NORTH DAKOTA DEPARTMENT OF HUMAN SERVICES
BISMARCK, NORTH DAKOTA
October 11, 2017

Second Amended PI 16-45

TO: Regional Supervisors
CSSB Directors, County Social Services

FROM: Diana Weber, Well-Being Administrator

SUBJECT: New Indian Child Welfare Act (ICWA) Provisions

PROGRAMS: Wraparound (In-Home) Case Management 641
Assessment 641-05-10

RETENTION: Until Manualized

The purpose of the Indian Child Welfare Act (ICWA) is "...to protect the best interest of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children and placement of such children in homes which will reflect the unique values of Indian culture..."(25 U.S. C. 1902). New binding regulations of the Indian Child Welfare Act were released June 14, 2016 and all Indian child welfare proceedings initiated after **December 12, 2016** must be in compliance with these regulations (codified at 25 CFR 23). The new rule implements the substantive and procedural standards of ICWA to: (1) Provide a uniform Federal standard; (2) Promote nationwide consistency; and (3) Provide clarity that will reduce litigation and produce better outcomes for children.

ICWA only protects American Indian and Alaska Native children who are:

1. Unmarried;
2. Under 18 years old; **AND**
3. A tribal member; **OR**

4. Eligible for tribal membership in a Federally Recognized Tribe **AND** have a biological parent who is a tribal member.

ICWA does not apply to Canadian Indians.

To Determine if the Child is a Tribal Member or Eligible for Membership:

If determined by the CPS worker at the time of initial assessment that the child is a tribal member or eligible for membership in an Indian tribe, the In-Home case manager will ensure the necessary notifications have been completed as described below. If a determination has not been made, the In-Home case manager must ask the child and family how they self-identify as part of the initial assessment with the child and family (i.e. Family Assessment Instrument), and before every change or potential change in custody. For example:

- Whether the child and family identifies as American Indian, Alaska Native, or Native American.

- Which of the following they consider themselves: Asian American, Black/African American, American Indian or Alaska Native or Native American, White, Latino, etc.

The In-Home case manager should always follow up by asking:

- Do you have any Native American, American Indian, Alaska Native ancestry?

If the child and family respond they are not Native American, American Indian or Alaska Native, and do not have any related ancestry the In-Home case manager must:

- Document this in the case record.

If the child and family respond they are American Indian, Alaska Native, or Native American, or believe there is Native ancestry, the In-Home case manager must:

- Ask the child and family which tribe(s) they identify with and if they are a member and/or enrolled.

- Fill out a family tree chart with the help of the child and family or other genealogy form used by the agency.

If, after completing the previous steps, the In-Home case manager has reason to believe the child is Indian, the case manager will identify the Indian tribe by:

- Consulting with the child and family, extended family members, and other relatives; **AND**

- Contacting, as appropriate, the suspected tribe(s) (their child welfare units, enrollment office, their designated tribal service agent for ICWA notice), an appropriate Indian social services organization, or the Bureau of Indian Affairs.

Note: An Authorization to Disclose Information (release of information) is not required.

If the parents are unavailable or unable to confirm the Native heritage of their child(ren), the In-Home case manager must:

- Make a thorough review of all documentation in the case record (look for clues regarding Native ancestry); **AND**

- Contact the previous caseworker, if any; **AND**

- Contact any extended family identified by the child or family and ask about identification of the family.

Note: As a best practice it is suggested that case managers assume ICWA applies in a case until otherwise determined. This will help avoid unnecessary delays or the potential for disrupted placements or proceedings in the future. An Authorization to Disclose Information (release of information) is not required.

Verifying the Child is a Tribal Member

If the family identifies as American Indian, Alaska Native, or Native American, tribal membership must be verified. The In-Home case manager must send notice to the child's tribe via their designated tribal service agent for ICWA in order to:

- Confirm that the child is a member; **OR**

- Confirm that the child is eligible for membership **AND** confirm a biological parent's membership.

Note: If several tribes are identified by the child and family, the In-Home case manager must send the letter to all tribes identified. Best practice includes telephone contact also be made with the tribe's child welfare unit, enrollment office, and their designated tribal service agent for ICWA notice. Although this is not required by ICWA, it may help a case manager get quick confirmation that ICWA may apply to a case. Any phone conversation that confirms that ICWA may apply must be documented in the case record. Formal notice must still be sent to the tribe. An Authorization to Disclose Information (release of information) is not required.

When the Child is Verified as a Tribal Member

Once a tribe has verified that an Indian child is a member, the response must be documented in the case record, including the date and the source of documentation. The In-Home case manager must:

- File in the case record the tribe's written statement declaring the Indian child is a member; **AND**

- Incorporate in any court hearing the tribe's written statement declaring the Indian child to be a member; **AND**

- Work with the understanding that ICWA applies throughout the entirety of the child welfare case.

When the Child is Eligible for Tribal Membership

The In-Home case manager must confirm the membership status of the biological parent. The response to both the Indian child's and biological parent's status must be documented in the case record, including date and source of documentation. The In-Home case manager must:

- File in the case record the tribe's written statement declaring the Indian child's eligibility for membership; **AND**

- Incorporate into any court hearing the tribe's written statement declaring the Indian child's eligibility for membership and the biological parent's membership; **AND**

- Assist the family in formally enrolling the Indian child or establishing membership of the Indian child (if necessary, the In-Home case manager may counsel parents hesitant to enroll their Indian child by emphasizing the positive benefits of tribal membership, particularly in child welfare and adoption proceedings); **AND**

- Work with the understanding that ICWA applies throughout the entirety of the child welfare case.

When the Child is Not a Tribal Member and Ineligible for Membership
Once a tribe has determined that a child is not a member and not eligible for membership, the In-Home case manager must:

- Document all steps taken to determine the child's Indian or tribal ancestry; **AND**

- File in the case record the tribe's written statement declaring the child is ineligible for membership; **AND**

- Incorporate into any court hearing the tribe's written statement declaring the child is ineligible for membership; **AND**

- Work with the understanding that ICWA does not apply.

If the Tribe Does Not Respond
If the tribe does not respond, the In-Home case manager will call the ICWA designated tribal agent for service and inquire about the status of the inquiry and the membership status of the child. The In-Home case manager must document the conversation in the case record.

Notifications Procedures Required by ICWA
The following must receive notice of the Indian child's tribal membership/eligibility for membership:

- The Indian child's biological parents; **AND**

- Indian Custodian (defined by ICWA as "any Native person who has legal custody of the child under tribal law or custom or under state law or to whom temporary physical care, custody, or control has been transferred by the parent"); **AND**

- The Indian child's tribe (if the Indian child is affiliated with, or eligible for, membership in more than one tribe, all tribes should receive notice); **OR**

- The BIA (only if identity/location of the tribe and/or parent, or Indian Custodian cannot be determined).

Process to Contact Tribes

If the In-Home case manager does not have accurate contact information for a tribe, or the contacted tribe fails to respond to written inquiries, the In-Home case manager must:

- Seek assistance from the BIA local or regional office; **OR**

- Seek assistance from the BIA's Central Office in Washington, DC (see www.bia.gov); **OR**

- Find the tribe's designated tribal agent for service of notice.

    - BIA publishes a list each year in the Federal Register

    - The list is also available at: www.bia.gov under the "Office of Indian Services" and "Division of Human Services"

Sending Notice of a Court Proceeding

If a court proceeding has been scheduled (for example, a court-ordered services proceeding), notice must be sent by registered mail, return receipt requested. A copy of this notice should be filed in the case file and with the court, along with any returned receipts. No requests for a court proceeding (with the exception of emergency removals) can be made until:

- At least 10 days after receipt of notice by parents or Indian Custodian, or after 30 days if 20 additional days are requested by the parents or Indian Custodian to prepare for the proceedings; **OR**

- At least 10 days after receipt of notice by the tribe, or after 30 days if the tribe requests an additional 20 days to prepare or the proceeding; **OR**

- No fewer than 15 days after receipt of notice by the Bureau of Indian Affairs.

If the Tribe Does Not Respond
Even if a tribe does not respond to an official notice sent, or if it replies that it does not wish to intervene in the proceeding, the In-Home case manager must continue to send the tribe notices of every proceeding. The tribe can intervene at any point in the proceeding and therefore it has the right to notice of all hearings related to the case.

Active Efforts Required in ICWA Cases:
"Active efforts" means not just an identification of the challenges a family faces and providing solutions. It also requires an In-Home case manager make efforts to actively assist a family in making the changes necessary to keep an Indian child safely in their home, or to make the changes necessary for an Indian child to return safely and reunify with family.

Active efforts must be undertaken to provide remedial services after an investigation and before a decision is made to place the Indian child out of the home. Active efforts must also be provided after the Indian child has been removed in order to prevent the breakup of the family by working toward reunification.

Active efforts can be demonstrated by the following:

- Making a strength-based evaluation of the family's circumstances that takes into account the prevailing social and cultural conditions and way of life of the Indian child's tribe

- Intervening only when necessary. In-Home case managers conducting such an intervention must:

    - Develop a case plan with assistance from the parents or Indian Custodian that involves use of tribal Indian community resources; **AND**

- Seek out the necessary family preservation services to support the family with the Indian child in the home, except where imminent physical or emotional harm may result; **AND**

- Involve the child, if of sufficient age, in the design and implementation of case plan

- Assisting parents or Indian Custodian and Indian child in maintaining an ongoing familial relationship

- Engaging the Indian child's tribe early and working closely with the Indian child's tribe to access culturally relevant resources and informal support networks

Removing a Child in an ICWA Case From the Home

If removal of the Indian child from the home is imminent due to the case circumstances, the In-Home case manager must collaborate closely with the CPS caseworker and/or Foster Care case manager to ensure CPS and Foster Care policies and the federal law related to Indian child removal for ICWA cases is followed. If the In-Home case manager also works in other child welfare programs (i.e. Child Protection Services and/or Foster Care case management), the case manager must adhere to CPS and Foster Care policies and the federal law related to Indian child removal for ICWA cases.

Adapted from, "A Guide to Compliance with the Indian Child Welfare Act"; *The National Indian Child Welfare Association, 2016*

http://www.nicwa.org/Indian_Child_Welfare_Act/documents/2015Guide%20to%20ICWA%20Compliance.pdf

Quick Reference Sheet for State Agency Personnel in Involuntary Proceedings

http://www.indianaffairs.gov/cs/groups/xois/documents/document/idc2-041403.pdf