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NY-CRR

OFFICIAL COMPILATION OF CODES, RULES AND REGULATIONS OF THE STATE OF NEW YORK  
TITLE 18. DEPARTMENT OF SOCIAL SERVICES  
CHAPTER II. REGULATIONS OF THE DEPARTMENT OF SOCIAL SERVICES  
SUBCHAPTER C. SOCIAL SERVICES  
ARTICLE 2. FAMILY AND CHILDREN'S SERVICES  
PART 431. CARE AND PROTECTION OF CHILDREN

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431.18 Care and protection of Indian children.

**(a) Definitions.**

For purposes of this section, the following definitions shall apply:

(1) *Indian child* means any unmarried person:

(i) who either (a) is under the age of 18 years, or (b) is between the ages of 18 and 21 years, is in foster care, and is a student attending a school, college or university or regularly attending a course of vocational or technical training designed to fit him or her for gainful employment or lacks the skills or ability to live independently; and

(ii) who either (a) is a member of an Indian tribe, or (b) is eligible for membership in an Indian tribe, or (c) is the biological child of a member of an Indian tribe who resides on or is domiciled within the reservation of such tribe.

(2) *Indian tribe* shall mean any tribe, band, nation or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary of the Department of the Interior or by the State of New York or by any other state because of their status as Indians.

(3) *Indian child's tribe* means the Indian tribe of which an Indian child is a member or is eligible for membership. If the Indian child meets the definition of an Indian child in more than one tribe, deference should be given to the tribe in which the Indian child is already a member, unless otherwise agreed to by the tribes. In the case of an Indian child who is a member of or eligible for membership in more than one tribe, the tribes must be given an opportunity in any involuntary child-custody proceeding to determine which tribe should be designated as the Indian child's tribe. If they are able to agree, the agreed-upon Indian tribe should be the designated as the Indian child's tribe by the court in which the involuntary child custody proceeding with respect to the Indian child is pending. If the tribes are unable to agree, the court will designate the Indian child's tribe with which the Indian child has the more significant contacts taking into consideration:

(i) preference of the parents for membership of the child;

(ii) length of past domicile or residence on or near the reservation of each tribe;

(iii) tribal membership of the custodial parent or Indian custodian;

(iv) interest asserted by each tribe in response to the notice that the Indian child is involved in a child custody proceeding;

(v) whether there has been a previous adjudication with respect to the child by a court of one of the tribes; and

(vi) self-identification by the child, if the child is of sufficient age and capacity to meaningfully self-identify.

(4) *Child custody proceedings* means and includes any action, other than an emergency proceeding, that may culminate in one of the following:

(i) *foster care placement*, which means any action to remove an Indian child from his or her parent or Indian custodian for temporary placement in a foster home or foster care facility or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) the *termination of parental rights*, which means any action to terminate the parent-child relationship;

(iii) *pre-adoptive placement*, which means the temporary placement of an Indian child in a foster home or foster care facility after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) an *adoptive placement*, which means the permanent placement of an Indian child for adoption, including any action for a final decree of adoption.

Such term or terms shall not apply where an Indian child is found to be a juvenile delinquent pursuant to article 3 of The Family Court Act or in a divorce proceeding, upon an award of custody to one of the parents.

(5) A *qualified expert witness*, which means an expert qualified to testify on whether continued custody by the parents of an Indian child or an Indian custodian is likely to result in serious physical or emotional damage to the child and should be qualified to testify as to the prevailing social and cultural standards of the Indian child's tribe. Any 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. Persons with the following characteristics are most likely to meet the requirements for a qualified expert witness:

(i) a member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and child-rearing practices;

(ii) a lay expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and child-rearing practices within the Indian child's tribe; and

(iii) a professional person having substantial education and experience in the provision of services to Indian children and families.

(6) *Indian custodian*, which means an Indian who has legal custody of an Indian child under the applicable tribal law or custom or under applicable State law, or for whom temporary physical care, custody and control has been transferred by the parent of such child. An Indian custodian may demonstrate that he or she is an Indian custodian by looking to tribal law or tribal custom or State law.

(7) *Emergency proceeding* means and includes any court action that involves an emergency removal or emergency placement of an Indian child.

(b) Each social services district must consider:

(1) according to section 101(e) of the Indian Child Welfare Act of 1978 (P.L. 95-608), 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; and

(2) according to section 101(f) of the Indian Child Welfare Act of 1978 (P.L. 95-608), no termination of parental rights of an Indian child may be ordered by a court unless there is a determination, supported by evidence beyond a reasonable doubt, 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.

(c) In each child custody proceeding initiated by a social services official pursuant to section 384-b of the Social Services Law or article 7, 10 or 10-C of the Family Court Act where the social services official knows or has reason to know that the subject of the proceeding is an Indian child, the official must notify the child's parent or Indian custodian and the Indian child's tribe, by registered or certified mail with return receipt requested of the pending proceeding and of their right to intervene in such proceeding. The official must also forward such notice by registered or certified mail with return receipt requested or personal delivery to the Secretary of the Interior at: Eastern Area Director, Bureau of Indian Affairs, 545 Marriott Drive, Suite 700, Nashville, TN 37214. If the identity or location of the parent or Indian custodian or the tribe cannot be determined, such notice must be given to the Secretary of the Interior at the address noted above and the Office of Children and Family Services by registered or certified mail with return receipt requested. The notice forwarded to the child's parent, Indian custodian, Indian tribe, the Secretary of the Interior and, where applicable, the Office of Children and Family Services must contain the following information:

(1) the Indian child's name, date of birth and place of birth;

(2) 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;

(3) all names known, including maiden, married, and former names or aliases, of the parents, the parents' birth dates and birth places, and tribal enrollment numbers, if known or the Indian custodian, where applicable;

(4) if known, the names, birthdates, birthplaces and tribal enrollment information of other direct lineal ancestors of the child, such as grandparents;

(5) a copy of the petition, complaint or other document filed with the court to initiate the child custody proceeding and, if a hearing has been scheduled, information on the date, time, and location of the hearing;

(6) a statement setting out:

(i) the name of the petitioner and the name and address of the 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 proceeding;

(iii) the Indian tribe's right to intervene at any time in the proceeding for the foster care placement of or termination of parental rights to an Indian child;

(iv) that, if the Indian 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 proceeding;

(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 the Tribal court as provided by the Indian Child Welfare Act of 1978 (P.L. 95-608) and applicable Federal regulations;

(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 subdivision;

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

(ix) that all parties notified must keep confidential the information contained in the notice and notice should not be accessed by anyone not needing the information to exercise rights under the Indian Child Welfare Act of 1978 (P.L. 95-608).

(d) In any child custody proceeding initiated by a social services official pursuant to section 358-a or 384-b of the Social Services Law or article 7, 10 or 10-C of The Family Court Act which involves an Indian child, the social services official must demonstrate to the court that prior to the commencement of such proceeding, active efforts were made to alleviate the need to remove the Indian child from his or her home. Such efforts must be tailored to the facts and circumstances of the case and must involve and use available resources of the child's extended family, the tribe, Indian social services agencies and individual Indian care givers. Active efforts must be documented in the Indian child's case record.

(e) In any child custody proceeding initiated by a social services official pursuant to section 358-a or 384-b of the Social Services Law or article 7, 10 or 10-C of The Family Court Act, the social services official must routinely inquire whether the child is an Indian and notify the Family Court in writing where there is reason to know the child involved is an Indian. If the social services official subsequently receives information that provides reason to know that the child is an Indian child, such social services official must notify the court in writing.

(f)

(1) A social services official which provides an Indian child with foster care or a voluntary authorized agency which provides foster care to an Indian child pursuant to a purchase of service agreement with such district in any foster care or pre-adoptive placement of an Indian child must place such Indian child in the least-restrictive setting that:

(i) most approximates a family, taking into consideration sibling attachment;

(ii) allows the Indian child's special needs, if any, to be met; and

(iii) is in reasonable proximity to the Indian child's home, extended family, or siblings.

(2) Such social services official or voluntary authorized agency must in the absence of good cause to the contrary, place the child according to the following preferences:

(i) first, with a member of the Indian child's extended family, as such term is defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, with a person who has reached the age of 18 and who is the child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin or stepparent;

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

(iii) third, with Indian foster parents who have been licensed, certified or approved by a social services district or voluntary authorized agency to provide foster care services; and

(iv) fourth, in a foster care facility for children approved by an Indian tribe or operated by a Indian organization which has a program suitable to meet the needs of the child.

(3) Good cause not to follow the order of preference set forth in paragraph (1) of this subdivision must be based on one or more of the following considerations:

(i) the request of one or both of the biological parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference or of the child if the child is of sufficient age and capacity to understand the

decision that is being made;

(ii) 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;

(iii) the unavailability of a suitable placement after a diligent search has been conducted for families meeting the preference criteria established in paragraph (1) of this subdivision and not one has been located. For the purpose of this analysis, the standards for determining whether a placement is unavailable must conform with 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. A diligent attempt to find a suitable family must include at a minimum, contact with the child's tribal social services program, a search of all State or county listings of available Indian homes and contact with nationally or locally known Indian program with available placement resources; or

(iv) the presence of a sibling attachment that can be maintained only through a particular placement.

(4) If the Indian child's tribe has established by resolution an order of preference different than that established in paragraph (1) of this subdivision, the social services official or voluntary authorized agency must follow the order of preference established by the resolution, provided the placement would be in the least restrictive setting appropriate to the particular needs of the child.

(5) Where a parent of an Indian child has voluntarily consented to the transfer of care and custody of the child to an authorized agency and has expressed a desire to the agency for anonymity, the social services official or voluntary authorized agency must consider the desire for anonymity in applying the preferences established in paragraph (1) of this subdivision or the preferences established by resolution of the child's Indian tribe. A request for anonymity does not otherwise release the social services official or voluntary authorized agency from any duty of compliance with the Indian Child Welfare Act of 1978 (P.L. 95-608) or this section, including, but not limited to, verification of whether the child is an Indian child as defined in subdivision (a) of this section.

(6) All foster care placements made by social services officials or voluntary authorized agencies pursuant to this subdivision must be made in foster homes which have been certified or approved by a social services district or voluntary authorized agency or in foster care facilities licensed by the Office of Children and Family Services.

(7) The standards to be applied by a social services official or the voluntary authorized agency in approving placements that comply with the preference requirements of this subdivision must be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or which the parent or extended family members maintain social and cultural ties.

**(g)**

(1) A social services official or voluntary authorized agency that places an Indian child in an adoptive home must, in the absence of good cause to the contrary, place the child according to the following preferences:

(i) first, with a member of the Indian child's extended family, as such term is defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, with a person who has reached the age of 18 and who is the child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin or stepparent;

(ii) second, with other members of the Indian child's tribe; and

(iii) third, with other Indian families.

(2) Good cause not to follow the order of preference set forth in paragraph (1) of this subdivision must be based on one or more of the following considerations:

(i) the request of one or both of the biological parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference, or the child when the child is of sufficient age and capacity to understand the decision that is being made;

(ii) the extraordinary physical 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;

(iii) the unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria established by paragraph (1) of this subdivision. For the 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. A diligent attempt to find a suitable family must include at a minimum, contact with the child's tribal social services program, a search of all State or local listings of available Indian homes and contact with nationally or locally known Indian programs with available placement resources; or

(iv) the presence of a sibling attachment that can be maintained only through a particular placement.

(3) If the Indian child's tribe has established by resolution an order of preference different than that established in paragraph (1) of this subdivision, the social services official or voluntary authorized agency must follow the order of preference established by the resolution, provided the placement would be in the least restrictive setting appropriate to the particular needs of the child.

(4) Where a parent of an Indian child has voluntarily consented to the transfer of guardian and custody of the child to an authorized agency and has expressed a desire to the agency for anonymity, the social services official or voluntary authorized agency must consider the desire for anonymity in applying the preferences established in paragraph (1) of this subdivision or the preferences established by resolution of the child's Indian tribe. A request for anonymity does not otherwise release the social services official or voluntary authorized agency from any duty of compliance under the Indian Child Welfare Act (P.L. 95-608) or this section, including, but not limited to, verification whether the child is an Indian child as defined in subdivision (a) of this section.

(5) The standards to be applied by a social services official or voluntary authorized agency in approving placements which comply with the preference requirements of this subdivision must be the prevailing social and cultural standards for the Indian community which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(h) When a local social services official is aware that a child in receipt of foster care or adoption services is an Indian child or that an application for foster care or adoption services is being submitted on behalf of an Indian child, the official shall determine to the extent possible whether the child is a resident, domiciliary or ward of a tribal court in New York State or another state. If the child is a resident, domiciliary or ward of a tribal court in New York State or another state, the local social services official shall advise the Family Court that the child should be returned to the jurisdiction of the tribal court. In the event that the court orders the child returned to the jurisdiction of the appropriate tribal court, the social services official may provide social services and/or foster care services to the child for 30 days after such order. The services provided to the child during this period shall be subject to reimbursement in accordance with the provisions of section 153 of the Social Services Law.

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