



CDSS

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**DEPARTMENT OF SOCIAL SERVICES**

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GOVERNOR

REASON FOR THIS TRANSMITTAL

- State Law Change
- Federal Law or Regulation Change
- Court Order
- Clarification Requested by One or More Counties
- Initiated by CDSS

November 1, 2013

ALL COUNTY LETTER NO. 13-91

TO: ALL COUNTY WELFARE DIRECTORS  
ALL CHILD WELFARE SERVICES PROGRAM MANAGERS  
ALL PROBATION OFFICERS  
ALL IV-E TRIBES  
ALL ELIGIBILITY WORKERS

SUBJECT: AFTER 18 PROGRAM (AB 12 EXTENDED FOSTER CARE) AND INDIAN NON-MINOR DEPENDENTS (NMDs) COVERED BY THE INDIAN CHILD WELFARE ACT (ICWA)

REFERENCE: FOSTERING CONNECTIONS TO SUCCESS AND INCREASING ADOPTIONS ACT OF 2008, (PUBLIC LAW (P.L.) 110-351); INDIAN CHILD WELFARE ACT, 25 U.S.C. SECTION 1901 et seq.; ASSEMBLY BILL (AB)12, (CHAPTER 559, STATUTES of 2010); AB 1712 (CHAPTER 846, STATUTES of 2012); AB 2418 (CHAPTER 468, STATUTES of 2010); WELFARE AND INSTITUTIONS CODE (W&IC) SECTION 224.1(b), SECTION 11155.5, 11008.5; MANUAL OF POLICIES AND PROCEDURES (MPP) SECTION 44-111.61; ALL COUNTY LETTERS (ACLs) NO. 11-69, 11-77,12-12

This ACL contains information on both case management and eligibility issues related to Indian youth as Non-Minor Dependents (NMDs). This ACL highlights and provides clarification regarding policies and procedures for the placement of NMDs that have been determined to be an “Indian child” per the Indian Child Welfare Act (ICWA), hereafter referred to as “Indian youth.”<sup>1</sup> Also, this ACL provides guidance to Indian youth in out-of-home placements who are seeking to participate in the After 18 Program. Pursuant to AB 12, this Program allows foster youth to remain in foster care under court jurisdiction, up to age 21 as NMDs.

<sup>1</sup> The youth’s tribe has confirmed that he or she is a member of the tribe or eligible for membership and the biological child of a member of the tribe.

## **Background**

The Fostering Connections to Success and Increasing Adoptions Act, P.L. 110-351, was enacted in 2008 allowing for the extension of foster care for qualifying youth up to age 21. In 2010, the California Fostering Connections to Success Act (AB 12) was enacted, to extend foster care to foster youth after age 18, and to establish what is hereafter referred to as the "After 18 Program." Through enactment of AB 1712 in 2012, the After 18 Program's provisions were further clarified and expanded. These laws allow eligible California foster youth over the age of 18, in out-of home placement, to continue to remain in foster care and continue to receive services and foster care benefits up to age 21, if they meet the federal participation criteria for continued eligibility.

## **Indian Youth and the After 18 Program**

Eligibility or services available through the After 18 Program are not affected by a youth's status as an Indian youth. However, there are unique circumstances regarding Indian youth that could impact the content of their case plans. The following factors and circumstances will be discussed in this ACL:

1. Continued Application of ICWA in the After 18 Program
2. Indian Youth's Right to Withdraw from ICWA Standards After 18
3. Participation Plan requirements
4. Placement options for Indian Youth
5. Funding and eligibility criteria for Indian youth
6. Indian Youth under a Tribal Title IV-E Program

## **Continued Application of ICWA in the After 18 Program**

Many questions have been raised on how ICWA mandates intersect with the After 18 Program. California state laws and policy consistently acknowledge that it is in the best interest of Indian children that membership in their tribe and connection to their tribal community be encouraged and protected. Even after reaching adulthood, it is vital to ensure that youth maintain their tribal memberships and continued association with their tribal communities. In this spirit, the California legislature extended ICWA for Indian youth up to age 21 when their dependency case continues beyond age 18, through the passage of AB 2418 in 2010. AB 2418 extended the definition of "Indian child" as found in ICWA, up to age 21 in a dependency action. (W&IC section 224.1(b)).

The W&IC 224.1(b) states "*As used in connection with an Indian child custody proceeding, the term "Indian child" also means an unmarried person who is 18 years of*

*age or over, but under 21 years of age, who is a member of an Indian tribe or eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe, and who is under the jurisdiction of the dependency court, unless that person or his or her attorney elects not to be considered an Indian child for purposes of the Indian child custody proceeding.”*

Thus, an Indian youth who remains under the jurisdiction of a state dependency court, and who meets the criteria for a NMD, will continue to have ICWA standards apply to his or her case. If a tribe has been involved in an Indian youth’s case as a minor, that tribe will continue to be involved in the Indian youth’s After 18 Program case. Social workers will thus need to continue to apply ICWA standards in an Indian youth’s After 18 Program case, and should continue to secure the available resources of the Indian youth’s extended family, tribe, tribal and other Indian social service agencies, and Indian service providers. Doing so will provide Indian youth, the opportunity to obtain the best available services and support, as they transition into adulthood while maintaining their Indian heritage and connections to their tribe.

Similarly, if an Indian youth has exited foster care but has chosen to re-enter, ICWA will apply if he or she has previously been determined to be covered by ICWA or if identified as covered by ICWA upon re-entry.

### **Indian Youth’s Right to Withdraw from ICWA Standards After 18**

The ICWA standards continue to apply to an Indian youth’s dependency case after age 18, unless the youth chooses to withdraw from being defined an “Indian child” for purposes of his or her After 18 Program case. The W&IC section 224.1(b) recognizes that as Indian youth become adults, they are capable of making decisions independently and therefore youth can elect to no longer be considered an Indian child. **However, withdrawing from being defined an “Indian child” as provided in W&IC section 224.1(b), does not require or mean disenrollment from the Indian youth’s tribe, nor does it affect an Indian youth’s tribal membership status.** It is important for county and tribal social workers, as well as eligibility workers to understand that should an Indian youth decide he or she no longer wishes to have ICWA mandates applied to their After 18 Program case, that decision will not impact the Indian youth’s enrollment status. The consequences of disenrollment from tribal membership can be lifelong, and youth could be adversely affected in their tribal rights and other entitlements.

**Indian youth should not be encouraged or pressured to withdraw from the ICWA.** However, it is appropriate to inform Indian youth that the implications of withdrawing from the ICWA include the following:

- There will be less or no involvement by their tribe in their case plan, and
- The youth's tribe would no longer have a formal role in court proceedings.

Also, there is nothing to prevent an Indian youth from requesting that ICWA standards be reapplied. Should an Indian youth at a later date, request again to be defined an Indian child pursuant to W&IC section 224.1(b), ICWA standards would apply to their case and the tribe would assume a formal role in any related proceedings. Counties may continue to encourage, and upon request, assist Indian youth in maintaining personal connections with their tribe even when they have chosen not to have ICWA standards applied to their case.

### **Participation Plan Requirements**

As with all other youth seeking to access the After 18 Program, an Indian youth as a condition for participation in the Program must sign the mutual agreement (SOC 162 form) acknowledging that he or she voluntarily consents to remain in foster care as a court dependent, and to be responsible for reporting changes to his or her case manager while residing in a licensed or approved placement. (See ACL 11-69 Extension of Foster Care Beyond Age 18: Part One)

All NMDs must meet at least one of the five following participation criteria:

1. Be enrolled in a high school or an equivalency program (under AB 12, NMDs do not have to complete high school by age 19 to be eligible)
2. Be enrolled in post-secondary education or vocational school
3. Participate in a program or activity that promotes or removes barriers to employment
4. Be employed at least 80 hours per month; or
5. Is deemed incapable of participating in any activity as described above due to a documented medical condition.

Development of the case plan must be done in collaboration with the Indian youth and in consultation with the youth's tribe. While evaluating an Indian youth's participation plan, it is important for counties to collaborate with tribes and Indian service providers to acquire all available resources for the youth. There may be valuable tribally based resources available to youth that can facilitate the development of a successful participation plan. These resources may be helpful in keeping the youth on track with housing, employment, educational goals, or other activities that will help remove

barriers to employment and facilitate a successful transition of social and economic independence towards adulthood.

In addition, Indian youth remain eligible for independent living services via the Independent Living Program or other community agencies that assist transitioning youth. All of these services should be accessed and documented in the youth's Transitional Independent Living Plan (TILP).

### **Placement Options and Re-Entry for Indian youth**

Placement options and the process for re-entry into the After 18 Program for Indian youth is the same as for all other former foster youth. Indian youth may exit foster care, and return to foster care at any time, if they have not reached the maximum age limit in order to qualify for the After 18 Program as specified in W&IC section 391(d)(2) and provided they meet the criteria specified in ACL 12-12 (Re-entry Into Extended Foster Care).

In addition to the options available as placement types in the After 18 Program, Indian youth may also identify Supervised Independent Living Placements (SILPs) on tribal land.<sup>2</sup> While conducting supervision visits required under the After 18 Program, it is recommended that social workers receive the tribe's permission prior to entering tribal land. If an Indian youth seeks to participate in the After 18 Program in a SILP on tribal land, county social workers would complete the SILP assessment as with all cases. However, county social workers must collaborate with tribes to ensure not only an accurate assessment of the SILP but also the social worker's ability to supervise the placement, including ability to conduct the monthly visitations. Best practice would suggest development of a Memorandum of Understanding or other form of written agreement between the county and the tribe specifying the county's responsibility for supervision and monthly contact with the youth. For more information on placement options, see ACL 11-77 Extension of Foster Care: Part 2 (Placement).

### **Funding and AFDC-FC Eligibility Criteria for Indian Youth**

Questions have been raised regarding funding for the continuation of eligibility and funding for Indian youth. For purposes of maintaining Title IV-E funding, Indian youth must still meet the financial Aid to Families with Dependant Children-Foster Care (AFDC-FC) eligibility requirements as all other NMDs to receive the AFDC-FC payment. As with all NMD's, earned income shall be disregarded, provided that it is documented in the TILP that the purpose of employment is to enable the NMD to gain work skills and the responsibilities of maintaining employment (W&IC section 11008.15). The NMDs may retain fiscal and programmatic resources with a combined value not to exceed

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<sup>2</sup> Sometimes referred to as Tribal SILPs

\$10,000. Although withdrawal of savings for a foster child requires written approval, that requirement does not pertain to NMDs as they are adults (see W&IC section 11155.5, and ACL 11-69 Extension of Foster Care: Part 1)

In the resource evaluation, Indian youth may present some unique issues, as it pertains to per capita distributions made to tribal members. Depending on a tribe's distribution criteria, tribally based financial distributions (e.g. gaming or trust funds) may become available to the youth upon reaching the age of majority. However, it is also possible that such funds may not be fully available until an Indian youth meets tribal conditions, e.g. completion of high school, completion of college. Tribal distributions must therefore be reviewed on a case by case basis as criteria and conditions for such distributions will differ. It is important to note that depending on the tribe, funds may actually not be available to the Indian youth. In such cases, funds should not be included as a resource.

In addition, AFDC regulations found in the Manual of Policies and Procedures (MPP) 44-111.61, (1996 AFDC regulations) specify tribal funds under certain federal laws, are exempt from the resource evaluation.

MPP. Section 44-111.61- Payments Excluded or Exempt from Consideration as Income:

- a. Public Law 92-254 or 94-540 exempts funds distributed per capita or held in trusts for members of any Native American tribe.
- b. Public Law 93-134, PL 97-458 and PL 98-64 exempt as income the funds of Native American tribes including interest earned from investment income derived from funds when they have been:
  1. Distributed from the Secretary of the Interior on a per capita basis;  
or
  2. Held in trust by the Secretary of the Interior.
- c. Public Law 103-66 exempts, up to \$2000 in any 12 consecutive month period, the income of individual Indians when such income is derived from individually owned interest in trusts or restricted lands.
- g. Public Law 100-241 exempts distributions to a household, individual Native or descendent of a Native when received from a Native Corporation established pursuant to the Alaskan Native Claims Settlement Act (ANCSA). Exempt distributions include:

- (1) Cash (including cash dividends on stock received from a Native Corporation) to the extent it does not exceed \$2,000 total per person per annum, stock, a partnership interest, land or interest in land, and interest in a settlement trust.

There are additional federal laws that may preclude consideration of certain types of distributions. Laws are enacted by Congress fairly regularly, which provide settlement funds to tribes and therefore each Indian youth's financial situation will need to be assessed individually as to whether the funds are actually available.

Any questions regarding the Title IV-E Eligibility information in this ACL can be directed to the CDSS Funding and Eligibility Unit at (916) 651-9152.

### **Indian youth under a Tribal Title IV-E Program**

Some tribes have entered into Title IV-E agreements with the State of California which enable the tribes to establish child welfare programs that can draw down federal Title IV-E funding. These programs are authorized to establish and provide an After 18 Program consistent with the federal requirements and as further specified in AB 12 and AB 1712. Further guidance will be provided directly to Title IV-E tribes as they engage in an After 18 Program.

Further clarification regarding the After 18 Program can be found by visiting the following website:

[http://www.cafosteringconnections.org/pdfs/110211/AB%2012\\_Benefits%20and%20Eligibility%20110911\\_Final.pptx.pdf](http://www.cafosteringconnections.org/pdfs/110211/AB%2012_Benefits%20and%20Eligibility%20110911_Final.pptx.pdf)

If you have any questions regarding this letter, please contact the Child Welfare Policy and Program Development Bureau at (916) 651-6160.

Sincerely,

### ***Original Document Signed By:***

GREGORY E. ROSE  
Deputy Director  
Children and Family Services Division