

f. Parental rights termination orders; evidence; determination of damage to child

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, 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. (Pub. L. 95-608, title I, § 102, Nov. 8, 1978, 92 Stat. 3071.) Section Referred to in Other Sections This section is referred to in sections 1914, 1916 of this title.

§ 1913. Parental rights; voluntary termination

a. Consent; record; certification matters; invalid consents

Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

b. Foster care placement; withdrawal of consent

Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

c. Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody

In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

- d. Collateral attack; vacation of decree and return of custody; limitations

After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law. (Pub. L. 95-608, title I, § 103, Nov. 8, 1978, 92 Stat. 3072.) Section Referred to in Other Sections This section is referred to in section 1914 of this title.

§ 1914. Petition to court of competent jurisdiction to invalidate action upon showing of certain violations

Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title. (Pub. L. 95-608, title I, § 104, Nov. 8, 1978, 92 Stat. 3072.)

§ 1915. Placement of Indian children

- a. Adoptive placements; preferences

In any adoptive placement of an Indian child under State law, 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; or (3) other Indian families.

- b. Foster care or preadoptive placements; criteria; preferences

Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with--

- i. a member of the Indian child's extended family;
- ii. a foster home licensed, approved, or specified by the Indian child's tribe;
- iii. an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
- iv. 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.

- c. Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences

In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: Provided, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

- d. Social and cultural standards applicable

The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties. (e) Record of placement; availability A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe. (Pub. L. 95-608, title I, § 105, Nov. 8, 1978, 92 Stat. 3073.)

§ 1916. Return of custody

a. Petition; best interests of child

Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 1912 of this title, that such return of custody is not in the best interests of the child.

b. Removal from foster care home; placement procedure

Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this chapter, except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed. (Pub. L. 95-608, title I, § 106, Nov. 8, 1978, 92 Stat. 3073.)

§ 1917. Tribal affiliation information and other information for protection of rights from tribal relationship; application of subject of adoptive placement; disclosure by court

Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement, the court which entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship. (Pub. L. 95-608, title I, § 107, Nov. 8, 1978, 92 Stat. 3073.)

§ 1918. Reassumption of jurisdiction over child custody proceedings

a. Petition; suitable plan; approval by Secretary

Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

b. Criteria applicable to consideration by Secretary; partial retrocession

1. In considering the petition and feasibility of the plan of a tribe under subsection (a) of this section, the Secretary may consider, among other things:
 - i. whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe;
 - ii. the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe;
 - iii. the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and (iv) the feasibility of the plan in cases of multitribal occupation of a single reservation or geographic area.
2. In those cases where the Secretary determines that the jurisdictional provisions of section 1911(a) of this title are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 1911(b) of this title, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 1911(a) of this title over limited community or geographic areas without regard for the reservation status of the area affected.

c. Approval of petition; publication in Federal Register; notice; reassumption period; correction of causes for disapproval

If the Secretary approves any petition under subsection (a) of this section, the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a) of this section, the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.

d. Pending actions or proceedings unaffected

Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction, except as may be provided pursuant to any agreement under section 1919 of this title. (Pub. L. 95-608, title I, § 108, Nov. 8, 1978, 92 Stat. 3074.)

References in Text

Act of August 15, 1953, referred to in sub§ (a), is act Aug. 15, 1953, ch. 505, 67 Stat. 588, as amended, which enacted section 1162 of Title 18, Crimes and Criminal Procedure, section 1360 of Title 28, Judiciary and Judicial Procedure, and provisions set out as notes under section 1360 of Title 28. For complete classification of this Act to the Code, see Tables.

Section Referred to in Other Sections

This section is referred to in sections 1727, 1923 of this title.

§ 1919. Agreements between States and Indian tribes

a. Subject coverage

States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.

b. Revocation; notice; actions or proceedings unaffected

Such agreements may be revoked by either party upon one hundred and eighty days' written notice to the other party. Such revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction, unless the agreement provides otherwise. (Pub. L. 95-608, title I, § 109, Nov. 8, 1978, 92 Stat. 3074.)

Section Referred to in Other Sections

This section is referred to in sections 1918, 1923 of this title.

§ 1920. Improper removal of child from custody; declination of jurisdiction; forthwith return of child: danger exception

Where any petitioner in an Indian child custody proceeding before a State court has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

§ 1921. Higher State or Federal standard applicable to protect rights of parent or Indian custodian of Indian child

In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard.

§ 1922. Emergency removal or placement of child; termination; appropriate action

Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to

the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

§ 1923. Effective date

None of the provisions of this subchapter, except sections 1911(a), 1918, and 1919 of this title, shall affect a proceeding under State law for foster care placement, termination of parental rights, preadoptive placement, or adoptive placement which was initiated or completed prior to one hundred and eighty days after November 8, 1978, but shall apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child.

§ 1931. Grants for on or near reservation programs and child welfare codes

a. Statement of purpose; scope of programs

The Secretary is authorized to make grants to Indian tribes and organizations in the establishment and operation of Indian child and family service programs on or near reservations and in the preparation and implementation of child welfare codes. The objective of every Indian child and family service program shall be to prevent the breakup of Indian families and, in particular, to insure that the permanent removal of an Indian child from the custody of his parent or Indian custodian shall be a last resort. Such child and family service programs may include, but are not limited to--

1. a system for licensing or otherwise regulating Indian foster and adoptive homes;
 2. the operation and maintenance of facilities for the counseling and treatment of Indian families and for the temporary custody of Indian children;
 3. family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care;
 4. home improvement programs;
 5. the employment of professional and other trained personnel to assist the tribal court in the disposition of domestic relations and child welfare matters;
 6. education and training of Indians, including tribal court judges and staff, in skills relating to child and family assistance and service programs;
 7. a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as foster children, taking into account the appropriate State standards of support for maintenance and medical needs; and
 8. guidance, legal representation, and advice to Indian families involved in tribal, State, or Federal child custody proceedings.
- b. Non-Federal matching funds for related Social Security or other Federal financial assistance programs; assistance for such programs unaffected; State licensing or approval for qualification for assistance under federally assisted program

Funds appropriated for use by the Secretary in accordance with this section may be utilized as non-Federal matching share in connection with funds provided under titles IV-B and XX of the Social Security Act [42 U.S.C. 620 et seq., 1397 et seq.] or under any other Federal financial assistance programs which contribute to the purpose for which such funds are authorized to be appropriated for use under this chapter. The provision or possibility of assistance under this chapter shall not be a basis for the denial or reduction of any assistance otherwise authorized under titles IV-B and XX of the Social Security Act or any other federally assisted program. For purposes of qualifying for assistance under a federally assisted program, licensing or approval of foster or adoptive homes or institutions by an Indian tribe shall be deemed equivalent to licensing or approval by a State.

References in Text

The Social Security Act, referred to in sub§ (b), is act Aug. 14, 1935, ch. 531, 49 Stat. 620, as amended. Titles IV-B and XX of the Social Security Act are classified generally to part B (§ 620 et seq.) of subchapter IV and subchapter XX (§ 1397 et seq.) of chapter 7 of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see section 1305 of Title 42 and Tables.

§ 1932. Grants for off-reservation programs for additional services

The Secretary is also authorized to make grants to Indian organizations to establish and operate off-reservation Indian child and family service programs which may include, but are not limited to--

1. a system for regulating, maintaining, and supporting Indian foster and adoptive homes, including a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as

- Indian foster children, taking into account the appropriate State standards of support for maintenance and medical needs;
2. the operation and maintenance of facilities and services for counseling and treatment of Indian families and Indian foster and adoptive children;
 3. family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care; and
 4. guidance, legal representation, and advice to Indian families involved in child custody proceedings. (Pub. L. 95-608, title II, § 202, Nov. 8, 1978, 92 Stat. 3076.)

Section Referred to in Other Sections

This section is referred to in section 1934 of this title.

§ 1933. Funds for on and off reservation programs

- a. Appropriated funds for similar programs of Department of Health and Human Services; appropriation in advance for payments in the establishment, operation, and funding of Indian child and family service programs, both on and off reservation, the Secretary may enter into agreements with the Secretary of Health and Human Services, and the latter Secretary is hereby authorized for such purposes to use funds appropriated for similar programs of the Department of Health and Human Services: Provided, That authority to make payments pursuant to such agreements shall be effective only to the extent and in such amounts as may be provided in advance by appropriation Acts.
- b. Appropriation authorization under section 13 of this title Funds for the purposes of this chapter may be appropriated pursuant to the provisions of section 13 of this title. (Pub. L. 95-608, title II, § 203, Nov. 8, 1978, 92 Stat. 3076; Pub. L. 96-88, title V, § 509(b), Oct. 17, 1979, 93 Stat. 695.)

Change of Name

"Secretary of Health and Human Services" and "Department of Health and Human Services" substituted for "Secretary of Health, Education, and Welfare" and "Department of Health, Education, and Welfare", respectively, in sub§ (a) pursuant to section 509(b) of Pub. L. 96-88, which is classified to section 3508(b) of Title 20, Education.

Section Referred to in Other Sections

This section is referred to in section 1934 of this title.

§ 1934. "Indian" defined for certain purposes

For the purposes of sections 1932 and 1933 of this title, the term "Indian" shall include persons defined in section 1603(c) of this title.

§ 1951. Information availability to and disclosure by Secretary

- a. Copy of final decree or order; other information; anonymity affidavit; exemption from Freedom of Information Act
- b. Any State court entering a final decree or order in any Indian child adoptive placement after November 8, 1978, shall provide the Secretary with a copy of such decree or order together with such other information as may be necessary to show--
 1. the name and tribal affiliation of the child;
 2. the names and addresses of the biological parents;
 3. the names and addresses of the adoptive parents; and
 4. the identity of any agency having files or information relating to such adoptive placement. Where the court records contain an affidavit of the biological parent or parents that their identity remain confidential, the court shall include such affidavit with the other information. The Secretary shall insure that the confidentiality of such information is maintained and such information shall not be subject to the Freedom of Information Act (5 U.S.C. 552), as amended.
- c. Disclosure of information for enrollment of Indian child in tribe or for determination of member rights or benefits; certification of entitlement to enrollment Upon the request of the adopted Indian child over the age of eighteen, the adoptive or foster parents of an Indian child, or an Indian tribe, the Secretary shall disclose such information as may be necessary for the enrollment of an Indian child in the tribe in which the child may be eligible for enrollment or for

determining any rights or benefits associated with that membership. Where the documents relating to such child contain an affidavit from the biological parent or parents requesting anonymity, the Secretary shall certify to the Indian child's tribe, where the information warrants, that the child's parentage and other circumstances of birth entitle the child to enrollment under the criteria established by such tribe.

§ 1952. Rules and regulations

Within one hundred and eighty days after November 8, 1978, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter.

Locally convenient day schools

a. Sense of Congress

It is the sense of Congress that the absence of locally convenient day schools may contribute to the breakup of Indian families.

b. Report to Congress; contents, etc.

The Secretary is authorized and directed to prepare, in consultation with appropriate agencies in the Department of Health and Human Services, a report on the feasibility of providing Indian children with schools located near their homes, and to submit such report to the Select Committee on Indian Affairs of the United States Senate and the Committee on Interior and Insular Affairs of the United States House of Representatives within two years from November 8, 1978. In developing this report the Secretary shall give particular consideration to the provision of educational facilities for children in the elementary grades. (Pub. L. 95-608, title IV, § 401, Nov. 8, 1978, 92 Stat. 3078; Pub. L. 96-88, title V, § 509(b), Oct. 17, 1979, 93 Stat. 695.)

c. Change of Name

"Department of Health and Human Services" substituted for "Department of Health, Education, and Welfare" in sub§ (b), pursuant to section 509(b) of Pub. L. 96-88 which is classified to section 3508(b) of Title 20, Education.

Select Committee on Indian Affairs of the Senate redesignated Committee on Indian Affairs of the Senate by section 25 of Senate Resolution No. 71, Feb. 25, 1993, One Hundred Third Congress.

Committee on Interior and Insular Affairs of the House of Representatives changed to Committee on Natural Resources of the House of Representatives on Jan. 5, 1993, by House Resolution No. 5, One Hundred Third Congress.

Committee on Natural Resources of House of Representatives treated as referring to Committee on Resources of House of Representatives by section 1(a) of Pub. L. 104-14, set out as a note preceding section 21 of Title 2, The Congress.

§ 1962. Copies to the States

Within sixty days after November 8, 1978, the Secretary shall send to the Governor, chief justice of the highest court of appeal, and the attorney general of each State a copy of this chapter, together with committee reports and an explanation of the provisions of this chapter.

§ 1963. Severability

If any provision of this chapter or the applicability thereof is held invalid, the remaining provisions of this chapter shall not be affected thereby.

(1) So in original. Probably should be capitalized.