



# **INDIAN CHILD WELFARE ACT FINAL RULE - 25 CFR PART 23 SUMMARY OF KEY PROVISIONS**

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On June 14, 2016, the Bureau of Indian Affairs (BIA) released the first comprehensive regulations for the substantive legal requirements of the Indian Child Welfare Act (ICWA) in the *Federal Register*. The regulations provide the first legally-binding federal guidance on how to implement ICWA. The regulations will go into effect 180 days from the date of their release providing time for state agencies, private agencies, and state courts to prepare for their implementation. Below is a brief description of key provisions of the regulations. This summary is not exhaustive or fully comprehensive; rather it provides an overview of key provisions. [Editor's note: Italicized emphasis throughout this document is ours.]

## Description of Key Provisions

### Active Efforts Definition

The regulations provide 11 examples of “active efforts” that can assist states, courts, and private agencies in their work to prevent the breakup of Indian families. The examples emphasize the engagement of families in accessing services as opposed to providing information or referrals to services. The definition also emphasizes using culturally appropriate services and working with the child’s tribe to provide services.

### Definition of Child Custody Proceedings

The regulations provide definitions of each of the four distinct child custody proceedings covered by ICWA (foster care, pre-adoptive, adoptive placement, and termination of parental rights), as well as proceedings that involve status offenses where an Indian child has been placed in out-of-home care because of a status offense—an offense that would not be a criminal offense if committed by an adult, such as incorrigibility or truancy from school.

A foster care proceeding includes institutional or group care, guardianship, and conservatorship placements. Foster care proceedings do not include placements where parents can have their child returned upon demand, as is the case in voluntary foster care placements.

### Definition of Domicile

The regulations clarify the domicile of an Indian parent or custodian as well as the fact that the domicile of the Indian child follows the parent or custodian. This clarification is critical to establishing tribal or state jurisdiction in a child welfare matter and whether ICWA may apply to a particular case.

### Definitions of Custody and Continued Custody

The regulations provide a definition of “continued custody” that includes legal or physical custody, or both, of a parent or Indian custodian under applicable tribal law, custom, or state law. “Custody” is also defined and includes legal or physical custody, or both, of a parent or Indian custodian under applicable tribal law, custom, or state law.

These definitions respond to the United States Supreme Court’s use of these terms in their decision in *Adoptive Couple v. Baby Girl*.

### Definition of Indian Foster Home

A new definition is provided for Indian foster home, which was not in earlier guidance. It provides that at least one of the foster parents must be an Indian person as defined under federal law (see ICWA statutory definition).

### Definitions of Involuntary and Voluntary Proceedings

Involuntary proceedings are defined as those where a parent *does not consent* of her or his own free will to the foster care, pre-adoptive, or adoptive placement *or* to termination of parental rights *or* consents to one of these placements *under threat of removal* by a state court or agency. The determination between involuntary and voluntary proceeding hinges on the determination of “own free will” and “under threat of removal.” The definition of involuntary proceedings includes placements that may be characterized as voluntary by a state agency, but because of threat of removal, actually are involuntary under the regulations.

Voluntary proceedings are defined as proceedings that are *not* involuntary, where either parent or both parents, or Indian custodian has, of their free will and without threat of removal by a state agency, consented to a placement or termination of parental rights. This would include voluntary foster care and adoptive placements.

### Definition of Upon Demand

This term has not previously been defined in federal guidance. “Upon demand” is expressed as the parent or Indian custodian’s ability to regain custody simply upon verbal request without any formalities or contingencies. This is important when trying to determine if ICWA applies with regard to a specific placement. Formalities and contingencies may include use of service or placement agreements, asking birth parent to repay child expenses, or formal court proceedings.

### Notice in Child Custody Proceedings

The regulations require that notice must be provided by the party seeking placement or termination of parental rights to the parent(s), Indian custodian, and child’s tribe by either registered or certified mail, return receipt requested, in involuntary proceedings. Allowing certified mail with return receipt is less expensive and, according to the BIA, also meets the statutory requirement for ensuring timely and appropriate notice. In addition, copies of the notices must be provided to the regional director in each corresponding BIA regional office where the proceedings are taking place and the BIA will provide assistance in locating the Indian child’s parents and tribe. This provision allows parties to request that the BIA make a “reasonable” effort to locate and notify the Indian child’s tribe and parent or Indian custodian.

These are new and very significant requirements, which will increase the BIA’s involvement as a repository of ICWA notices and engagement in work to help state agencies, courts, and other parties locate and provide notice to parents, Indian custodians, and the child’s tribe.



## Request of Information to Establish Tribal Affiliation by Indian Adult Adoptees

The BIA has added a process for adoptees to request information from the BIA, who will operate a central file on all records of state Indian adoptions. The process requires either an Indian adoptee age 18 or older, the Indian adoptee's foster care or adoptive parents, or the Indian adoptee's tribe to request the information to establish the adoptee's tribal membership. Adult Indian adoptees can also still petition the court where their final adoption decree or order occurred.

## ICWA Application

The regulations *exclude* application of ICWA in voluntary placements where either parent, both parents, or the Indian custodian has of their own free will, without threat of removal by a state agency, chosen a placement for an Indian child that does not prohibit the Indian child's parents or Indian custodian from regaining custody of their child upon demand. This would exclude coverage of what is often referred to as an informal placement with a relative or friend arranged by the birth parent.

## The Existing Indian Family Exception

The regulations address this judicially created exception to application of ICWA, which only operates in a few states, by prohibiting state courts from considering, in the application of ICWA in a case, factors such as:

1. Participation of the parents in cultural, social, religious, or political activities
2. The relationship between the Indian child and his or her parents
3. Whether the parent has ever had custody of the Indian child
4. The Indian child's blood quantum

## Extending Application of ICWA to Youth Beyond 18 Years of Age

In many states, child custody proceedings can now extend for youth beyond the age of 18. The regulations state that if the Indian child reaches age 18 during the proceedings, application of ICWA will not be discontinued.

## Determining if a Child is an Indian Child

The regulations, like the revised guidelines, require state courts to inquire in every emergency, involuntary, and voluntary child custody proceeding if the participant (1) knows or (2) has *reason* to know that the child is an Indian child. If the court does not have sufficient evidence to confirm that the child is an Indian child, the court must make diligent efforts to work with the tribe(s) that are thought to be the Indian child's tribe(s) and proceed by applying ICWA *until they have confirmation that the child is not an Indian child*. The tribe believed to be the child's tribe is the *only* entity that can make a determination of whether a child is an Indian child or not.

## Notice Requirements

The regulations state that a notice of an involuntary child custody proceeding must be provided to the child's tribe, parents, and Indian custodian, if applicable. The regulations do not require notice in voluntary child custody proceedings. Description of the contents of a notice and notice process are also included. Notice by electronic or personal delivery are allowed as good practice, but are not a substitute for official notice by either registered or certified mail, return receipt requested.

## Emergency Removals

The regulations provide that emergency removals are authorized to protect an Indian child in imminent physical damage or harm, but they should cease immediately when the placement is no longer necessary to prevent harm. The regulations also state that emergency removals should not last longer than 30 days unless the court makes certain determinations.

## Transfer of Jurisdiction to Tribal Court

A request for transfer of jurisdiction may be made orally on the record in court or in writing by either a parent, Indian custodian, or the Indian child's tribe. The right to request transfer is available at any stage of child custody proceedings. The regulations contain five different factors that that court *cannot* consider in determining whether good cause exists not to transfer jurisdiction, including:

1. If the tribe, parents, or Indian custodian did not receive notice of the proceedings until the proceedings were at an advanced stage, thus delaying their request for transfer
2. Whether transfer was requested in prior proceedings
3. Whether transfer could affect the placement of the Indian child
4. The Indian child's cultural connections to the tribe or reservation
5. Socio-economic conditions or any negative perception of tribal or BIA social services or judicial systems

## Active Efforts

In addition to requiring case workers to provide active efforts before a foster care placement or termination of parental rights can be ordered, the regulations require that active efforts—and the reasons that they may have been unsuccessful—must be documented in detail in the court record.

## Standards of Evidence

In addition to ICWA's statutory requirements for standards of evidence in a foster care placement or termination of parental rights proceeding, the regulations state that the evidence must show a causal relationship between the particular conditions in the home and the likelihood that continued custody will result in serious emotional or physical damage to the child. For example, showing that a family lives in poverty or using the age of the Indian custodian, such as a grandmother, without demonstrating a causal relationship to harm is *not* acceptable.

## Qualified Expert Witness

The regulations stipulate that a qualified expert witness must be able to testify to whether the Indian child's continued custody by the parents is likely to result in serious emotional or physical damage to the Indian child and should be qualified to testify to the prevailing social and cultural standards of the Indian child's tribe. The regulations also state that the Indian child's tribe may designate a qualified expert witness and that a state social worker assigned to the Indian child may not serve as a qualified expert witness.

## Identification of an Indian Child in Voluntary Proceedings

The regulations state that the parties participating in a voluntary proceeding must state on the record if the child is an Indian child or whether there is reason to believe that the child may be an Indian child. If there is reason to believe the child is an Indian child, the state court must ensure that the party seeking placement has taken all reasonable steps to verify the child's status.

## Parental Consent to Termination of Parental Rights or Placement

In addition to the consent being executed in writing and recorded in state court, the court:

1. Must explain to the parent or Indian custodian the terms and consequences of the consent
2. Must explain to the parent or Indian custodian the limitations to consent based on the type of proceeding
3. Must certify that the terms and consequences were explained on the record in English or the language of the parents
4. May allow the parents to execute consent at a court hearing that is not open to the public when they have requested or indicated a need for confidentiality



5. Must find that consent acquired prior to, or within 10 days of, the birth of an Indian child is not valid.

The regulations also include a description of what information must be contained in a consent document.

## Withdrawal of Consent

Following the statute, the regulations also set out procedures for how a withdrawal of consent to a placement or termination of parental rights may be accomplished, including that:

1. Withdrawal of consent to a voluntary foster care placement may be done at any time
2. The parent or Indian custodian must file a written document with the court, or testify before the court, of their intent to withdraw consent
3. The child must be returned to the parent(s) "as soon as practicable"

The regulations also contain other requirements regarding withdrawal of consent for other placements and proceedings.

## Placement Preferences

The regulations state that the placement preferences under the statute apply in any foster care, pre-adoptive, and adoptive placement of an Indian child, unless the court finds that good cause exists to deviate from the placement preferences, or the Indian child's tribe has established a different order of preference than those contained in ICWA. If a parent of an Indian child requests anonymity in a voluntary proceeding, the court must give weight to the request in applying the preferences. The court, where appropriate, must consider the Indian child's parents' preferences in foster care, pre-adoptive, and adoptive placements.

## Determining Good Cause to Deviate from Placement Preferences

The regulations state that the party asserting that there is good cause to deviate from the placement preferences must state on the record, in court or in writing to the parties, the reason for that assertion or belief. The party seeking to assert good cause bears the burden of proving by *clear and convincing evidence* that there is good cause, and the court's determination of good cause must be made on the record, or in writing. The regulations also identify considerations on which good cause may be based, which include:

1. The request of one or both of the Indian child's parents after they have reviewed the ICWA preferred placement options, if any, that are available
2. The request of the child if the child is of sufficient age and has the capacity to understand the decision
3. The presence of a sibling attachment that can only be maintained through a particular placement
4. The extraordinary physical, mental, or emotional needs of the Indian child
5. The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements that meet the placement preferences, but none has been located.

The standards for determining if a suitable placement is unavailable must conform to the prevailing social and cultural standards of the Indian community of the Indian child's parents. The regulations go on to state that a placement may not depart from the placement preferences based on the socio-economic status of one placement over another or solely on ordinary bonding and attachment that occurred during the time the Indian child was in a non-compliant placement.

## Invalidating Certain ICWA Violations

The regulations allow the following parties to petition to invalidate violations of Sections 1911, 1912, or 1913 of ICWA:

1. An Indian child who was the subject of any action related to a foster care placement or termination of parental rights
2. A parent or Indian custodian from whose custody an Indian child was removed
3. The Indian child's tribe

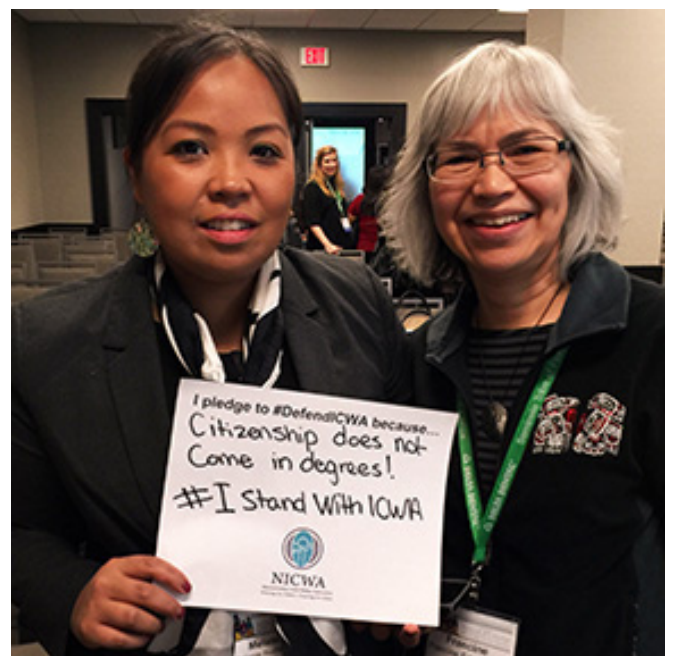
The petitioner does not have to have had his or her rights violated under these sections of the law to bring a petition, but rather only has to show that there was any violation under these sections of the law.

## State Court Orders of Adoption Decrees

Any state court entering an order or decree of voluntary or involuntary adoption for an Indian child must provide a copy of that decree or order within 30 days to the BIA (address provided in the regulations). The regulations also describe additional information, besides that contained in the decree or order, that must be included.

## State Collection of ICWA Proceedings

All states must maintain records of every involuntary and voluntary foster care, pre-adoptive, and adoptive placement of an Indian child and make the record available within 14 days of a request by an Indian child's tribe or the Secretary of the Interior.





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