

State of New Mexico
CHILDREN, YOUTH and FAMILIES DEPARTMENT

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ICWA - Foster and Adoptive Placement of American Indian/Alaskan Native Children

To: All CYFD, Pueblos/Nations/Tribes, and additional stakeholders/partners

From: Brian Blalock, Cabinet Secretary [Include Signature Here]

Issue Date: December 1, 2020

Effective Immediately

Purpose

The purpose of this Guidance Memorandum is to inform all CYFD employees, Pueblos/Nations/Tribes, and other stakeholders/partners of CYFD's commitment and the steps it is taking to comply with the Indian Child Welfare Act 25 U.S.C. §§ 1901-63 (ICWA) in its letter and intent. The Indian Child Welfare Act (ICWA) provides protections for Indian children in PSD custody and helps them remain connected to their families, culture and communities. Indian children in the custody of PSD must be placed in accordance with the ICWA placement preferences and efforts should primarily focus on placement with relatives. Placement settings include foster care and pre-adoptive or pre-guardianship placements. A placement should be in a setting that is least restrictive, is most like family, is within reasonable proximity to the child's family, and meets any special needs the child might have. CYFD is committed to the placement of American Indian/Alaskan Native children in foster/adoptive homes which are compliant with ICWA Placement Preferences. As required by the ICWA, preference must be given in descending order as listed below, to placement of the child, unless the Tribe or Pueblo has a different placement preference or there is a documented good cause to place the child elsewhere, as determined by a court.

FOSTER CARE OR PREADOPTIVE PLACEMENT PREFERENCES (25 U.S.C. § 1915 (b)):

- (1) A member of the Indian child's extended family;
- (2) A foster home that is licensed, approved, or specified by the Indian Child's tribe;
- (3) An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
- (4) An institution for children approved by an Indian Tribe or operated by an Indian organization which has a program suitable to meet the child's needs.

ADOPTIVE PLACEMENT PREFERENCES (25 U.S.C. § 1915 (a)):

- (1) A member of the child's extended family;
- (2) Other members of the Indian child's tribe; or
- (3) Other Indian families.

If the Indian child's Tribe has established by resolution a different order of preference than that specified in ICWA, the Tribe's placement preferences apply, so long as the placement is the least-restrictive setting appropriate to the particular needs of the Indian child. Consideration should also be given, where appropriate, of the preference of the Indian child or the Indian child's parent. Prior to a placement occurring or a placement change, the PSD worker will contact and consult with the Tribe or Pueblo. The worker will ask if the tribe or pueblo has a different order of preference and will accommodate that preference. Proper documentation shall be kept as to the reasoning a different order of placement is used, and the worker(s) shall work directly with the Pueblo/Nation/Tribe to ensure preferred placement preferences are met. This documentation will be memorialized on the "ICWA Out of Preferred Placement staffing form."

Documentation of efforts made to have the Indian child placed in an ICWA preferred placement will be documented on the "ICWA Out Of Preferred Placement staffing form." This form will be uploaded into FACTS in the case record in the Administrative icon under "ICWA Staffing" narrative.

If a child is in an out-of-preferred-placement (OOPP) setting, the Office of the Secretary-Tribal Affairs Division shall be notified within 48 hours of the placement by the child's worker. The CYFD Office of the Secretary-Tribal Affairs is responsible for scheduling and conducting an out-of-preferred placement meeting (OOPP) for each Indian child in an out of preferred placement at least every 30 days until a preferred placement is made. An OOPP meeting shall occur every 30 days until the child is an ICWA-/Tribal-preferred placement. The following individuals will be invited to participate in the OOPP meeting: Director of Tribal Affairs and/or delegate; Tribal Representative and Tribal caseworker, if available; PPW and Supervisor; CCA; parents/guardians and their attorneys; guardian ad litem/youth attorney; the resource family; and the youth as appropriate.

American Indian/Alaskan Native children will not be placed in a concurrent adoptive home which is outside of the Pueblo/Nation/Tribe's or ICWA's placement preferences for adoptive placement. Guardianship and/or Tribal Customary Adoption shall be considered appropriate permanency options, unless a tribe has indicated a termination of parental rights would not be appropriate and would contradict the Pueblo/Nation/Tribe's cultural practices.

History and Guiding Statues/Regulations/Mandates

Prior to the enactment of the Indian Child Welfare Act (ICWA) in 1978, studies revealed a large number of American Indian/Alaskan Native children were separated from their parents, extended families and communities by state child welfare and private adoption agencies. Research found that 25% - 35% of all American Indian/Alaskan Native children were being removed; of these 85% were placed outside of their families and communities – even when fit and willing relatives were available. Although some progress has been made as a result of ICWA, out-of-home placement continues to occur more frequently for American Indian/Alaskan Native children than it does for the general population. Native families are still four times more likely to have their children removed and placed in foster care than their White counterparts.

Congressional testimony documents the devastating impact of these practices on Native children, families, and tribes. The intent of Congress under ICWA is to “protect the best interest of Indian children and to promote the stability and security of the Indian tribes and families” (25 U.S.C. § 1902). ICWA (25 U.S.C. § 1915(b)) requires States to place Indian children in foster care first with their extended families. When this is not possible, placement should be with a foster family licensed or approved by the child’s tribe. In situations where neither of these options are available, then placement should be with an Indian family licensed by a non-Indian agency. In regards to adoptions, ICWA ((25 U.S.C. § 1915(a)) requires States to place first with extended family, then a family of the child’s tribe, then another Indian family. If the child’s tribe establishes a different order of preference, States shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child ((25 U.S.C. § 1915(c)).

One of the goals of the *Kevin S.* Settlement Agreement is to set up practices and procedures to enable the State to comply with ICWA and provide culturally appropriate and relevant care to children in State custody, and to their families. CYFD is committed to having Native children in ICWA-preferred placements. By December 1, 2020, when a Native child is in a non-ICWA-preferred placement, the placement will be reviewed every 30 days to seek, develop and support placements in accordance with ICWA preferences. CYFD will work with NM Pueblos/Nations/Tribes to identify any tribal placement preferences that deviate from ICWA. (*KEVIN S., et al. v. BLALOCK, et al.*, No. 1:18-cv-00896.)

Process

The following actions will be implemented in order to demonstrate compliance to guiding statutes, regulations, and mandates:

Out of Preference Placements (OOPP): When an Indian child is in the custody of CYFD, the first active effort will be to secure a relative placement for the child. The CYFD caseworker will utilize family history, genograms, ancestry charts, Seneca searches, and other methods to obtain information on relatives and fictive kin to the child. If efforts to locate and place with a family member or fictive kin are not successful, and the child is placed in a non-preferred placement, the CYFD Office of the Secretary - Tribal Affairs is notified by email within 48 hours of the non-preferred placement by the child’s worker. The CYFD Office of the Secretary - Tribal Affairs is responsible for documenting any request received on a tracking spreadsheet. The OTS Director of Tribal Affairs will be responsible for scheduling and conducting an out-of-preference placement (OOPP) meeting for each child in an out of preference placement at least every 30 days until a preferred placement is made. The Director or their designee will utilize the “ICWA Out of Preferred Placement Staffing Form” to document this meeting.

1. At a minimum, the OTS – Tribal Affairs delegate, the permanency planning worker, and the permanency planning supervisor must participate in the out-of-preference placement meeting. The CCA is strongly encouraged to attend. The OTS – Tribal Affairs delegate will also ensure a representative from the child’s Tribe(s) is aware of the meeting and

will be invited to participate in a meaningful manner. Other attendees should include the resource family, the Guardian Ad Litem or Youth Attorney, the child's parents, the parents' attorneys, and grandparents and other extended family members and the youth, as appropriate.

2. The OTS – Tribal Affairs delegate must ensure that the following issues are addressed and documented in FACTS:
 - a. status of diligent extended family search and efforts being made to assess any identified extended family members, as identified through a CYFD search or a search by the child's tribe;
 - b. recommendations of specific actions and timeframes to identify an ICWA preference placement;
 - c. recommendations for culturally responsive services, supports or interventions needed to support an ICWA preference placement; and
 - d. recommendations for transition of the child to the preferred placement including specific supports needed to make the transition successful; a plan to ensure that medical, dental, and behavioral health services that the child is receiving continue; and a transition calendar.

3. The OTS – Tribal Affairs delegate will address and document in writing the following discussion questions during the OOPP meeting:
 - a. Why can't the child be with members of the child's family or extended family?
 - b. Why is the child in an out-of-preference placement, and how long has the child been there? What are the barriers to finding a preferred placement?
 - c. What additional services, support and community resources could be made available to allow the child to live in a preferred placement?
 - d. Are there other preference placements available? Such as:
 - i. foster homes licensed by the Tribe or Pueblo; or
 - ii. members of the Indian child's Tribe or other Indian families.
 - e. Are the siblings placed together, if not, why?
 - f. What is the status of the relative/extended family search, who was ruled out and why, and who do we need to contact again? Is contact information needed?

- g. What extended family members have been documented in FACTS and sent the Notice of Right to Request Placement?
 - h. What is the permanency goal?
 - i. Who else is important to the child, and who else is this child important to, including the resource family and others?
 - j. What is the tribe's position on and recommendation for placement? (Where does the tribe want the child to be placed?)
 - k. What are the recommendations and next steps to move the child into a preferred placement, and who are the responsible parties?
 - l. Is there consensus in the meeting on the recommendations and next steps? If not, opposition to the recommendations and who is opposed should be noted in the case record.
4. The recommendations and decisions made during OOPP meeting will be documented in the FACTS Administrative Icon, under the "ICWA Staffing" narrative.
 5. The PPW will be responsible for follow through with the recommendations and decisions from the meeting. Meetings will be held monthly until the goal of placing the Indian child in a preferred placement is achieved.
 6. The completed Out of Placement Preference forms will be provided to the court at every judicial review and permanency hearing.

Timeline for Implementation:

Beginning February 1, 2021, the Office of Tribal Affairs will receive notice of all instances of an Indian child being placed in State custody as a result of a PS investigation. The PS investigator is responsible for sending this notice. The Director of Tribal Affairs or their delegate will begin tracking these cases and will staff all cases in which an Indian child is not in a preferred placement.

Cases filed before January 2021 will be identified and tracked by the Office of Tribal Affairs starting in January 2021. These cases will be identified through FACTS case demographics, the legal icon, and the placement icon. A tiered staffing plan will be used to identify and staff these cases until all cases are up to date. The Director of Tribal Affairs will determine the number of cases to be staffed per month, with the goal that all cases filed before January 2021 will have an OOPP staffing held by July 1, 2021. Cases will be staffed in order of length of time in care, with

the oldest cases to be staffed first. A case may also be reviewed by the Director of Tribal Affairs at any time per request of the PPW, supervisor, CCA, or a tribal representative.

In the event there are questions or concerns in implementing this process, please contact:

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