

MODULE 1



The
Whitener
Group

INDIAN CHILD WELFARE ACT TRAINING

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For the Choctaw Nation

INTRODUCTION

Individual Reflection: Opening

Take a minute to jot down answers to these questions—don't over think them.

One reason I like my job is:

One value I bring to work with me every day is:

On a scale of 1 (What does ICWA stand for?) to 5 (I should be teaching this training!), I would rank my ICWA knowledge as: 1 2 3 4 5 (circle one)

One thing I'd like to learn during this training is:

LECTURE

Topic 1: ICWA Authorities

NOTES

MATERIALS

- [Federal Law \(ICWA\)](#) (25 USC § 1901 *et seq.*)
- [Federal ICWA Regulations](#) (25 CFR Part 23)
- [State OICWA Law](#) skip to page 40 (Okla Stat. Ann T. 10 Sect 40 *et seq.*)
- [Guidelines for Implementing the Indian Child Welfare Act](#)

RELEVANT CITATION(S)

ICWA

25 USC § 1921 Higher State or Federal standard applicable to protect rights of parent or Indian custodian of Indian child

In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard.

Federal Regulations

25 CFR § 23.101 What is the purpose of this subpart?

The regulations ... clarify the minimum Federal standards governing implementation of the Indian Child Welfare Act (ICWA) to ensure that ICWA is applied in all States consistent with the Act's express language, Congress's intent in enacting the statute, and to promote the stability and security of Indian tribes and families.

25 CFR § 23.106 How does this subpart interact with State and Federal laws?

(a) The regulations in this subpart provide minimum Federal standards to ensure compliance with ICWA.

(b) Under section 1921 of ICWA, where applicable State or other Federal law provides a higher standard of protection to the rights of the parent or Indian custodian than the protection accorded under the Act, ICWA requires the State or Federal court to apply the higher State or Federal standard.

Topic 2: Tribal Social Worker’s Role in State Courts

NOTES

MATERIALS

- Child Welfare Information Gateway Tribal-State Relations: <https://www.childwelfare.gov/topics/systemwide/diverse-populations/americanindian/>
- BIA ICWA Quick Reference: <https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/ois/pdf/idc2-041404.pdf>
- Oklahoma Child Welfare Services ICWA Overview: <https://oklahoma.gov/okdhs/services/cws/cwparent-icwa.html#:~:text=Case%20specialists%20must%20use%20Active,being%20made%20in%20the%20case.>

RELEVANT CITATION(S)

ICWA

25 USC § 1911(c) State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child’s tribe shall have a right to intervene at any point in the proceeding.

Federal Regulations

25 CFR § 23.133 Should courts allow participation by alternative methods?

If it possesses the capability, the court should allow alternative methods of participation in State-court child custody proceedings involving an Indian child, such as participation by telephone, videoconferencing, or other methods.

Topic 3: Active Efforts to Prevent Removal and Removal Proceedings

NOTES

MATERIALS

- BIA Quick Reference Sheet Active Efforts:
<https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/ois/pdf/idc2-041405.pdf>
- Maintaining Active Efforts During COVID-19:
<https://familyjusticeinitiative.org/blog/active-efforts-in-icwa-cases-during-the-pandemic/>

RELEVANT CITATION(S)

ICWA

Removal Standards

25 USC § 1922 Emergency removal or placement of child; termination; appropriate action

Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian

or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

Active Efforts to Prevent Removal

25 USC § 1912(d) Remedial services and rehabilitative programs; preventive measures

Any party seeking to effect a foster care placement of... an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

Federal Regulations

Removal Standards

25 CFR § 23.113 What are the standards for emergency proceedings involving an Indian child?

(a) Any emergency removal or placement of an Indian child under State law must terminate immediately when the removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.

(b) The State court must:

(1) Make a finding on the record that the emergency removal or placement is necessary to prevent imminent physical damage or harm to the child;

(2) Promptly hold a hearing on whether the emergency removal or placement continues to be necessary whenever new information indicates that the emergency situation has ended; and

(3) At any court hearing during the emergency proceeding, determine whether the emergency removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.

(4) Immediately terminate (or ensure that the agency immediately terminates) the emergency proceeding once the court or agency possesses sufficient evidence to determine that the emergency removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.

(c) An emergency proceeding can be terminated by one or more of the following actions:

(1) Initiation of a child-custody proceeding subject to the provisions of ICWA;

(2) Transfer of the child to the jurisdiction of the appropriate Indian Tribe;
or

(3) Restoring the child to the parent or Indian custodian.

(d) A petition for a court order authorizing the emergency removal or continued emergency placement, or its accompanying documents, should contain a statement of the risk of imminent physical damage or harm to the Indian child and any evidence that the emergency removal or placement continues to be necessary to prevent such imminent physical damage or harm to the child. The petition or its accompanying documents should also contain the following information:

- (1) The name, age, and last known address of the Indian child;*
- (2) The name and address of the child's parents and Indian custodians, if any;*
- (3) The steps taken to provide notice to the child's parents, custodians, and Tribe about the emergency proceeding;*
- (4) If the child's parents and Indian custodians are unknown, a detailed explanation of what efforts have been made to locate and contact them, including contact with the appropriate BIA Regional Director (see www.bia.gov);*
- (5) The residence and the domicile of the Indian child;*
- (6) If either the residence or the domicile of the Indian child is believed to be on a reservation or in an Alaska Native village, the name of the Tribe affiliated with that reservation or village;*
- (7) The Tribal affiliation of the child and of the parents or Indian custodians;*
- (8) A specific and detailed account of the circumstances that led the agency responsible for the emergency removal of the child to take that action;*
- (9) If the child is believed to reside or be domiciled on a reservation where the Tribe exercises exclusive jurisdiction over child-custody matters, a statement of efforts that have been made and are being made to contact the Tribe and transfer the child to the Tribe's jurisdiction; and*
- (10) A statement of the efforts that have been taken to assist the parents or Indian custodians so the Indian child may safely be returned to their custody.*

(e) An emergency proceeding regarding an Indian child should not be continued for more than 30 days unless the court makes the following determinations:

- (1) Restoring the child to the parent or Indian custodian would subject the child to imminent physical damage or harm;*
- (2) The court has been unable to transfer the proceeding to the jurisdiction of the appropriate Indian Tribe; and*
- (3) It has not been possible to initiate a "child-custody proceeding" as defined in § 23.2.*

25 CFR § 23.114 What are the requirements for determining improper removal?

(a) If, in the course of any child custody proceeding, any party asserts or the court has reason to believe that the Indian child may have been improperly removed from the custody of his or her parent or Indian custodian, or that the Indian child has been improperly retained (such as after a visit or other temporary relinquishment of custody), the court must expeditiously determine whether there was improper removal or retention.

(b) If the court finds that the Indian child was improperly removed or retained, the court must terminate the proceeding and the child must be returned immediately to his or her parent or Indian custodian, unless returning the child to his parent or Indian custodian would subject the child to substantial and immediate danger or threat of such danger.

Active Efforts to Prevent Removal

25 CFR § 23.120 How does the State court ensure that active efforts have been made?

(a) Prior to ordering an involuntary foster-care placement ..., the court must conclude that active efforts have been made to prevent the breakup of the Indian family and that those efforts have been unsuccessful.

(b) Active efforts must be documented in detail in the record.

25 CFR § 23.2 Definitions.

Active efforts means affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. Where an agency is involved in the child-custody proceeding, 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. To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's Tribe and should be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians, and Tribe. Active efforts are to be tailored to the facts and circumstances of the case and may include, for example:

(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 appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;

(3) Identifying, notifying, and inviting representatives 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;

(4) 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;

(5) 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;

(6) Taking steps to keep siblings together whenever possible;

(7) Supporting regular visits with 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 health, safety, and welfare of the child;

(8) 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 resources;
(9) Monitoring progress and participation in services;
(10) 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;
(11) Providing post-reunification services and monitoring.

OICWA

Removal Standards

§10-40.5 Emergency removal of Indian child from parent or custodian - Order.

A. When a court order authorizes the emergency removal of an Indian child from the parent or Indian custodian of such child in accordance with 25 U.S.C. Section 1922, the order shall be accompanied by an affidavit containing the following information:

- 1. The names, tribal affiliations, and addresses of the Indian child, the parents of the Indian child and Indian custodians, if any;*
- 2. A specific and detailed account of the circumstances that lead the agency responsible for the removal of the child to take that action; and*
- 3. A statement of the specific actions that have been taken to assist the parents or Indian custodians so that the child may safely be returned to their custody.*

B. No pre-adjudicatory custody order shall remain in force or in effect for more than thirty (30) days without a determination by the court, supported by clear and convincing evidence and the testimony of at least one qualified expert witness, that custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. However, the court may, for good and sufficient cause shown, extend the effective period of such order for an additional period of sixty (60) days.

Topic 4: Adjudication

NOTES

MATERIALS

- Keeping Cultural Bias Out of the Courtroom: How ICWA “Qualified Expert Witnesses” Make a Difference:
<https://digitalcommons.law.ou.edu/cgi/viewcontent.cgi?article=1710&context=ailr>

RELEVANT CITATION(S)

ICWA

Notice

25 USC § 1912(a) Notice; time for commencement of proceedings; additional time for preparation

In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: Provided, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

Standards of Evidence and Qualified Expert Witness

25 USC § 1912(e) Foster care placement orders; evidence; determination of damage to child

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, 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.

Federal Regulations

Notice

CFR § 23.111 What are the notice requirements for a child-custody proceeding involving an Indian child?

(a) When a court knows or has reason to know that the subject of an involuntary foster-care-placement ...proceeding is an Indian child, the court must ensure that:

(1) The party seeking placement promptly sends notice of each such child-custody proceeding (including, but not limited to, any foster-care placement or any termination of parental or custodial rights) in accordance with this section; and

(2) An original or a copy of each notice sent under this section is filed with the court together with any return receipts or other proof of service.

(b) Notice must be sent to:

(1) Each Tribe where the child may be a member (or eligible for membership if a biological parent is a member) (see § 23.105 for information on how to contact a Tribe);

(2) The child's parents; and

(3) If applicable, the child's Indian custodian.
(c) Notice must be sent by registered or certified mail with return receipt requested. Notice may also be sent via personal service or electronically, but such alternative methods do not replace the requirement for notice to be sent by registered or certified mail with return receipt requested.

(d) Notice must be in clear and understandable language and include the following:

(1) The child's name, birthdate, and birthplace;

(2) All names known (including maiden, married, and former names or aliases) of the parents, the parents' birthdates and birthplaces, and Tribal enrollment numbers if known;

(3) If known, the names, birthdates, birthplaces, and Tribal enrollment information of other direct lineal ancestors of the child, such as grandparents;

(4) The name of each Indian Tribe in which the child is a member (or may be eligible for membership if a biological parent is a member);

(5) A copy of the petition, complaint, or other document by which the child custody proceeding was initiated and, if a hearing has been scheduled, information on the date, time, and location of the hearing;

(6) Statements setting out:

(i) The name of the petitioner and the name and address of petitioner's attorney;

(ii) The right of any parent or Indian custodian of the child, if not already a party to the child-custody proceeding, to intervene in the proceedings.

(iii) The Indian Tribe's right to intervene at any time in a State-court proceeding for the foster-care placement of or termination of parental rights to an Indian child.

(iv) That, if the child's parent or Indian custodian is unable to afford counsel based on a determination of indigency by the court, the parent or Indian custodian has the right to court appointed counsel.

(v) The right to be granted, upon request, up to 20 additional days to prepare for the child-custody proceedings.

(vi) The right of the parent or Indian custodian and the Indian child's Tribe to petition the court for transfer of the foster-care-placement or termination-of-parental-rights proceeding to Tribal court as provided by 25 U.S.C. 1911 and § 23.115.

(vii) The mailing addresses and telephone numbers of the court and information related to all parties to the child-custody proceeding and individuals notified under this section.

(viii) The potential legal consequences of the child-custody proceedings on the future parental and custodial rights of the parent or Indian custodian.

(ix) That all parties notified must keep confidential the information contained in the notice and the notice should not be handled by anyone not needing the information to exercise rights under ICWA.

(e) If the identity or location of the child's parents, the child's Indian custodian, or the Tribes in which the Indian child is a member or eligible for membership cannot be ascertained, but there is reason to know the child is an Indian child, notice of the child-custody proceeding must be sent to the appropriate Bureau of Indian Affairs Regional Director (see www.bia.gov). To establish Tribal identity, as much information as is known regarding the child's direct lineal ancestors should be provided. The Bureau of Indian Affairs will not make a determination of Tribal membership but may, in some instances, be able to identify Tribes to contact.

(f) If there is a reason to know that a parent or Indian custodian possesses limited English proficiency and is therefore not likely to understand the contents of the notice, the court must provide language access services as required by Title VI of the Civil Rights Act and other Federal laws. To secure such translation or interpretation support, a court may contact or direct a party to contact the Indian child's Tribe or the local BIA office for assistance in locating and obtaining the name of a qualified translator or interpreter.

(g) If a parent or Indian custodian of an Indian child appears in court without an attorney, the court must inform him or her of his or her rights, including any applicable right to appointed counsel, right to request that the child-custody proceeding be transferred to Tribal court, right to object to such transfer, right to request additional time to prepare for the child-custody proceeding as provided in § 23.112, and right (if the parent or Indian custodian is not already a party) to intervene in the child-custody proceedings.

25 CFR § 23.112 What time limits and extensions apply?

(a) No foster-care-placement or termination-of-parental-rights proceeding may be held until at least 10 days after receipt of the notice by the parent (or Indian custodian) and by the Tribe (or the Secretary). The parent, Indian custodian, and Tribe each have a right, upon request, to be granted up to 20 additional days from the date upon which notice was received to prepare for participation in the proceeding.

(b) Except as provided in 25 U.S.C. 1922 and § 23.113, no child-custody proceeding for foster-care placement or termination of parental rights may be held until the waiting periods to which the parents or Indian custodians and to which the Indian child's Tribe are entitled have expired, as follows:

(1) 10 days after each parent or Indian custodian (or Secretary where the parent or Indian custodian is unknown to the petitioner) has received notice of that particular child-custody proceeding in accordance with 25 U.S.C. 1912(a) and § 23.111;

(2) 10 days after the Indian child's Tribe (or the Secretary if the Indian child's Tribe is unknown to the party seeking placement) has received notice of that particular child-custody proceeding in accordance with 25 U.S.C. 1912(a) and § 23.111;

(3) Up to 30 days after the parent or Indian custodian has received notice of that particular child-custody proceeding in accordance with 25 U.S.C. 1912(a) and § 23.111, if the parent or Indian custodian has requested up to 20 additional days to prepare for the child custody proceeding as provided in 25 U.S.C. 1912(a) and § 23.111; and

(4) Up to 30 days after the Indian child's Tribe has received notice of that particular child-custody proceeding in accordance with 25 U.S.C. 1912(a) and § 23.111, if the Indian child's Tribe has requested up to 20 additional days to prepare for the child-custody proceeding.

(c) Additional time beyond the minimum required by 25 U.S.C. 1912 and § 23.111 may also be available under State law or pursuant to extensions granted by the court.

Standards of Evidence

25 CFR § 23.121 What are the applicable standards of evidence?

(a) The court must not order a foster care placement of an Indian child unless clear and convincing evidence is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(b) The court must not order a termination of parental rights for an Indian child unless evidence beyond a reasonable doubt is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(c) For a foster-care placement or termination of parental rights, the evidence must show a causal relationship between the particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage to the particular child who is the subject of the child-custody proceeding.

(d) Without a causal relationship identified in paragraph (c) of this section, evidence that shows only the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not by itself constitute clear and convincing evidence or evidence beyond a reasonable doubt that continued custody is likely to result in serious emotional or physical damage to the child.

Qualified Expert Witness

25 CFR § 23.122 Who may serve as a qualified expert witness?

(a) A qualified expert witness must be qualified to testify regarding whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and should be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe. A person may be designated by the Indian child's Tribe as being qualified to testify to the prevailing social and cultural standards of the Indian child's Tribe.

(b) The court or any party may request the assistance of the Indian child's Tribe or the BIA office serving the Indian child's Tribe in locating persons qualified to serve as expert witnesses.

(c) The social worker regularly assigned to the Indian child may not serve as a qualified expert witness in child-custody proceedings concerning the child.

OICWA

Notice

OK. Stat. § 10-40.4 Indian child custody proceedings – Notice.

A. In all Indian child custody proceedings of the Oklahoma Indian Child Welfare Act, including voluntary court proceedings and review hearings, the court shall ensure that the district attorney or other person initiating the proceeding shall send notice to the parents or to the Indian custodians, if any, and to the tribe that is or may be the tribe of the Indian child, and to the appropriate Bureau of Indian Affairs area office, by certified mail return receipt requested, except as provided by subsection B of this section. The notice shall be written in clear and understandable language and include the following information:

- 1. The name and tribal affiliation of the Indian child;*
- 2. A copy of the petition by which the proceeding was initiated;*
- 3. A statement of the rights of the biological parents or Indian custodians, and the Indian tribe: a. to intervene in the proceeding, b. to petition the court to transfer the proceeding to the tribal court of the Indian child, and c. to request an additional twenty (20) days from receipt of notice to prepare for the proceeding; further extensions of time may be granted with court approval;*
- 4. A statement of the potential legal consequences of an adjudication on the future custodial rights of the parents or Indian custodians;*
- 5. A statement that if the parents or Indian custodians are unable to afford counsel, counsel will be appointed to represent them; and*
- 6. A statement that tribal officials should keep confidential the information contained in the notice.*

B. Notice of review hearings shall be sent, via regular first class mail, to the tribe of the Indian child unless the tribe is present at the time the review hearing is set and consents to the date of the review. A tribe's right to notice under this section is not dependent on intervention into the case. The notice shall be evidenced by filing a certificate of mailing prior to the review hearing.

Topic 5: Foster Care Placements

NOTES

MATERIALS

- Oklahoma Tribal Child Foster Care Program Information:
<https://oklahoma.gov/okdhs/services/cws/tribalfostercare.html>
- Characteristics of Successful Foster, Adoptive and/or Kinship Caregivers of American Indian, Alaska Native, First Nations and Native Hawaiian (AIAN/FN/NH) Children:
<https://digital.lib.washington.edu/researchworks/bitstream/handle/1773/43793/Literature%20and%20Resource%20Review.pdf>

RELEVANT CITATION(S)

ICWA

25 USC § 1915 Placement of Indian children

(b)Foster care or preadoptive placements; criteria; preferences

Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—

(i) a member of the Indian child's extended family;

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(c)Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences

In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: Provided, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

(d)Social and cultural standards applicable

The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(e)Record of placement; availability

A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

Federal Regulations

25 CFR § 23.129 When do the placement preferences apply?

- (a) In any preadoptive, adoptive, or foster-care placement of an Indian child, the placement preferences specified in § 23.130 and § 23.131 apply.*
- (b) Where a consenting parent requests anonymity in a voluntary proceeding, the court must give weight to the request in applying the preferences.*
- (c) The placement preferences must be applied in any foster-care, preadoptive, or adoptive placement unless there is a determination on the record that good cause under § 23.132 exists to not apply those placement preferences.*

25 CFR § 23.131 What placement preferences apply in foster-care or preadoptive placements? *(a) In any foster-care or preadoptive placement of an Indian child under State law, including changes in foster care or preadoptive placements, the child must be placed in the least restrictive setting that:*

- (1) Most approximates a family, taking into consideration sibling attachment;*
- (2) Allows the Indian child's special needs (if any) to be met; and*
- (3) Is in reasonable proximity to the Indian child's home, extended family, or siblings.*

(b) In any foster-care or preadoptive placement of an Indian child under State law, where the Indian child's Tribe has not established a different order of preference under paragraph (c) of this section, preference must be given, in descending order as listed below, to placement of the child with:

- (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.*

(c) 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, as provided in paragraph (a) of this section.

(d) The court must, where appropriate, also consider the preference of the Indian child or the Indian child's parent.

25 CFR § 23.132 How is a determination of "good cause" to depart from the placement preferences made?

- (a) If any party asserts that good cause not to follow the placement preferences exists, the reasons for that belief or assertion must be stated orally on the record or provided in writing to the parties to the child-custody proceeding and the court.*
- (b) The party seeking departure from the placement preferences should bear the burden of proving by clear and convincing evidence that there is "good cause" to depart from the placement preferences.*
- (c) A court's determination of good cause to depart from the placement preferences must be made on the record or in writing and should be based on one or more of the following considerations:*

- (1) The request of one or both of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference;*
 - (2) The request of the child, if the child is of sufficient age and capacity to understand the decision that is being made;*
 - (3) The presence of a sibling attachment that can be maintained only through a particular placement;*
 - (4) The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live;*
 - (5) The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the preference criteria, but none has been located. For purposes of this analysis, the standards for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties.*
- (d) A placement may not depart from the preferences based on the socioeconomic status of any placement relative to another placement.*
- (e) A placement may not depart from the preferences based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA.*

OICWA

OK. Stat. § 10-40.6 Placement preference.

The placement preferences specified in 25 U.S.C. Section 1915, shall apply to all preadjudicatory placements, as well as...foster care placements. In all placements of an Indian child by the Oklahoma Department of Human Services (DHS), or by any person or other placement agency, DHS, the person or placement agency shall utilize to the maximum extent possible the services of the Indian tribe of the child in securing placement consistent with the provisions of the Oklahoma Indian Child Welfare Act...

OK. Stat. § 10-40.8 Payment of foster care expenses under certain circumstances.

A. In the event the Department of Human Services has legal custody of an Indian child, and that child is placed with a tribally licensed or approved foster home, the state shall pay the costs of foster care in the same manner and to the same extent the state pays the costs of foster care to state-licensed or state-approved foster homes, provided that the tribe shall have entered into an agreement with the state pursuant to Section 8 herein, which shall require tribal cooperation with state plans required by federal funding laws.

B. The state shall pay the costs of foster care of a child placed with a tribally licensed or approved foster home where the placement is made by a tribe having jurisdiction of the proceeding, provided that the tribe shall have entered into an agreement with the state pursuant to Section 8 herein, which shall require tribal cooperation with state plans required by federal funding laws.

SMALL GROUP LEARNING

Discussion 1: Tribal Case Workers in State Court

(25 min)

- 1) Briefly discuss how you prepare for state court hearings. Do you review the file? Do you call the family? The state DHS caseworker? The foster home? Do you write a report? Do you write yourself notes about what you want to be sure to mention? Do you staff the case? Do you prepare differently depending on what type of hearing it is?
 - A) Attorneys: what is something that the tribal case manager could do to help you better prepare for state court?
 - B) Caseworkers: what is something that the tribal attorney could do to help you better prepare for state court?
- 2) What are 5 things that Choctaw does when it gets involved in a case that the state can't do or doesn't do well?
- 3) In what states (and counties) do you have the most kids in state care? Where do you have good relationships with state workers? Where do you need to build better relationships?
- 4) On a scale of 1 (like oil and water) to 5 (like peas and carrots) how well do the ICW department and legal department collaborate? What would improve this score?
 - A) Caseworkers: How do you know when it is time to get legal advice?
 - B) Attorneys: Do you have regular case staffings with case managers? What would make them more helpful?

Discussion 2: Active Efforts to Prevent Removal

(20 min)

- 1) In general, do you think the state(s) you work with are providing active efforts to prevent removal?
 - A) Have you ever argued with a caseworker to keep a child in the home? To return the child as soon as you learned about the case?
 - B) Have you ever argued (or asked your attorney to argue) in state court that the state failed to provide efforts to prevent removal?
- 2) How often is Choctaw involved in a case or aware of a case before the child has been removed from the home? What can you do to increase the number of cases you are aware of before removal? In your service area? In broader Oklahoma? In other States?
 - a. How often is Choctaw involved in a case or aware of a case where the state has a safety plan?
- 3) What are the 3 most common reasons that Choctaw children are removed from their parents? What services can Choctaw offer to prevent removal in those cases? In your service area? In broader Oklahoma? In other states?

Active Efforts Hypothetical

Facts: State police are called because of a fight in an apartment complex. Witnesses saw father hit mother repeatedly in the parking lot. The children who were 6 and 7 were inside sleeping. Police arrest father and call OKDHS. When OKDHS arrives mother is very cooperative, shares that she is a member of Choctaw, and tells OKDHS her mother lives up the street and her husband's family is in a neighboring town. Mother tells OKDHS she wants to leave but doesn't know what to do. OKDHS provides mother with a referral for a DV program and helps her call the advocate. The advocate will meet mother at the hospital for a quick examination and to safety plan—her injuries appear minor. OKDHS removes the children and places them with their grandmother and provides mother notice of the removal and hearing.

- 1) Is this active efforts to prevent removal? Why? Why not?

Discussion 3: Adjudication and Foster Care Placement

(20 min)

- 1) What do you typically do to prepare for a state court adjudication? What tools does Choctaw have to help you prepare for adjudication? What tools would be helpful when preparing for an adjudication?
- 2) Does Choctaw have a process for responding to notice? How familiar are you with it? How well does it work? On average, how long does it take to respond?
- 3) Who typically serves as the QEW when Choctaw disagrees as to whether abuse or neglect occurred? What should Choctaw do when it disagrees with the state about whether abuse or neglect occurred?
- 4) What are Choctaw's Foster Care Placement Preferences? How do they differ from ICWA?
 - A) When and how do you educate the state caseworker and court about these placement preferences?
 - B) Describe what a state case worker's diligent search for a placement in line with the Choctaw placement preferences should look like? How often do you see the state actually perform a diligent search?
- 5) What should Choctaw's position be when the only placement in line with the placement preferences is far away from the parent (for example, the case is in Oregon but the family placement is in Oklahoma) and the parent appears to be capable of reunification? What if the child is very young? What if the child is a teenager?

Individual Reflection: Closing

Take a minute to jot down answers to these questions—don't over think them.

One thing I learned today is:

One thing we talked about today that I have been doing well in state ICWA cases is:

One thing I think I can do better after today in state ICWA cases is:
