

The Indian Child Welfare Act: Strengthening Native Families



**LEAD JUDGE ALL-SITES MEETING
SEPTEMBER 15, 2016**

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NATIONAL COUNCIL OF JUVENILE AND
FAMILY COURT JUDGES**



Courts Before ICWA

This is not old history.
See:

Oglala v. Van Hunnicks
2015 WL 1466067 (D. S.
D.)

- Cultural biases regarding child rearing practices were used as justification for removal
- Neglect and “social deprivation” were the reasons cited for removal in 99% of cases in South Dakota
- Testimony from anyone besides the state’s case worker was rare
- Parents were coerced into voluntary agreements or relinquishments
- Attorneys were not provided for parents or children
- The burden was on the Indian family to prove they could provide for their children

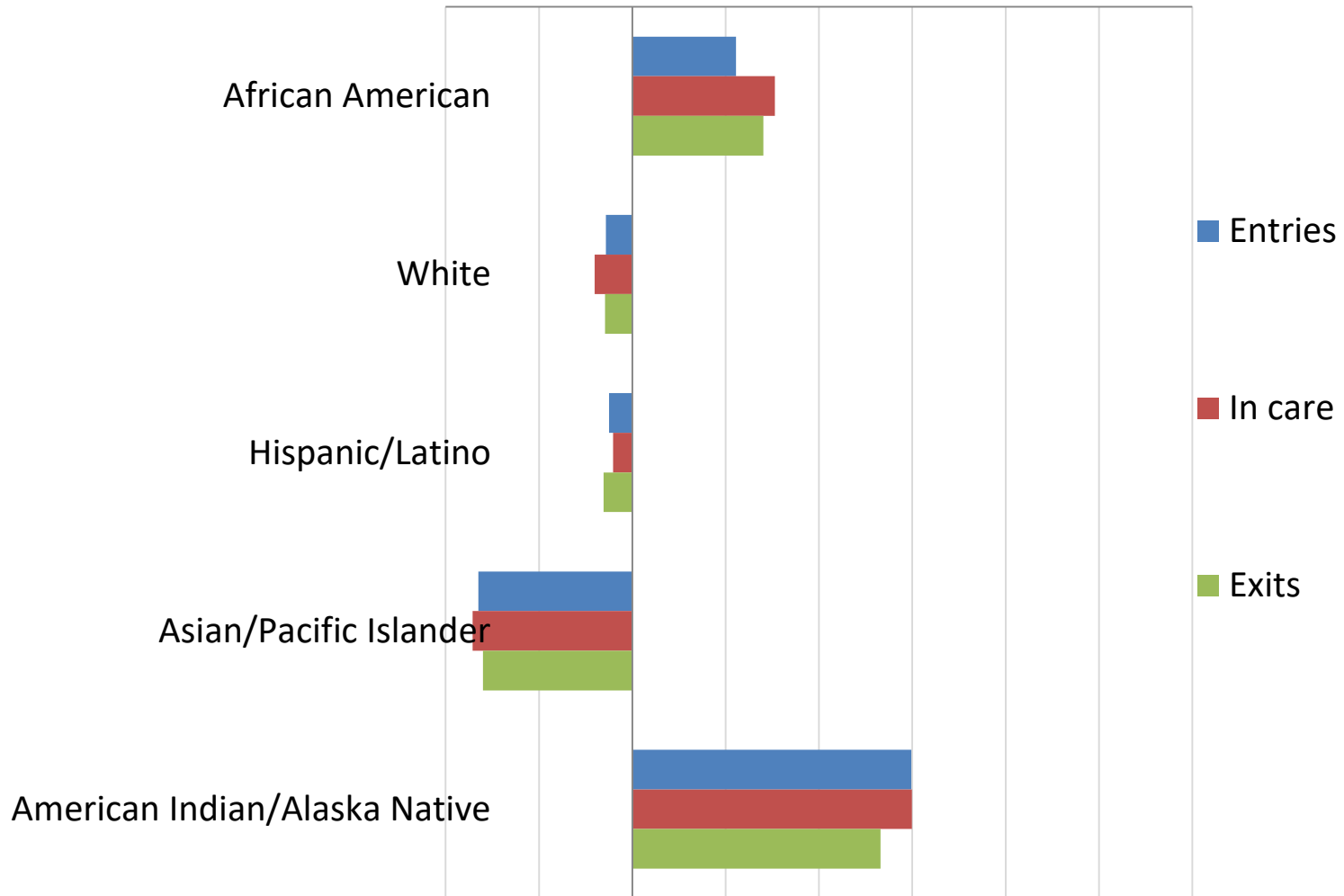
Data and the Risks



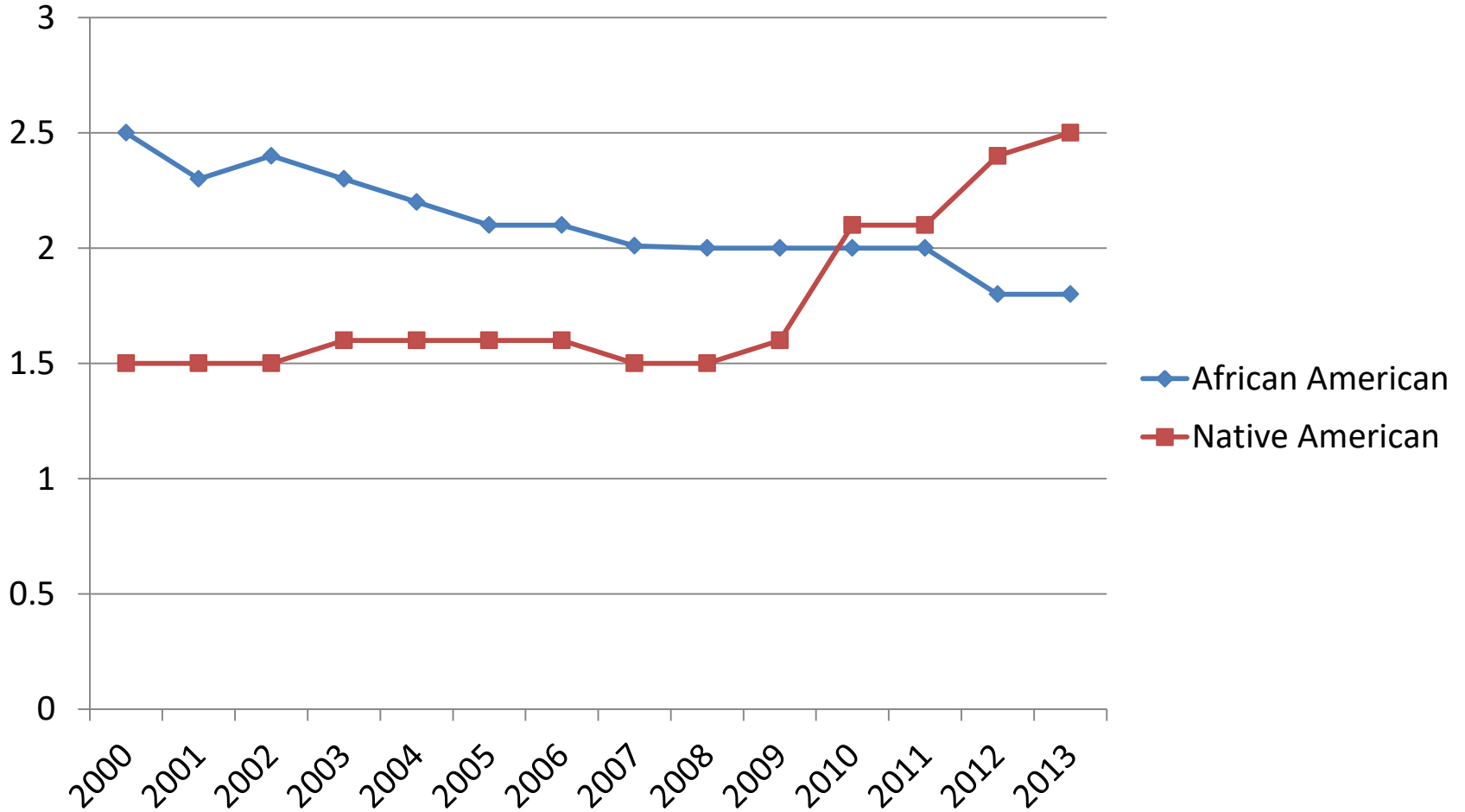
- AI/AN children experience child abuse and neglect at a rate of 16.5 per 1000 children (U.S. Health and Human Services, 2007)
- Native disproportionality rates for foster care placement have increased in the last 10 years from 1.5 to 2.5 (NCJFCJ, 2015)
- 50 to 80% of all identified human trafficking victims are or have been involved with child welfare services at some point in their lives. (State of Alaska Task Force on the Crimes of Human Trafficking, 2013)

Racial Disproportionality Index, 2013

0.0 0.5 1.0 1.5 2.0 2.5 3.0 3.5 4.0



Disproportionality Over Time





What this Means for Children

With children of color overrepresented in the foster care system, these negative consequences need to be kept in mind when deciding to place the child in foster care.

Foster care children not only experience the trauma of being removed from their home, but are at increased risk for lower well-being measures (Casey Family Programs) such as:

- Negative health outcomes and increased risk for chronic diseases
 - Increased rates of teen pregnancy, sexually transmitted infections (STIs) and HIV (Guttmacher Institute, 2011)
 - Serious emotional problems and other mental health issues
 - Increase risk for suicide
 - Decreased educational attainment
 - Higher rates of unemployment
 - Increased likelihood of incarceration
 - Increased rates of poverty
- ❖ Removing AI/AN children from their homes can cut their cultural and traditional connections.

Why ICWA?



ICWA is designed to remedy cultural mistakes that have resulted in Native American children being placed in out of home care through:

- Requiring a higher burden of proof for removal
- Requirements that caseworkers look beyond the surface
- Involving extended families and tribes in cases
- Judicial understanding of Native values and tribal sovereignty

Best Interests of the Child



In ICWA, Congress determined that retaining an Indian child in his or her culture or placing an Indian child in a culturally appropriate placement best serves the needs of that Indian child.

25 U.S.C. 1902

Timeline of Selected Major ICWA-Related Events, 2013 - Present



- **Sept. 5, 2013** – Attorney General Eric Holder announced creation of American Indian and Alaska Native Children Exposed to Violence
- **August 2014** – Department of Justice filed an amicus brief on behalf of tribes and Indian parents involved in the court case *Oglala Sioux Tribe v. Van Hunnik*, (the case was filed by two tribes in South Dakota two parents against the presiding judge in South Dakota’s seventh circuit; the States Attorney for Pennington County, South Dakota; the Secretary of the South Dakota Department of Social Services, the person in charge of DSS Child Protection Services in Pennington County, South Dakota)

Timeline of Selected Major ICWA-Related Events, 2013 - Present



- **November 2014** – AG Task Force Submits Formal Report on American Indian and Alaska Native Children Exposed to Violence. The report recommends promoting greater ICWA compliance as one way to promote well-being for American Indian and Alaska Native Children.
- **December 3, 2014** – Attorney General Eric Holder announces new Department of Justice Initiative to promote compliance with the Indian Child Welfare Act (ICWA)
- **February 24, 2015** – The Bureau of Indian Affairs released updated ICWA Guidelines, effective immediately
- **March 18, 2015** – The Bureau of Indian Affairs published a proposed Federal Rule to govern ICWA implementation

Timeline of Selected Major ICWA-Related Events, 2013 - Present



- **March 30, 2015** – The United States District Court District of South Dakota Western Division ruled in favor of the tribes in *Oglala Sioux Tribe v. Van Hunnik*, holding that the named individuals developed policies and procedures for the removal of Indian children in violation of the Indian Child Welfare Act and the Due Process Clause. The opinion referred to both the old and the revised BIA Guidelines at least a dozen times stating that the Guidelines are “entitled to great weight.”
- **April 4, 2016** – Interior announces interagency partnership (MOU) with Justice and HHS to strengthen ICWA implementation and compliance
- **June 14, 2016** – Bureau of Indian Affairs (BIA) released comprehensive regulations for the substantive legal requirements of ICWA in the *Federal Register*

Purpose of the Regulations



The regulations in this subpart clarify the **minimum Federal standards** governing implementation of the Indian Child Welfare Act (ICWA) to ensure that ICWA is applied in all States consistent with the Act's express language, Congress's intent in enacting the statute, and to **promote the stability and security of Indian tribes and families.**

[emphasis added]



State Courts have
Responsibilities

Parents and Indian
Custodians have
Rights

Tribes have Rights



The Indian child is the heart of the law. Responsibilities and rights are assigned under the law - all designed to protect the children.

When Does ICWA Apply?



Child custody proceedings involving children who fit the definition of “Indian child”:

- Foster care placement
- Termination of parental rights
- Pre-adoptive placement
- Adoptive placement



Indian Child Definition



An unmarried person under 18 who is either

- ✦ A member of a federally recognized Indian tribe;
- OR
- ✦ Eligible for membership in a federally recognized Indian tribe
- ✦ AND is the biological child of a member of a federally recognized Indian tribe.

ICWA Requirements



- Inquiry and Notice
- Transfer of Proceedings
- Intervention
- Right to Counsel
- Active efforts
- Evidentiary burdens
- Qualified expert witness
- Placement preferences

Inquiry



“In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved”

How do you know? You must ask.

Agencies and courts must ask whether the child is or could be an Indian child in EVERY child custody proceeding until it has been determined.

Revised BIA ICWA Guidelines, A.3(c)

What do the Regulations Say?



- The courts must ask each participant in emergency or voluntary or involuntary child custody proceedings whether there is reason to know
- The inquiry is at the commencement of the proceeding and all responses are on the record
- Court must instruct parties to inform the court if subsequent information provides reason to know

What do the Regulations Say?



In addition, the court must:

- Confirm (report, declaration, or testimony included in the record) that the agency or other party used due diligence to identify and work with all Tribes of which there is reason to know the child may be a member to verify; AND
- Treat the child as an Indian child, unless and until it is determined on the record the child does not meet the definition.

What do the Regulations Say?



In determining whether ICWA applies to a proceeding, the State court **MAY NOT** consider factors such as:

- Participation of parents or child in Tribal cultural, social, religious or political activities;
- Relationship between the child and his or her parents;
- Whether the parent ever had custody of the child;
- The Indian child's blood quantum



DOMICILE

Why is this suddenly being emphasized?

- In any voluntary or involuntary child custody proceeding, the court must determine the residence and domicile of the Indian child.

Jurisdiction



State Court

A state court has jurisdiction over child custody proceedings involving an Indian child:

- Where the child is domiciled or resides off an Indian reservation, and is not a ward of the tribal court (25 U.S.C. 1911(b));
- Where the state has been granted jurisdiction on the reservation under Public Law 280;
- Through a tribal-state agreement in which the tribe allocates jurisdiction to the state (25 U.S.C. 1919(a)); and
- Through limited emergency jurisdiction where a reservation-resident Indian child is temporarily off the reservation and the state has removed the child in an emergency situation to prevent imminent physical damage or harm to the child .

Tribal Court

A tribe has jurisdiction over child custody proceedings involving an Indian child:

- Where the child is domiciled or resides on an Indian reservation (25 U.S.C. 1911(a));
- When the child is a ward of the tribal court, regardless of the child's domicile or residence (25 U.S.C. 1911(a)); and
- Concurrent jurisdiction where the child is domiciled or resides off an Indian reservation and is not a ward of the tribe's court (25 U.S.C. 1911(b)).

Domicile Definition



- 1) For parent or Indian custodian, the place at which a person has been physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain indefinitely even though the person may be currently residing elsewhere
- 2) For an Indian child, the domicile of the Indian child's parents or Indian custodian or guardian. In the case of a child whose parents are not married to each other, the domicile of the child's custodial parent.



Notice

Minimum Standard
– Must be sent
registered mail,
return receipt
requested.

**Notice is required
for each
proceeding (not
just the first or
the last).**

Revised BIA ICWA
Guidelines B.6

- In any involuntary proceeding in a State Court, the agency or court shall notify:
 - The parent or Indian Custodian
AND
 - The Indian child's tribe
About
 - The pending proceedings AND
 - The right to intervene

Includes but is not limited to temporary custody, removal, foster care placement, adoptive placement, TPR hearings.

What do the Regulations Say?



- The party seeking placement promptly sends notice of each such child custody proceeding (including, but not limited to, any foster care placement or any termination of parental or custodial rights)
- An original or copy of each notice sent is filed with the court along with any return receipts or other proof of service

What do the Regulations Say?



In voluntary proceedings:

- Court must require participants to state on the record whether the child is an Indian child or there is reason to believe;
- If there is reason to believe the court must ensure that the party seeking placement has taken all reasonable steps to verify the child's status

Notice Timelines



General rule:

The tribe and parents/custodians must receive notice 10 days prior to a hearing and may request an additional 20 days



Emergency Removal

The time period for temporary custody without a hearing has been shortened from 90 days to 30 days except in extraordinary circumstances.

Revised BIA ICWA Guidelines, B.8

- ICWA allows emergency removal of an Indian child who is off the reservation in order to prevent imminent physical damage or harm.
- The Indian child must be returned home as soon as the threat of imminent physical harm has passed or the tribal court asserts jurisdiction, whichever is earlier.
- If the child is not returned or case transferred, the State Court “*shall expeditiously initiate a child custody proceeding subject to the [ICWA]*”

What do the Regulations Say?



The State court must:

- Make a finding on the record that the emergency removal or placement is necessary to prevent imminent physical damage or harm to the child;
- Promptly hold a hearing on whether the emergency removal or placement continues to be necessary whenever new information indicates that the emergency situation has ended; and
- At any court hearing during the emergency proceeding, determine whether the removal or placement is no longer necessary to prevent imminent physical damage or harm to the child



Transfer of Proceedings

Factors that should NOT be considered “good cause”:

Proceeding is at an advanced stage

Level of contacts child has with Tribe

Socio-economic conditions or perceived inadequacies of the Tribe or tribal entities

Prospective Placement

Revised BIA ICWA Guidelines, C.2

A State Court shall transfer to tribal court a foster care placement or TPR proceeding involving an Indian child not domiciled or residing within the reservation of the child’s tribe when:

- Requested to do so,
- There is no good cause to the contrary,
- Neither parent objects, and
- The tribal court does not decline jurisdiction

What do the Regulations Say?



- Good cause to deny transfer – the reasons for that belief or assertion must be stated orally on the record or provided in writing on the record and to the parties
- Any party to the proceeding must have the opportunity to provide the court with views regarding whether good cause to deny transfer exists
- The basis for a decision to deny transfer should be stated orally on the record or in a written order.

What do the Regulations Say?



Must **not** consider (in good cause analysis):

- Whether the proceeding is at an advanced stage if the parent, Indian custodian, or Tribe did not receive notice until an advanced stage;
- Whether there have been prior proceedings involving the child for which no petition to transfer was filed;
- Whether the transfer could affect the placement;
- The child's cultural connections with the Tribe or its reservation;
- Socioeconomic conditions or any negative perception of Tribal or BIA social services or judicial systems

Active Efforts



Any party seeking foster care placement or TPR of an Indian child shall satisfy the court that:

- ❖ **Active efforts** have been made to provide remedial services and rehabilitative programs designed to prevent the break up of the Indian family; and
- ❖ These active efforts have been unsuccessful.

Take into consideration the prevailing social and cultural conditions and way of life of the Indian child's tribe; and

Involve and use the available resources of the extended family, the tribe, Indian social services, and individual Indian caregivers.



Active Efforts cont.:



The requirement to engage in active efforts begins from the moment the possibility arises that an agency case may result in the need for and Indian child to be placed outside the home or custody of parent or Indian custodian.

Active efforts must be conducted while investigating whether the child is a member of a tribe or eligible for membership.

Revised BIA ICWA Guidelines, B.1

What do the Regulations Say?



- Affirmative, Active, Thorough, and Timely Efforts
- Intended primarily to maintain or reunite child with his or her family
- Agency is involved – must involve assisting the parent/parents/Indian custodian through steps of case plan and with accessing or developing necessary resources to satisfy case plan
- Provided in manner consistent with prevailing social and cultural conditions and way of life of Tribe and in partnership with the child, parents, extended family, Indian custodians, and Tribe



ASFA and Active Efforts

**ASFA's
exceptions to
reunification
efforts do not
apply to
ICWA
proceedings.**

Revised BIA ICWA
Guidelines, A.2

ASFA does not alter ICWA's **active**
efforts requirement.

Even where ASFA may relieve the State from
proving reasonable efforts (e.g., when
aggravated circumstances exist), **active
efforts must be proved.**

Active Efforts are required in every ICWA
case.

Heightened Burden of Proof



- **No Foster care placement in the absence of**
 - clear and convincing evidence (including testimony of at least one qualified expert witness)
 - that continued custody is likely to result in serious emotional or physical damage to the child
- **No TPR in the absence of evidence:**
 - beyond a reasonable doubt (including testimony of at least one qualified expert witness)
 - that continued custody is likely to result in serious emotional or physical damage to the child

Placement Preferences, Foster Care Placement



Absent good cause to the contrary, a State court shall follow these preferences for the foster care placement of an Indian child:

- 1st Extended Family
- 2nd Foster home licensed by Tribe
- 3rd Indian foster home licensed by State
- 4th Institution approved by Tribe
- 5th Other foster homes licensed by State

Indian tribes are permitted under ICWA to change the order of the act's placement preferences, so you must investigate with each tribe you encounter the order of its particular preference scheme

Further information about “good cause” to deviate from placement preferences:



- Does not include normal bonding or attachment that may have resulted from a non-compliant placement
- Should not be based on an independent consideration of the child’s best interests
- Should not consider the socio-economic status of any placement relative to another
- Placement may not be considered unavailable if it conforms to prevailing social and cultural standards of the Indian community.

Revised BIA ICWA Guidelines, F.4



Placement Preferences, Adoptive Placement

Absent good cause to the contrary, a State court shall follow these preferences for the adoptive placement of an Indian child:

- 1st Member of child's extended family
- 2nd Other members of the child's Indian tribe
- 3rd Other Indian families

What do the Regulations Say?



- If any party asserts that good cause not to follow the placement preferences exists, the reasons for that belief or assertion must be stated orally on the record or provided in writing to the parties and the court
- The party seeking departure from the preferences should bear the burden of proving by clear and convincing evidence that there is good cause to depart from the preferences

What do the Regulations Say?



- A placement may not depart from the preferences based on the socioeconomic status of any placement relative to another placement
- A placement may not depart from the preferences based solely on ordinary bonding or attachment that flowed from time spent in non-preferred placement that was made in violation of ICWA



Voluntary Placements

Voluntary placements that do not prohibit the child's parent/Indian custodian from regaining custody upon demand are not covered by ICWA. (Written agreement with explicit terms required.)

Voluntary placements in which a parent consents to a foster care placement or seeks to permanently terminate his or her rights or place the child in a preadoptive or adoptive placement are covered by ICWA.

When a parent or Indian custodian voluntarily consents to foster care placement or relinquishment and TPR, it must be in writing and clear that the parent understand what they are agreeing to do.

Whenever a parent(s) or Indian custodian(s) seek to temporarily place an Indian child out of the home, or to voluntarily terminate parental rights, consent to placement must:

- Not be given prior to or within 10 days after birth;
- Be in writing; and
- Be recorded before a judge

Links



How to find the Revised BIA ICWA Guidelines:

<http://www.bia.gov/cs/groups/public/documents/text/idc1-029637.pdf>

How to find the MOU:

<http://www.indianaffairs.gov/cs/groups/public/documents/text/idc1-033719.pdf>

How to find the new Regulations:

<https://www.federalregister.gov/articles/2016/06/14/2016-13686/indian-child-welfare-act-proceedings>

Miigwech – Thank you

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