



## **The North American Indian Center of Boston**

### **THE INDIAN CHILD WELFARE ACT: AN OVERVIEW**

#### **What is included in this guide?**

This guide provides an overview of the Indian Child Welfare Act (ICWA). It is **not** a substitute for legal counsel. You should **always contact a lawyer** for advice on ICWA.

#### **What is the Indian Child Welfare Act?**

The Indian Child Welfare Act (ICWA) is a federal law that was passed in 1978, because an extremely high number of Indian children were being removed from their homes by government and private agencies. Congress passed ICWA to “protect the best interests of Indian children and to promote the stability and security of Indian tribes and families.”<sup>1</sup>

ICWA lays out the requirements that must be followed in state child custody cases involving an Indian child who is a member of or eligible for membership in a federally recognized tribe. The law recognizes that native families often involve broader communities than non-native families, and protects these structures by giving rights not only to native children and their parents, but to the child’s tribe, too.

#### **What does ICWA do for American Indian/Alaska Native children and families?**

ICWA protects Indian children who are removed from their homes and placed in foster care or an adoptive home. The law allows the child’s tribe to participate as a party in the case.

Once a social services agency or the court is aware that ICWA applies to a child’s case, the child’s family and tribe:

- have the opportunity to be involved in decisions affecting the services provided to the Indian child; and
- can petition to have the case transferred to their own tribal court.

ICWA gives an Indian child and their parents or custodians the right to a lawyer in involuntary removal, placement, or termination cases. In Massachusetts, a lawyer will be appointed to represent you if the Department of Children and Families (DCF) tries to remove your child from your custody, even if you cannot afford to pay for legal help. Separate lawyers will represent you and any other parent/custodian of the child.

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<sup>1</sup> 25 U.S.C. §1902.



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### Who is covered by ICWA?

Indian children in state court custody proceedings are covered by ICWA. The law specifically defines an “Indian child,” a “parent,” “custodian,” and a “tribe.”<sup>2</sup> These definitions are narrow. They only apply to federally recognized tribes.

**Indian children.** The law specifically defines an Indian child as “any unmarried person who is under the age of eighteen and is either (1) a member of an Indian tribe or (2) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.”

**Parent(s) of an Indian child.** ICWA defines a parent as “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.”

**Custodian(s) of an Indian child.** ICWA defines a custodian as “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.”

**Indian child’s Tribe.** “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.”

**If you are confused by these definitions or want more information about whether you, your child, or your tribe is covered by ICWA, please call NAICOB at 617.232.0343.**

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<sup>2</sup> See 25 U.S.C. §1903.



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### How do I know if my child is eligible for membership in a tribe?

Individual tribes determine who is eligible for membership, and have different requirements for enrollment. Contact the tribe directly to find out what their specific requirements are.

**For tribes outside of Massachusetts:** the Bureau of Indian Affairs has contact information for all of the federally recognized tribes. To find out how to contact another tribe, call the BIA at 202.208.3170 or visit the following website:

<https://www.bia.gov/WhoWeAre/BIA/OIS/TribalGovernmentServices/TribalDirectory/index.htm>.

### **To reach the federally recognized tribes in Massachusetts, contact:**

Rita Lopez  
Director of Enrollment  
Mashpee Wampanoag Tribal  
Community & Government Center  
483 Great Neck Road South  
Mashpee, MA 02649  
Phone: 508.477.0208 ext. 173

Eleanor Herbert  
Membership Coordinator  
Wampanoag Tribe of Gay Head  
(Aquinnah)  
20 Black Brook Road  
Aquinnah, MA 02535-1546  
Phone: 508.645.9265 ext. 105

### What if my child is NOT a member of a federally recognized tribe?

If your child does not meet the law's definition of "Indian child," ICWA will not apply. However, there may be other state and federal laws that protect you and your child.

In Massachusetts, DCF regulations state that decisions must respect the unique values of Indian culture. 110 CMR §1.07. This regulation does not mention ICWA or define "Indian culture." You should bring up this regulation when you meet with DCF staff or your lawyer.

If you are a First Nations member and your band has a close historical relationship with a federally recognized tribe, the court may be willing to consider whether your child is covered by ICWA.<sup>3</sup>

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<sup>3</sup> See In the Matter of the Adoption of Linda, 682 N.Y.S.2d 565 (1998).



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### **What is a “child custody proceeding” covered by ICWA?**

Child custody cases covered by ICWA include:

- Guardianships
- Termination of parental rights
- Pre-adoptive placements
- Adoptive placements (including conversion from foster care to an adoptive placement)
- Voluntary placements and involuntary placements where parents can't regain custody of the child “upon demand”
- Divorce proceedings or custody disputes in which neither parent will get custody
- Status offenses (juvenile proceedings that involve an offense that would not be a crime if committed by an adult- drinking, runaway, truancy, etc.)

ICWA does **not** apply to:

- custody disputes between parents where the parents will retain custody,
- juvenile delinquency proceedings (cases in which the offense would be considered criminal if the child was an adult), or
- cases in tribal court

**If you are confused by these categories and do not know whether your case is covered by ICWA, please call NAICOB at 617.232.0343.**

### **What are caseworkers expected to do in an ICWA case?**

Your caseworker must be able to explain your rights and what is happening in your case in a way that is easy for you to understand.

The caseworker must also:

- Provide “active efforts” to the family;
- Identify a placement for the Indian child that meets ICWA preference provisions;
- Notify the child’s tribe and the child’s parents of the child custody proceedings; and
- Work actively to involve the child’s tribe and the child’s parents in the proceedings.



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### What are “active efforts”?

If an agency (for example, DCF) is involved, active efforts “**must** involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan.”<sup>4</sup> Active efforts are required regardless of the child’s tribe’s participation in the case.

Active efforts are **NOT** the same as “reasonable efforts.” Reasonable efforts might be a referral for services, but active efforts would be to arrange for **culturally-appropriate** services **and** helping families to overcome obstacles in order to engage in those services. Other examples include:

1. Conducting a comprehensive assessment of the circumstances of the Indian child’s family, with a focus on safe reunification as the most desirable goal;
2. Identifying, notifying, and inviting members of the Indian child’s Tribe to participate in providing support and services to the Indian child’s family and in family team meetings, permanency planning, and resolution of placement issues;
3. Conducting or causing to be conducted a diligent search for the Indian child’s extended family members, and contacting and consulting with extended family members to provide family structure and support for the Indian child and the Indian child’s parents;
4. Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child’s Tribe;
5. Taking steps to keep siblings together whenever possible;
6. Supporting regular visits with the parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the safety, and welfare of the child;
7. Identifying community resources, including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child’s parents, or, when appropriate, the child’s family, in utilizing and accessing those services;
8. Monitoring progress and participation in services;
9. Considering alternative ways to address the needs of the Indian child’s parents and, where appropriate, the family, if the optimum services do not exist or are not available;
10. Providing post-reunification services and monitoring.

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<sup>4</sup> 25 CFR Part 23, §23.2 Definitions (2016).



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### **What should I tell the social services worker, my attorney, or the court?**

At intake (when an investigation involving DCF or social services begins), and before every potential change in custody, the caseworker should **ask your family how you self-identify**. For example, they should ask a question like:

“Which of the following do you consider yourself a member: Asian American, Black/African American, American Indian or Alaska Native or Native American, White, Latino/a?”

They should follow up by asking whether you have any Native American, American Indian, or Alaska Native ancestry. If you say yes, they should ask you which tribes you identify with/are a member of/are enrolled in. They should also fill out a family tree or genealogy form that includes this information and put it into your case file.

If they don't do these things, you should **tell the caseworker that you and/or your child are American Indian/Native American/Alaska Native**, and whether you and/or your child are enrolled in a tribe. You should also **tell your attorney (or the judge)** if no one else brings this up when you are in court for the first time.

### **What if I think my rights under ICWA are not being applied correctly or are being ignored?**

You should contact NAICOB and the child's tribe **as soon as possible**. The tribe may have an advocate or a lawyer who handles ICWA-related issues. It is important to tell someone about your situation because the court may change its orders for service or a placement of your child if it decides that ICWA is not being followed correctly.