

Mitakuyepi – My relatives, my friends, everyone...

Module 11 Chapter 2: Indian Child Welfare Act (ICWA)

Overview

In the 1960s and 70s, American Indian tribes, advocacy groups and other organizations brought the history of unjust U. S. governmental policies and practices that adversely affected American Indian tribes, families and children to Congress' attention.

The decades of destructive, detrimental policies and practices contributed to unacceptably high rates of out-of-home placement for American Indian children. American Indian tribes and groups successfully partnered with Congress to pass landmark legislation that governs child welfare work with Indian children and families – the Indian Child Welfare Act.

This chapter introduces the basic requirements of ICWA. Chapter 3 introduces Minnesota law to help you apply ICWA in your practice.

ICWA: Indian Child Welfare Act



ICWA is federal legislation that was passed in 1978 to protect the rights of American Indian children, parents and tribes by establishing specific child welfare requirements.

ICWA is a direct result of federal recognition that Indian children were removed from their families and homes at an alarming rate, and the removal of children had a direct impact on tribal survival.

Through the enactment of ICWA, Congress acknowledged that no nation or culture can flourish if its youngest members are removed from the culture (Jones, 1995).

ICWA recognizes unique attributes of American Indian culture, including the importance of tribal integrity and sovereignty, the cultural and social standards of the tribal community, and the concept of extended family systems within American Indian society.

The primary purpose of ICWA is to strengthen and preserve American Indian families and tribes by recognizing tribal authority over American Indian children.

A link to the federal Indian Child Welfare Act of 1978 is available in its entirety on the website.

Child Custody Proceedings and ICWA

ICWA applies to cases that include voluntary and involuntary child custody proceedings.

Examples of child custody proceedings are:

- Foster care
- Permanency (termination of parental rights, adoption, customary adoption, transfer of legal custody, and long-term foster care)
- Third party custody actions.

It is important to determine the cultural identity of a child because cultural identity may require you to follow different guidelines. For example, when a child in these proceedings may be American Indian or eligible for tribal membership, ICWA requirements apply.

This module does not address adoptions of Indian children. Issues of adoption are best handled by the tribes who have legal interest and authority.

ICWA Requirements for Child Welfare Cases

ICWA requirements must be met in all voluntary and involuntary child custody proceedings for American Indian children in the child welfare system. These requirements apply to children and families, tribes, child welfare workers and the courts.

There are seven major requirements:

- Eligibility for Membership
- Notice
- Active Efforts
- Qualified Expert Witness
- Right to Intervene
- Jurisdiction of the Tribal Court
- Legal Standards

On the website; locate and print the “ICWA Requirements for Child Welfare” chart. Refer to the chart for additional details. On the chart, note the third column which includes additional Minnesota requirements. Many of these requirements are covered in more detail in Chapter 3.

■ Eligibility for Membership

In order for ICWA to be applied to a child entering the child welfare system, certain membership requirements must be met. The child must be:

- Unmarried and under age 18; *and*
- A member of a federally-recognized Indian tribe; *or*
- The biological child of a member of a federally-recognized Indian tribe and the child is eligible for membership.

Membership: Your Responsibilities

Child protection workers must ask each family whether the child has American Indian heritage. Best practice is to ask each family member if he or she *is* or *is not* American Indian; don't assume based on informal knowledge of the family or what you see.

It is important for you to be aware that failure to properly identify American Indian children can result in serious complications if a child enters placement.

Membership: Step-by-Step Process

Consider ICWA eligibility whenever your agency receives an intake report of abuse or neglect, and when you meet with a family during an initial assessment.

You should reconsider ICWA at the point of case planning because, if ICWA eligibility has been determined, the tribe should be involved. If ICWA has not been determined, but appears to be a consideration at case planning, talk with the family about your responsibilities and tribal involvement.

1. Explain your legal obligation to inquire about each child's status as an American Indian.
2. Specifically ask the question, "Do you, or does your child, have any American Indian heritage?"
3. If the person answers affirmatively, follow up with, "Do you know which tribe?"
4. Document the family's response in SSIS. Some individuals have enrollment cards indicating tribal membership and an enrollment number; this information is also documented in SSIS.

Membership: Eligibility and Verification

Only the tribe can determine who is or is not a member and who is or is not eligible to become an enrolled member. Each tribe determines its own eligibility criteria.

Child welfare workers must verify tribal membership by contacting the tribe, through the tribal enrollment office, for written verification of membership status as early in the proceedings as possible to help determine whether ICWA will apply. When a child is eligible for membership in more than one tribe, *all* tribes should be contacted for written verification of eligibility.

If the family does not know which tribe it may have connections to, workers can retrieve the List of Bureau of Indian Affairs (BIA) Contacts from SSIS and send an inquiry to the BIA regarding the family. From the website the "Determining ICWA Application Flowchart" is available and can be used as a quick reference sheet to help you determine when ICWA may apply to your cases.

When tribal membership has been determined, specific requirements for notice apply.

■ Notice

A primary tenet of ICWA is the recognition of the tribe's discrete interest, separate from the parent or Indian custodian, in *any* proceeding involving an Indian child. Notice of proceedings initiates tribal involvement and helps ensure tribal interest and legal rights are protected throughout *all* proceedings.

Specific notice requirements in ICWA cover:

- Method: Send via registered mail, return receipt requested
- Timing: Send 10 days prior to *any* involuntary child custody proceeding
- Who must receive notification: The parent or Indian custodian, tribe, and the tribal social or human services agency
- Standard letter of notice: SSIS “Notice to Tribe of Services to an Indian Child.”

■ **Active Efforts**

A significant component of ICWA is the requirement for child placement agencies to demonstrate active efforts. There is not a clear legal definition for active efforts; however, the spirit of the law indicates that, at a minimum, active efforts are:

- Active attempts to engage parents in services to alleviate the problems or conditions that led to intervention and/or removal of the child
- Active attempts to prevent child removal
- Regular and documented contacts with the child, child’s family and the child’s tribe
- Continuous if the child enters placement until the final permanency decision is made.

Chapters 3 and 4 provide more information and practice application strategies for demonstrating active efforts. You will find it helpful to read the 2007 Tribal/State Agreement (TSA) for further insight regarding active efforts.

Active Efforts: Legal Standard

It is important for you to know that active efforts exceed the legal standard of reasonable efforts that is applied to non-ICWA cases. In ICWA cases, the court determines on a case-by-case basis whether sufficient efforts were made to meet the active efforts requirement.

Active Efforts: Your Responsibilities

One of your primary responsibilities is to consult and cooperate with the tribe to provide culturally-appropriate services and programs to prevent the breakup of the family and the removal of Indian children. The provision of culturally-appropriate services and programs inherently acknowledges traditional helping and healing systems of the child’s tribe.

It is important for child welfare workers and agencies to use active efforts throughout the life of the case.

■ **Qualified Expert Witness (QEW)**

ICWA requires testimony from a qualified expert witness (QEW) when the court determines an Indian child is in need of out-of-home placement, or a permanency hearing is scheduled.

QEW testimony supports the court's determination and helps demonstrate with clear and convincing evidence that "continued custody by the parent or Indian custodian will result in serious emotional or physical damage to the child."

Child welfare agencies should seek QEW's from a list maintained or designated by the appropriate tribe.

QEW: Characteristics

The term qualified expert witness is not defined in ICWA; however, legislative history of ICWA provides that "the...phrase 'qualified expert witness' is meant to apply to expertise beyond the normal social worker qualifications."

Persons with the following characteristics, as identified by ICWA, are most likely to meet the requirements for a qualified expert witness for purposes of Indian child custody proceedings:

- A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and child-rearing practices
- A lay expert witness with substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing tribal social and cultural standards and child-rearing practices within the Indian child's tribe
- A professional person with substantial education and experience in his or her specialty area; and with substantial knowledge of prevailing tribal social and cultural standards and child-rearing practices within the Indian community.

The TSA, available on the website, provides further guidance and clarification regarding characteristics and expertise for QEW's in Minnesota (see pgs. 16-18).

QEW: Your Responsibilities

At times it may be difficult to identify and locate qualified expert witnesses. Child welfare workers should first request a list of qualified persons from the Indian child's tribe. If the tribe does not have a formal list, request the tribe to identify and recommend qualified persons. Ask the tribe to provide a tribal council resolution stating who the QEW is for the case.

Child welfare workers need to provide sufficient information to help the qualified expert witness draw his or her own conclusions to answer two basic questions the court will ask:

1. Is parental conduct likely to result in serious physical or emotional harm to the child?
2. If such conduct will likely cause such harm, can the parents be persuaded to modify their conduct?

The BIA Guidelines are almost silent on what conditions constitute serious emotional and physical harm; they do state that in order to demonstrate serious harm, a causal relationship between the conditions and potential harm must be shown. The Guidelines do identify some conditions that would *not* constitute serious harm: evidence that only shows the existence of

community or family poverty, crowded or inadequate housing, alcohol abuse, or non-conforming social behavior.

■ **Right to Intervene**

The next ICWA requirement is the right to intervene. Intervention means the tribe becomes a party to the proceedings and is entitled to receive timely notice of *all* proceedings – hearings, family meetings, provider meetings – and copies of *all legal documents*. Consult with your supervisor to learn your agency’s policies and procedures for providing documents to tribes.

The right to intervene is absolute! The right to intervene applies to parents, Indian custodians of the child, and the Indian child’s tribe.

- Notice of intervention can be written or oral.
- Intervention may occur at *any* time and *any* stage of a foster care placement or termination of parental rights proceeding or *any* child custody proceeding.

Right to Intervene: Your Responsibilities

Best practices enable tribes to intervene. Best practices include:

- Establish contact with the tribe as soon as possible.
- Involve the tribe in *all* case decisions – work cooperatively with the tribe.
- Provide appropriate notices to *all* proceedings and meetings.
- Provide requested information in a timely manner, including case file documents and notes.
- Consult with the tribe to learn the tribal decision regarding intervention.

■ **Jurisdiction of the Tribal Court**

The next ICWA requirement details the jurisdiction of the tribal court. Jurisdiction is simply the extent or range of the court’s authority. When a district court has jurisdiction, the district court has authority. When a tribal court has jurisdiction, the tribal court has authority and the district court ceases to be involved.

American Indian tribes have exclusive jurisdiction “over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe” or is a ward of the tribal court. When this is the case, tribes may request the case be transferred to tribal court.

Use the “Jurisdiction Flowchart” (available from the website) as a quick reference for determining jurisdiction.

The transfer of a child welfare case to the jurisdiction of the tribal court must occur unless a parent objects, or the judge determines “good cause” exists to deny the transfer. The request to transfer may be made at *any* time during a child custody proceeding.

There are some exceptions to transfer of jurisdiction when the Indian child does not reside on the reservation, and there are financial implications when jurisdiction is transferred.

■ **Legal Standards**

ICWA cases require higher legal standards than non-ICWA cases for emergency removals and termination of parental rights.

Emergency Removals

Emergency removal of an Indian child may occur in order “to prevent imminent physical damage or harm to the child.” There must be clear and convincing evidence of imminent physical damage or harm to support the removal.

Termination of Parental Rights

Before a court can order a termination of parental rights (TPR) for an Indian child, QEW testimony must be heard and the petitioner must establish *beyond a reasonable doubt* that continued custody by the parents or Indian custodian would result in serious emotional or physical harm to the child. The testimony of the QEW must support the petition in order to establish evidence beyond a reasonable doubt.

Legal Standards: Your Responsibilities

In Minnesota, when emergency removal or termination of parental rights hearings occur, the social services agency must demonstrate by affidavit, but preferably by live testimony, the following:

- The agency has made active efforts to assist the parents or Indian custodians so the child may be safely and promptly returned to their custody, and
- The specific condition continues to exist which threatens imminent physical damage or harm to the child.

Finally, there are a few other considerations in the application of ICWA requirements for you to be aware of.

■ Order of Placement Preference

ICWA outlines a preferred order of placement when an American Indian child enters a foster, pre-adoptive or adoptive placement. Best practice is concurrent permanency planning for all American Indian children *and* diligently ensuring the child’s family and tribe are the *first* placement consideration in *all* situations requiring out-of-home care.

Foster Care Order of Placement Preference

The order of placement preference for foster care is:

- Member of the child’s extended family
- Foster home licensed and approved by the child’s tribe
- Indian foster home licensed and approved by CPS
- Children’s institution approved by the tribe or operated by an Indian organization.

Pre-Adoptive and Adoptive Order of Placement Preference

In pre-adoption and adoption cases, the order of placement preference is:

- Member of the child’s extended family
- Member of the child’s tribe
- Other Indian families external to the tribe.

Relationship to State and Federal Laws

In addition to a basic understanding of ICWA requirements and worker responsibilities, it is important to know that ICWA must be read in conjunction with other applicable laws. You should follow ICWA procedures unless other federal or state laws provide a higher standard of protection for the Indian child, parent, or Indian custodian. Three federal laws to consider are MEPA, IEPA and ASFA.

MEPA/IEPA

Recall that the Multi-Ethnic Placement Act (MEPA) and the Inter-Ethnic Provisions Act (IEPA) prohibit any type of discrimination in the out-of-home placement of children. These laws do not affect the application of ICWA.

ASFA

Sometimes there are questions about the Adoption and Safe Families Act superseding ICWA. It is important for you to recognize:

- States and child welfare workers must comply with federal laws.
- ASFA does not supersede ICWA.
- DHS regulations that implement ASFA do not supersede ICWA requirements.

Summary

As you have seen in this chapter, it is important to identify whether a child has American Indian heritage in the early stages of a case so that you comply with ICWA requirements for working with American Indian children and families.

Because this legislation is complex and has a number of requirements, you want to utilize the resources within your agency, tribal social services agencies, and DHS.

Next Steps

From the website, the following documents are available:

- The chapter transcript.
- The “ICWA Requirements for Child Welfare” chart.
- The “Determining ICWA Application Flowchart, “ and
- The “Jurisdiction Flowchart”.

Consult with your supervisor regarding any questions about the content of this chapter.

Remember to check the website and print the documents labeled for classroom use. You will need to bring those documents to class with you.

When you are ready, begin Chapter 3.