

City of New York
Administration for Children's Services

Policy and Procedure
2015/xx

Native Americans in ACS Cases: Required Actions for ACS and Provider Agencies

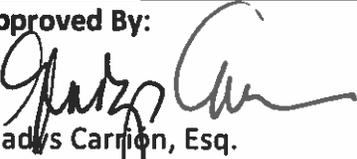
<p>Approved By:  Gladys Carrion, Esq. Commissioner</p>	<p>Date Issued: 9/15/2015</p>	<p>Number of Pages: 18</p>	<p>Number of Attachments: 5</p>
<p>Related Laws: Indian Child Welfare Act of 1978 (25 USC §§ 1901-1963); Social Security Act of 1935 (42 USC § 671(a), 42 USC § 679c); Soc. Serv. Law §§ 39, 358-a, 384-b; Articles 3, 7, 10, 10-A, and 10-C of the Family Court Act</p>	<p>ACS Divisions/Provider Agencies: Child Protection, Family Court Legal Services, Family Permanency Services, Preventive Services, foster care and preventive services provider agencies</p>	<p>Contact Office /Unit: Ray Kimmelman, Esq. Director of Legal Compliance, Division of Family Court Legal Services ray.kimmelman@acs.nyc.gov</p>	
<p>Supporting Regulations: 18 NYCRR § 431.18</p>	<p>Supporting Case Law: N/A</p>	<p>Bulletins & Directives: A Guide to Compliance with the Federal Indian Child Welfare Act in New York State; OCFS Indian Child Welfare Act Compliance Desk Aid for New York State Child Welfare Workers</p>	
<p>Key Words: Native Americans, Indian Child Welfare Act, ICWA, extended family, tribe, nation</p>	<p>Related Policies: The Federal Register: Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 FR 10146 (2015)</p>	<p>Supersedes: N/A</p>	
<p>Related Forms: N/A</p>			
<p>SUMMARY: The Administration for Children's Services (ACS) has always required child protective specialists, provider agency case planners, and other service providers to demonstrate respect for the cultures of the people they serve. ACS staff must make efforts to include a family's cultural resources and supportive individuals in all planning and decision-making regarding the family. These principles apply to ACS' work with Native Americans. Additionally, the federal Indian Child Welfare Act (ICWA) of 1978 and similar legislation in New York State require child and family service providers to follow special procedures when working with Native Americans. These procedures protect the integrity of both Native American families and the tribal nations to which they belong. These legal mandates also enable tribal nations to retain their traditional sovereignty over families within their jurisdiction.</p>			

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I. Introduction

- A. The federal Indian Child Welfare Act (ICWA) of 1978¹, associated guidelines,² and similar legislation and regulations in New York State³ require child and family service providers to follow special procedures when working with Native Americans⁴. These procedures protect the integrity of both Native American families and the tribal nations to which they belong. These legal mandates also enable tribal nations to retain their traditional sovereignty over families within their jurisdictions.
- B. In the past, the government often interfered excessively with the freedom and family life of Native Americans, including the unwarranted removal of children. In light of this history, the special legal requirements have particular importance.
- C. Even aside from legal mandates, ACS has always been committed to demonstrating respect for the cultures of the people we serve. ACS staff must make efforts to include a family's cultural resources and supportive individuals in all planning and decision making regarding the family. These principles apply, accordingly, to our work with Native Americans. ACS is committed to helping perpetuate the rich heritage and culture of Native Americans.

II. General Responsibilities for Child Protective Specialists (CPS) and Service Providers

A. Inquiry of Native American Heritage

1. Within five (5) days of the initiation of a child protective investigation, a CPS must ask a child's parent whether the family has any known Native American heritage. The CPS must document the answer in the CONNECTIONS (CNNX) progress notes or in the template.
2. Service providers must also ask a child's parent whether the family has any known Native American heritage. It is important for service providers to inquire because there may have been no prior CPS involvement or there may be newly-learned information suggesting the possibility of Native American heritage. Service providers may include the following individuals below:
 - a. A preventive services provider case planner in a preventive services case;
 - b. A foster care case planner or child planner;

¹ 25 USC §§ 1901-1963.

² "The Federal Register: Guidelines for State Courts and Agencies in Indian Child Custody Proceedings" (Also known as the Federal Guidelines), 80 F.R. 10146 (2015).

³ NY Soc Serv Law § 39, 18 NYCRR § 431.18.

⁴ Note that Native Americans are also known as American Indians. The term "Native American" is preferred. Both terms are used in law and policy.

- c. A CPS, in the case of a proposed voluntary placement;
 - d. A Family Assessment Program (FAP) staff member, in the case of a Person in Need of Supervision (PINS) diversion services case;
 - e. A CPS or case planner in a case where the family is receiving services pursuant to evidence-based models, the Family Preservation Program, or other similar programs;
or
 - f. A Family Services Unit (FSU) CPS.
3. The CPS and service providers must refrain from presuming, based upon physical appearance or any other factors, that a particular individual lacks Native American heritage. The CPS and service provider must ask the question in every instance.
 4. Except for Advocates Preventive Only (ADVO) cases, the CPS is encouraged to seek the assistance and guidance of the Family Court Legal Services (FCLS) Legal Compliance Unit (at ray.kimmelman@acs.nyc.gov or 212-341-3127) for any case at the initiation of and throughout the investigation, as needed, with respect to procedures relating to Native American issues. The CPS can contact the FCLS Legal Compliance Unit for assistance and guidance even if the case is not active in court. For Family Assessment Response (FAR) cases, the CPS can contact the FCLS Legal Compliance Unit for assistance if the CPS is considering a change from the FAR track.
 5. If there is an active court case and the CPS or service provider learns of the existence of possible Native American heritage, the individual must promptly communicate the information to the FCLS attorney. The FCLS attorney must promptly communicate that information to the Court and all parties. The FCLS attorney must also convey the information in writing to the Court.⁵ The FCLS attorney must document these communications in 'Notes to File' in the Legal Tracking System (LTS). The FCLS attorney must also inform the FCLS Legal Compliance Unit that there is an active court case involving a family that may have Native American heritage.
 6. Note that all of the above-mentioned responsibilities apply even if the child on the case is now a young adult age 18-21 years old.
- B. "Active Efforts" to Identify Child's Native American Heritage
1. If a parent indicates that the family may have Native American heritage, the CPS or service provider must explain the following to the parent:

⁵ 18 NYCRR § 431.18(e).

- a. ACS or the service provider would like to explore the family's Native American heritage;
 - b. The CPS or service provider must seek the parent's consent to explore the family's Native American heritage (see Attachment A- Consent to Explore Native American Heritage). The CPS or service provider must inform the parent that the parent may withdraw consent at any time;
 - c. ACS or the service provider is required to make "active efforts" to identify the Native American heritage of the child⁶; and
 - d. When the child's Native American heritage is identified, such "active efforts" will help ACS or the service provider to attempt to engage specialized Native American services for the family to avoid removal of a child protected under the Indian Child Welfare Act (ICWA) and related law.⁷ Additionally, the CPS or service provider must explain that ACS is mandated to make "reasonable efforts" to alleviate the need to remove the child from his or her home. Such efforts shall involve and use available resources of the child's extended family, the tribal nation, a Native American social services agency, and individual Native American caregivers.
2. If the parent declines to provide consent for ACS or the service provider to explore the family's Native American heritage, the CPS or service provider must alert the New York State Office of Children and Family Services (OCFS) Office of Native American Services and take appropriate and reasonable steps that the office may recommend. In the event that the CPS or service provider is concerned about the feasibility of OCFS's recommendations, the CPS and/or supervisor or service provider must immediately contact the FCLS Legal Compliance Unit for further discussion regarding possible alternatives.
 3. If the parent consents to ACS or the service provider exploring the family's Native American heritage, the CPS or service provider must make the following active efforts:
 - a. Determine the family's membership, or eligibility for membership, in a Native American nation:⁸

⁶ 25 USC § 1912(d). Pursuant to the Federal Guidelines, "active efforts" are intended primarily to maintain and reunite an Indian child with his or her family or tribal community and constitute more than reasonable efforts as required by Title IV-E of the Social Security Act. 80 FR 10146 (2015).

⁷ Ibid and "Reasonable efforts" is required pursuant to 18 NYCRR § 431.18(d).

⁸ Note that the term NATION is referred as TRIBE in the statute. The term NATION is preferred. Both terms are used in policy. See also, 25 USC § 1903. Pursuant to the Federal Guidelines, the court may ask the agency to certify on the record whether they have discovered or know of any information that suggests or indicates that the child is a Native American child. 80 FR 10146 (2015). If there is reason to believe that the child or family is eligible

- i. The CPS or service provider must ask for details, including the name of the tribal nation (tribe), if known.
 - ii. The CPS or service provider must ask the parent if there is any relevant documentation that the parent is willing to share.
 - iii. The CPS or service provider must ask if anyone in the family has a tribal identification card.
 - iv. If the parent or anyone in the family has a tribal identification card, the CPS or service provider must review the card and document the information contained on the card.
- b. Inform the parent that in New York State, the children eligible for membership in federally and state recognized tribes are subject to the protections of ICWA and related state laws.⁹ In both cases, the CPS or service provider must advise the parent that the CPS or service provider will be inviting the Native American nation, the American Indian Community House (AICH), and/or other known Native American service providers to participate in service planning for the family. The CPS or service provider may be required to obtain the parent's consent first before inviting representatives from the Native American nation to participate in services planning. Please see below for more information:
- i. The CPS or service provider must obtain the parent's consent if the family has no active family court case involving a child with Native American heritage.
 - ii. The CPS or service provider is not required to obtain the parent's consent under specific circumstances. Instead, the Native American nation is entitled to intervene and participate when the following circumstances apply:
 - a) The family has a court case involving a child with Native American heritage on a child protective matter where remand or placement is sought;
 - b) The family has a court case involving a child with Native American heritage where voluntary placement is sought;

for membership in more than one nation, the CPS must contact Native American Services at OCFS at (716) 847-3123 for guidance.

⁹ 25 USC § 1903(4), NY Soc. Serv. Law § 39(3)-(4), 18 NYCRR § 431.18

- c) The family has a court case involving a child with Native American heritage where surrender or a termination of parental rights (TPR) is sought;
 - d) The family has a court case involving a destitute child with Native American heritage; or
 - e) The family has a court case involving a child with Native American heritage and the child is a person in need of supervision (PINS).
- c. Telephone the OCFS Office of Native American Services at (718) 847-3123 to alert staff about the family and obtain assistance with contacting the Indian nation and any other related matters on all cases. The CPS or service provider shall obtain the name, address, phone number, and e-mail address of the appropriate contact person for the Native American nation or tribe in question.¹⁰
 - d. Promptly communicate with the Native American nation's contact person by phone or e-mail to alert him or her that that the CPS or service provider is mailing an inquiry letter requesting information about the family's membership or eligibility for membership.
 - e. Mail, via certified mail, return receipt requested, an inquiry letter to the Native American nation (See Attachment B).¹¹
 - f. Scan and e-mail a copy of the letter to Cassandra Sakelos at the OCFS Office of Native American Services – cassandra.sakelos@ocfs.state.ny.us.
 - g. Scan and e-mail a copy of the letter to Kevin Tarrant, Executive Director of the American Indian Community House (AICH) at ktarrant@aich.org.
 - h. Telephone the AICH at (212) 598-0100 to discuss what services may be appropriate for the family.

¹⁰ Many Native American nations designate an agent for receipt of ICWA notices. For tribes without a designated tribal agent for service of ICWA notice, the Office of Native American Services will assist in contacting the Native American nation so the CPS can be directed to the appropriate individual or office.

¹¹ If the agency has reason to believe that the Native American parent possesses limited English proficiency, the agency must provide a translated version of the notice or have the notice read and explained in a language that the parent understands. 80 F.R. 10146 (2015). Information contained in the notice should be kept confidential to the extent possible. Moreover, to the extent that a parent has requested anonymity, the agency and court must take steps to keep information related to the parent confidential and sealed from disclosure. However, a request for anonymity does not relieve the obligation to obtain verification from the Native American nation(s) or to provide notice. 80 F.R. 10146 (2015).

- i. Refer the family, as appropriate, for services from service providers specializing in services for Native Americans.
- j. Discuss any substantive response from the Native American nation to the parent.
- k. Send or e-mail copies of any substantive response from the Native American nation to the OCFS Office of Native American Services and AICH to the following addresses:
 - i. OCFS Office of Native American Services, 295 Main Street, Suite 545, Buffalo, NY 14203; and
 - ii. AICH, 254 West 29th Street, 2nd Floor, New York, NY 10001
- l. With the documented consent of the parent (if required), invite AICH and any other known Native American service providers to participate in discussions of services for the family, including participation in family team meetings.
- m. With the documented consent of the parent, invite any identified Native American relatives or associates of the family to discuss services for the family, including participation in family team meetings and family team conferences.

C. Documentation in CONNECTIONS (CNNX)

1. If the parent indicates that the family has or may have Native American heritage, the CPS or service provider must identify the family's Native American identity by selecting AMERICAN INDIAN in the racial identity dropdown in CNNX under the "Person Info" tab.¹³
2. The CPS or service provider must document whether the parent consents to the CPS or service provider's exploration of the family's Native American heritage in CNNX.
3. The CPS or service provider must document whether the parent consents to the Native American nation, AICH, or other Native American service providers' participation in service planning in cases where the family has no active court case involving a child with Native American heritage.
4. The CPS or service provider must document contacts made with OCFS, FCLS Legal Compliance Unit, AICH, and any other service providers contacted in CNNX.

¹³ Note that the identifier AMERICAN INDIAN is not appropriate for a family that identifies as being from the country of India or from anywhere else in East Asia, unless the family also cites Native American heritage.

5. The CPS or service provider must document in CNNX any responses received from the Nation, including the initial “return receipt” acknowledging the receipt of the inquiry and if the Nation declines to participate.
6. The CPS or service provider must document any other relevant contacts and information regarding the family’s Native American heritage or exploration of heritage.

III. Emergency Removal of a Child

- A. A CPS must make an immediate emergency removal of a child if remaining in the care of the parent or caretaker presents an imminent danger to the child’s life or health, and if there is not enough time to seek a court order.¹⁴
- B. If the family is one in which there is Native American heritage, ACS must seek to place the child according to the preferences listed below in section VIII, *Placement Preferences*.¹⁵ The CPS must promptly alert the appropriate FCLS supervising attorney of the emergency removal and that the family has Native American heritage at the time of the removal during the business day or on the next business day. The CPS must document in CNNX the FCLS supervising attorney’s acknowledgment that this notification was received.
- C. The FCLS supervising attorney must inform the FCLS Legal Compliance Unit of the emergency removal and that the family has Native American heritage.
- D. After the emergency removal, the CPS must promptly report to FCLS Intake for filing of a child protective petition. (See section V, *Filing of a Child Protective Petition*, below.)

IV. Child Safety Conference

At every Initial Child Safety Conference, the child and family specialist (CFS) must ask family members whether they have Native American heritage. The CFS must document the response, including any relevant detail, in the Child Safety Conference Summary. If a family member reports Native American heritage, the CFS must promptly notify the FCLS supervising attorney of that information upon the conclusion of the conference. The CFS must document that communication and the FCLS supervising attorney’s acknowledgement that this notification was received.

V. Filing of a Child Protective Petition

- A. When preparing to file a child protective petition at FCLS Intake, the CPS must inform the FCLS attorney on Intake that the family has Native American heritage. The FCLS attorney

¹⁴ See 25 USC § 1922.

¹⁵ 25 USC § 1915(b), 18 NYCRR § 431.18(f).

must promptly alert the Court, the parties, and the child's attorney of the Native American heritage¹⁶ on the court record at the outset of the initial hearing. The FCLS attorney must also document such communications in 'Notes to File' in LTS.

- B. On the petition itself, the FCLS attorney must indicate whether the child is a child protected by ICWA, and whether ACS has notified the parent or custodian, nation, or Secretary of the Interior of the United States regarding the filing of the petition. (See Section VI, below.)
- C. The FCLS attorney must promptly alert the FCLS Legal Compliance Unit of the filing.
- D. If the CPS is unaware of the existence of possible Native American heritage at the outset of the proceedings, but learns of it later in the proceedings, the CPS must promptly communicate the information to the FCLS attorney. The FCLS attorney must promptly convey the information in writing to the Court¹⁷ and all parties. The FCLS attorney must document these communications in 'Notes to File' in LTS.
- E. If ACS is seeking a remand of a child protected by ICWA, the FCLS attorney must alert the Court that ACS intends to promptly send notice of the court action to the nation or tribe and others, as required by law.¹⁸ (See section VI, *Notice of Court Action*, below.)
- F. If the CPS has determined and documented that the child will be safe from harm for up to two (2) weeks with temporary court-ordered services or supervision, prior to a remand, the FCLS attorney must request leave to move for immediate calendaring of the matter for further hearing within 10 days from the nation's receipt of the notice. This interim period will allow the nation the statutorily required 10 day period to respond as to whether it intends to take jurisdiction, decline jurisdiction, or participate in Family Court.¹⁹
- G. If the CPS has already made an emergency removal of the child, or if the CPS has determined and documented that the child will not be safe from harm if left temporarily in the care of the parent or caretaker, the FCLS attorney must so inform the Court on the record. The FCLS attorney must state that ACS is seeking an immediate remand and requesting leave to move for immediate re-calendaring for a further hearing if the nation seeks to assume jurisdiction or participate.
- H. Any petition for a court order authorizing a temporary removal (pre-disposition)²⁰ must be accompanied by an affidavit containing the following information:

¹⁶ 18 NYCRR § 431.18(e).

¹⁷ Ibid.

¹⁸ 25 USC § 1912(a), 18 NYCRR § 431.18(c).

¹⁹ See 25 USC § 1912(a).

²⁰ The Federal Guidelines refers to a petition for a court order authorizing temporary removals as an "emergency removal" or as "continued emergency physical custody." 80 FR 10146 (2015).

1. The name, age, and last known address of the Native American child;
 2. The name and address of the child's parents;
 3. If the child's parents persons are unknown, a detailed explanation of what efforts have been to locate them;
 4. Facts necessary to determine the residence and domicile of the Native American child;
 5. If either the residence or domicile is believed to be on a Native American reservation, the name of the reservation;
 6. The tribal affiliation of the child and of the parents and/or Native American custodian;
 7. A specific and detailed account of the circumstances that led the agency responsible for the emergency removal of the child to take that action;
 8. If the child is believed to reside or be domiciled on a reservation where the nation exercises exclusive jurisdiction over child custody matters, a statement of efforts that have been made and are being made to transfer the child to the nation's jurisdiction;
 9. A statement of the specific active efforts that have been taken to assist the parents or Indian custodians so that the child may safely be returned to their custody; and
 10. A statement of the imminent physical damage or harm expected and any evidence that the removal or emergency custody continues to be necessary to prevent such imminent physical damage or harm to the child.²¹
- I. At any hearing regarding the removal or placement of a Native American child prior to disposition, the court must make a determination whether the removal or placement is necessary to prevent imminent physical damage or harm to the child. The court must accept and evaluate all information relevant to the agency's determination provided by the child, the child's parents, the child's Native American custodians, the child's nation, or any participants in the hearing. ACS must advocate accordingly.²²

If ACS is requesting a remand, ACS must seek to place the child according to the preferences listed below in section VII, *Placement Preferences*.²³ As needed, the FCLS attorney must inform the Court of the intention of ACS to abide by these preferences.

²¹ 80 F.R. 10146 (2015).

²² Ibid.

²³ 25 USC § 1915, 18 NYCRR § 431.18.

VI. Notice of Court Action

- A. The Native American nation has the legal right to intervene (that is, to participate as a party to the case) at any point in certain court proceedings involving a child protected by ICWA.²⁴ These include child protective, voluntary, PINS, destitute child, surrender or TPR cases. They do not include child protective cases where no remand or placement is sought. The Native American nation may decide to assume jurisdiction of the matter,²⁵ to decline to assume jurisdiction, or to decline to assume jurisdiction, but participate in the Family Court proceeding. As soon as an FCLS attorney knows he or she intends to file a petition in one of the above-referenced types of cases, the attorney must promptly contact the Native American nation's contact person by phone or e-mail to alert the Native American nation that the attorney is mailing a Notice of Court Action. The attorney must provide details regarding the court proceeding, including the next scheduled hearing date. The attorney must seek the assistance of the FCLS Legal Compliance Unit for general assistance and to ascertain the appropriate point person and contact information for the Native American nation.
- B. The attorney must send notice of the court action to the parent or Native American custodian, as well as the nation, or the Secretary of the Interior of the United States if the nation cannot be identified. (See Attachments C, D, and E - form notices of court action.) The notice must be sent "certified, return receipt requested."²⁶
- C. The FCLS attorney must send or e-mail a copy of the notice to the OCFS Office of Native American Services. If the parent or Native American nation has previously consented to the involvement of AICH, the FCLS attorney must also send or e-mail a copy of the notice to AICH.
- D. Except as noted elsewhere in this policy, the FCLS attorney must ask the Court to calendar any hearing on the remand or placement of the child until 10 days after the nation receives the notice. By law, the parent or Native American custodian, or the Native American nation, may request up to 20 additional days to prepare for any hearing.²⁷ Note that if proper notice is not provided, a Native American nation may petition the Court to invalidate the foster care placement.²⁸

²⁴ 25 USC § 1911, NY CLS Soc. Serv. § 39(7).

²⁵ Upon receipt of a petition by a parent or Native American nation, the State court must transfer the case to the jurisdiction of the Native American nation unless any of the following criteria are met: 1) either parent objects to such transfer; 2) the tribal court declines the transfer; or 3) the court determines that good cause exists for denying such transfer; In determining whether good cause exists, the court may not consider whether the case is at an advanced stage or whether transfer would result in change of placement of the child. 80 F.R. 10146 (2015)

²⁶ 25 USC § 1912(a), 18 NYCRR § 431.18(c).

²⁷ Ibid.

²⁸ 25 USC § 1914.

- E. Note that it is possible that the Native American nation may appear in court prior to receiving notice if the Native American nation has learned of the case through other means or has already been involved with ACS on the case.
- F. If a Native American nation intervenes in the Family Court proceeding, the FCLS attorney must serve the Native American nation with any notices or documents to which any other party would be entitled.²⁹

VII. Placement Preferences

- A. In any instance in which a CPS or case planner is arranging a placement setting for a Native American child, the CPS or case planner must abide by the following preferences. (See D, below, for exceptions.) These preferences, set forth by order of priority, must take precedence over other important considerations, such as placement with siblings, placement in the community, placement with family friends, and placement for special needs or medical services:
 - 1. First: **Extended Family**: The child should be placed with a member of the child's extended family. In this context, "extended family" is defined by the law or custom of the Native American nation. In the absence of such law or custom, "extended family" means a grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent.
 - 2. Second: **Foster Home Licensed by the Native American Nation**: The child should be placed in a foster home licensed, approved, or specified by the child's Native American nation and approved by ACS.
 - 3. Third: **Native American Foster Parents**: The CPS should refer the child to the Office of Placement who must then seek a placement with Native American foster parents who have been authorized by an agency contracted with ACS.
 - 4. Fourth: **Institution Approved by a Native American Nation**: The child should be placed in an institution for children approved by a Native American nation or operated by a Native American organization.³⁰ The institution must have a program suitable to meet the needs of the child. The CPS should contact the Native American nation directly or contact the American Indian Community House for information regarding such placements.³¹

²⁹ 25 USC § 1912(c).

³⁰ It is presumed that such an institution must meet the approval of ACS in that such a placement constitutes foster care.

³¹ 25 USC § 1915(b), 18 NYCRR § 431.18(f)(1).

- B. For adoptive placements, the case planner must generally abide by the following preferences:
1. First: **Extended Family**, as described above;
 2. Second: **Other Members of the Child's Native American Nation**; and
 3. Third: **Other Native American Families**.³²
- C. If ACS or a foster care agency determines that any of these preferences cannot be met, ACS or the foster care agency must demonstrate through clear and convincing evidence that a diligent search has been conducted to seek out and identify placement options that would satisfy the placement preferences. Departure from placement preferences may occur only when ACS or the foster care agency demonstrates by clear and convincing evidence that there is "good cause" to deviate from placement preferences. These mandated preferences reflect the best interest of a Native American child in light of the purposes of the ICWA Act.³³
- D. In applying these preferences, the case planner must consider the prevailing social and cultural standards of the Native American community in which the parent or extended family resides or maintains social and cultural ties.³⁴
- E. The case planner may decline to follow the above preference order in certain cases, based on one or more of the following considerations:
1. The biological parents have so requested;
 2. The child has so requested, and is of sufficient age to make decisions concerning where he or she should reside (the child is able to understand and comprehend the decision that is being made);
 3. A qualified expert witness [see definition in section IX(C) below] signs an affidavit or testifies that the extraordinary physical or emotional needs of the child do not permit the preferences to be followed;
 4. After a diligent search has been completed for families meeting the preference criteria, no suitable families are available. A diligent search must include, at minimum, contact with the Native American nation's social service program, a search of all state or county

³² 25 USC § 1915(a), 18 NYCRR § 431.18(g)(1).

³³ 80 F.R. 10146 (2015)

³⁴ 25 USC § 1915(d).

listings of available Native American homes, and contact with nationally or locally known Native American programs with available placement resources; or

5. The Native American nation agrees that the best interests of the child require placement with a non-Native American family or in another setting not within the order of placement preferences.³⁵
- F. If the Native American nation has established by resolution an order of preference different than those indicated above, the case planner must follow the order of preference established by the resolution, provided that the placement made is in the least restrictive setting appropriate to the particular needs of the child.³⁶
- G. Where a parent is voluntarily placing a Native American child in foster care, or surrendering parental rights to the child, and the parent has expressed a desire for anonymity, the case planner must consider the desire for anonymity in applying placement preferences.³⁷

VIII. Presenting and Proving the Child Protective Case

A. Active Efforts

When seeking a remand or placement of a child protected by ICWA in a child protective case, the FCLS attorney must demonstrate to the Court and make a record that ACS has made “active efforts” and “reasonable efforts” to keep the family intact and that such efforts have proved unsuccessful.³⁸ Active efforts are intended primarily to maintain and reunite a Native American child with his or her family or tribal community and constitute **more than the reasonable efforts** as required by Title IV-E of the Social Security Act.³⁹ Reasonable efforts involve the use of available resources of the child’s extended family, the tribe, the Native American Social Services Agency, and individual Native American caregivers.

B. Burden of Proof

The FCLS attorney must work with the CPS to present *clear and convincing evidence*, including the testimony of a *qualified expert witness*, in order for the Court to issue an order remanding or placing a child protected by ICWA into foster care. Such evidence must

³⁵ 18 NYCRR § 431.18(f)(2).

³⁶ 25 USC §1915(c), 18 NYCRR § 431.18(f)(3).

³⁷ 25 USC § 1915(c), 18 NYCRR § 431.18(f)(4).

³⁸ 25 USC § 1912(d). Note that pursuant to 18 NYCRR § 431.18(d), “reasonable efforts” must be made to alleviate the need to remove the Indian child from his home.

³⁹ see 42 USC § 671(a)(15) and Federal Guidelines, 80 FR 10146 (2015)

demonstrate that the continued custody of the child by the parent or Native American custodian is likely to result in serious emotional or physical damage to the child.⁴⁰

C. Qualified Expert Witness

1. A “qualified expert witness” (QEW) is an individual qualified to speak on whether continued custody by the parents of a Native American child or a Native American custodian is likely to result in serious physical or emotional harm to the child.⁴¹ The following types of individuals are most likely to meet that requirement:
 - a. A member of the child’s Native American nation who is recognized by the Native American community as knowledgeable in customs as they pertain to family organization and child rearing practices;
 - b. A lay expert witness having substantial experience in the delivery of child and family services to Native Americans and extensive knowledge of prevailing social and cultural standards and child-rearing practices within the child’s Native American nation; or
 - c. A professional person having substantial education and experience in provision of services to Native American children and families.⁴²
2. To obtain a QEW, the FCLS attorney must first attempt to contact the child’s Native American nation. If that attempt is unsuccessful, the FCLS attorney shall contact the OCFS Office of Native American Services at (716) 847-3123 or AICH at (212) 598-0100 or at www.aich.org. The FCLS attorney should keep the FCLS Legal Compliance Unit informed, and seek its assistance as needed.
3. At each stage of the proceeding, the FCLS attorney should keep the FCLS Legal Compliance Unit informed, and seek its assistance as needed.

IX. **Other Petitions**

A. Voluntary Placements

⁴⁰ 25 USC § 1912(e), 18 NYCRR § 431.18(b)(1) (no foster care placement of an Indian child may be ordered by a court unless there is a determination, supported by clear and convincing evidence, including testimony of a qualified expert witness, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child). ACS must also present evidence regarding imminent danger, neglect, and abuse as required by the relevant Family Court statutes, including but not limited to Family Court Act sections 1012, 1027, 1028, and 1051.

⁴¹ 25 USC § 1912(e), 18 NYCRR §§ 431.18(a)(5) & 431.18(b)(1).

⁴² 18 NYCRR § 431.18(a)(5)

1. Whenever a CPS plans for a parent or custodian to sign a Voluntary Placement Agreement, and the parent or custodian has indicated that they may have Native American heritage, the CPS must notify the FCLS Legal Compliance Unit.
2. The CPS and FCLS attorney must arrange for any parent or custodian seeking to sign a Voluntary Placement Agreement regarding a child protected by ICWA to sign, or resign, the agreement in court.⁴³ The FCLS attorney must send notice of court action as above (see section VI, *Notice of Court Action*).⁴⁴
3. Note that a parent or Native American custodian of a child with ICWA status may withdraw consent to the foster care placement at any time.⁴⁵ If the consent is withdrawn, the case planner and FCLS attorney must immediately alert the Court and parties and arrange for the child to be promptly returned to the parent or Native American custodian, unless a child protective petition is filed. Note, the 10 day rule applies if the Native American nation was neither notified nor involved on the case.

B. Destitute Children

The CPS must follow the same procedures as in child protective proceedings. If there is reason to believe that the child is a member of a Native American nation, FCLS must follow the same procedure of notification of court action (See Section VIII, *Presenting and Proving the Child Protective Case*, above).⁴⁶

C. Person in Need of Supervision Extensions

If new information is learned at the time of an extension of a PINS placement, or thereafter, the case planner and FCLS attorney should follow similar procedures as with child protective proceedings. (See Section VIII, *Presenting and Proving the Child Protective Case*, above.)⁴⁷

D. Permanency Hearings

If new information is learned at the time of a permanency hearing, or thereafter, the case planner and FCLS attorney should follow similar procedures as with child protective proceedings⁴⁸ (See Section VIII, *Presenting and Proving the Child Protective Case*, above).

⁴³ 25 USC § 1913(a).

⁴⁴ 25 USC § 431.18(c).

⁴⁵ 25 USC § 1913(b).

⁴⁶ 25 USC § 1912(a).

⁴⁷ 25 USC § 1912(a), NY Soc. Serv. Law § 39(c); Note: ICWA does not impose any obligations on ACS at the time a PINS petition is filed because ACS is not the petitioner and is not the party seeking placement of the child in foster care. By contrast, ACS is the petitioner and the party seeking foster care placement when filing for a PINS extension of placement.

E. Termination of Parental Rights/Surrenders

1. The foster care agency attorney (or FCLS attorney, if no foster care agency is involved) must send the required notice (see Section VI above, *Notice of Court Action*) in TPR and surrender proceedings.⁴⁹ New notices must be sent even if the parent and tribe were previously notified about other proceedings.
2. To terminate parental rights to a child protected by ICWA, the agency attorney (or FCLS attorney, if no foster care agency is involved) must present *evidence beyond a reasonable doubt*, including the testimony of a *qualified expert witness* that the continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child.⁵⁰ The agency must also again demonstrate that *active efforts* were made to keep the Native American family intact.⁵¹ Even if such determinations were previously made at the time of the original remand or placement, the Court must make them again in order to terminate parental rights.
3. The agency attorney must provide final orders regarding the adoptive placement of any child protected by ICWA to the Secretary of the Interior along with the following:
 - a. Name and tribal nation affiliation of the child;
 - b. Names and addresses of the child's parents;
 - c. Names and address of the child's adoptive parents; and
 - d. The identity of any agency having files or information relating to such adoptive placement.⁵²

CPS staff and case planners are urged to seek the assistance and guidance of the FCLS Legal Compliance Unit (at 212-341-3127) throughout the progress of a case involving Native Americans, as needed. The Unit will provide assistance regarding, among other things, efforts to avoid removal as well as the procedures for placements and notifications.

⁴⁸ 25 USC § 1912(a), 18 NYCRR § 431.18(c).

⁴⁹ Ibid.

⁵⁰ 25 USC § 1912(F), 18 NYCRR § 431.18(b)(2) (No foster care placement of a Native American child may be ordered by a court unless there is a determination, supported by clear and convincing evidence beyond a reasonable doubt, including testimony of a qualified expert witness, that the continued custody of the child by the parent or Native American custodian is likely to result in serious emotional or physical damage to the child).

⁵¹ 25 USC § 1912(d); Note that pursuant to 18 NYCRR § 431.18(d), "reasonable efforts" must be made to alleviate the need to remove the Native American child from his home. Such efforts shall involve and use available resources of the child's extended family, the Native American nation, the Native American Social Services Agency, and individual Native American caregivers.

⁵² 25 USC § 1951(a)(1).

ATTACHMENT A

CONSENT TO EXPLORE NATIVE AMERICAN HERITAGE

I, _____, believe that my family may have Native American heritage.

I understand that the Administration for Children’s Services (ACS) or its designee wishes to explore my heritage further, in order to provide appropriate services and support to the family, and to comply with applicable laws.

I consent to ACS pursuing this exploration, including but not limited to the following:

1. Determining my family’s membership, or eligibility for membership, in a Native American tribe. If the family is eligible, ACS will be inviting the tribe to participate in services planning.
2. Referring my family, as appropriate, for services from service providers specializing in services for Native Americans.
3. Contacting the New York State Office of Children and Family Services (OCFS) Office of Native American Services to obtain assistance.
4. Contacting the American Indian Community House (AICH) to obtain assistance.

I understand that attempting to engage specialized Native American services is required of ACS as a component of “active efforts” to avoid removal of a child protected under the Indian Child Welfare Act (ICWA) and related law. I understand that I may withdraw consent at any time.

Date

Signature

Attachment B – Model Letter - Inquiry to Tribe

[address of Tribe]

BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED

[date]

CONFIDENTIAL

Greetings.

Our agency, the Administration for Children's Services, which is the child protective agency for New York City, has become involved in providing services to the [name of family] family.

[Name, and relation to children] has informed us that he [she] is a member of [may be eligible to be a member of] the [name of Tribe]. I write to seek confirmation. I also seek to learn whether the child is [children are] eligible for tribal membership. Here is the information:

Children:

[names and birthdates of the child or children]

Mother:

[name and birthdate]

Father:

[name and birthdate]

Relative:

[name and birthdate]

We are interested in obtaining the information as soon as possible so we can promptly take additional steps as necessary. We have also e-mailed [faxed] you the above information.

Feel free to call or e-mail me as needed. Thank you so much for your immediate attention and assistance.

Very truly yours,

REGISTERED MAIL/ RETURN RECEIPT REQUESTED

Date:

Docket #

(Address)

Dear :

Pursuant to the federal Indian Child Welfare Act of 1978 (25 USC 1912), the Department of Social Services/Administration for Children's Services, as petitioner in the above proceeding, gives notice to _____ of a child custody proceeding now pending in the court named below. A hearing in this proceeding has been scheduled for _____ at before the Honorable _____, Judge. The name, address and phone number of the courthouse are: _____.

The name of the child(ren) in question is _____, born _____ in _____. It is believed that _____ is a member of or eligible for membership in the _____ Tribe/ Nation or is the biological child of a member of the _____ Tribe/Nation who resides or is domiciled within an Indian reservation.

Father: _____, born _____ in _____
Address: _____ (Tribe/ Nation enrollment number)

Mother: _____, born _____ in _____
Address: _____ (Tribe/ Nation enrollment number)

Indian custodian(s): _____
Address: _____.

Attached is additional information regarding the child ancestry.

Under the federal Indian Child Welfare Act of 1978 (25 USC 1911), the parent(s) or Indian custodian(s) of the child, and the child's Tribe/Nation have the right to intervene at any point in this proceeding. In addition, the parent(s), Indian custodian(s) and the Tribe/Nation have the right to petition the above-named court to transfer this proceeding to the Tribe's/Nation's jurisdiction. Upon such petition, the court shall transfer such proceeding to the Tribe's/Nation's jurisdiction, absent good cause to the contrary or the Tribe's/Nation's court declining such transfer.

No proceeding involving the above-named child(ren) may take place until at least ten (10) days after receipt of this notice. Upon request, the parent(s), Indian custodian(s) of

the child and the child's Tribe/Nation must be granted an additional twenty (20) days to prepare for this proceeding.

Be advised that the above referenced proceeding may have significant legal consequences on the future custodial parental rights of the parent or Indian custodial of the child(ren) referenced above. Enclosed is a copy of the petition, complaint or other legal document filed with the court to initiate this proceeding.

If the parent(s) or Indian custodian(s) of the child wish legal counsel but cannot afford attorney fees, court-appointed counsel may be requested and the court must appoint counsel upon a finding that you can not afford counsel.

If you need more information, call me at . Your earliest response would be most appreciated.

Respectfully,

Caseworker

Attorney

cc: New York State Office of Children
and Family Services
Native American Services
295 Main Street
Buffalo, New York 14203

attachment

REGISTERED MAIL/ RETURN RECEIPT REQUESTED

Date:
Docket #

(Address)

Dear:

Pursuant to the federal Indian Child Welfare Act of 1978 (25 USC 1912), the Department of Social Services/Administration for Children's Services, as petitioner in the above proceeding, gives notice to of a child custody proceeding now pending in the court named below. A hearing in this proceeding has been scheduled for at before the Honorable , Judge. The name, address and phone number of the courthouse are:

The name of the child(ren) in question is , born in . It is believed that is a member of or eligible for membership in the Tribe/ Nation or is the biological child of a member of the Tribe/ Nation who resides or is domiciled within an Indian reservation.

Father: , born in
Address: (Tribe/ Nation enrollment number)

Mother: , born in
Address: (Tribe/ Nation enrollment number)

Indian custodian(s):
Address: .

Attached is additional information regarding the child ancestry.

Under the federal Indian Child Welfare Act of 1978 (25 USC 1911), the parent(s) or Indian custodian(s) of the child, and the child's Tribe/Nation have the right to intervene at any point in this proceeding. In addition, the parent(s), Indian custodian(s) and the Tribe/Nation have the right to petition the above-named court to transfer this proceeding to the Tribe's/Nation's jurisdiction. Upon such petition, the court shall transfer such proceeding to the Tribe's/Nation's jurisdiction, absent good cause to the contrary or the Tribe's/Nation's court declining such transfer.

No proceeding involving the above-named child(ren) may take place until at least ten (10) days after receipt of this notice. Upon request, the parent(s), Indian custodian(s) of the child and the child's Tribe/Nation must be granted an additional twenty (20) days to prepare for this proceeding.

Be advised that the above referenced proceeding may have significant legal consequences on the future custodial parental rights of the parent or Indian custodial of the child(ren) referenced above. Enclosed is a copy of the petition, complaint or other legal document filed with the court to initiate this proceeding.

If the parent(s) or Indian custodian(s) of the child wish legal counsel but cannot afford attorney fees, court-appointed counsel may be requested and the court must appoint counsel upon a finding that you can not afford counsel.

If you need more information, call me at () . Your earliest response would be most appreciated.

Respectfully,

Caseworker

Attorney

cc: New York State Office of Children
and Family Services
Native American Services
295 Main Street
Buffalo, New York 14203

attachment

Attachment E – OCFS Model Secretary of the Interior Notification Letter

REGISTERED MAIL/ RETURN RECEIPT REQUESTED

Date:

Docket #

Secretary of the Interior
United States Department of the Interior
1849 C Street, NW
Washington, DC 20240

Dear Secretary:

Pursuant to the federal Indian Child Welfare Act of 1978 (25 USC 1912), the Department of Social Services/Administration for Children's Services, as petitioner in the above proceeding, is attempting to give notice to the parent(s) or Indian custodian(s) of a child custody proceeding now pending in the court named below. A hearing in this proceeding has been scheduled for _____ at _____ a.m. before the Honorable _____, Judge. The name, address and phone number of the courthouse are: _____.

The Department of Social Services/Administration for Children's Services is sending this notification to the Secretary of the Interior because it does not possess complete information regarding the name and location of the parent(s)/Indian custodian(s) of the above referenced child and the applicable Tribe/Nation. The extent of the information in our possession is as follows.

The name of the child(ren) in question is _____, born _____ in _____. It is believed that _____ is a member of or eligible for membership in the _____ Tribe/ Nation or is the biological child of a member of the _____ Tribe/ Nation who resides or is domiciled within an Indian reservation.

Father: _____, born _____ in _____
Address: _____ (Tribe/ Nation enrollment number)

Mother: _____, born _____ in _____
Address: _____ (Tribe/Nation enrollment number)

Indian custodian(s):
Address: _____.

Attached is additional information regarding the child ancestry.

The parent(s) or Indian custodian(s) and the child's Tribe/Nation have the right to intervene at any point in this proceeding. The parent(s), Indian custodial and the

Tribe/Nation have the right to petition the above-named court to transfer this proceeding to the Tribe's/Nation's jurisdiction. Upon such petition, the court shall transfer such proceeding to the Tribe's/Nation's jurisdiction, absent good cause the contrary or the Tribe's/Nation's court declining such transfer.

No proceeding involving the above-named child(ren) may take place until at least ten (10) days after receipt of this notice. Upon request, the parent(s), Indian custodian(s) of the child and the child's Tribe/Nation must be granted an additional twenty (20) days to prepare for this proceeding.

The above referenced proceeding may have significant legal consequences on the future custodial parental rights of the parent or Indian custodial of the child(ren) referenced above. Enclosed is a copy of the petition, complaint or other legal document filed with the court to initiate this proceeding.

If the parent(s) or Indian custodian(s) of the child wish legal counsel but cannot afford attorney fees, court-appointed counsel may be requested and the court must appoint counsel upon a finding that you can not afford counsel.

If you need more information, call me at . Your earliest response would be most appreciated.

Respectfully,

Caseworker

Attorney

cc: New York State Office of Children
and Family Services
Native American Services
295 Main Street
Buffalo, New York 14203

attachment