Chapter 13
Relevant Federal Laws

13.1 Scope of Chapter

Many federal laws affect abuse, neglect, dependency, or termination of parental rights (TPR) proceedings. Some of those federal laws relate specifically to child welfare and require the states to comply with certain requirements, particularly when related to eligibility for and receipt of federal funding for child welfare activities. For a discussion of selected federal child welfare laws and the impact of those laws on North Carolina's Juvenile Code (G.S. Chapter 7B), see Chapter 1.3.B.

Other federal laws apply to abuse, neglect, dependency, or TPR cases because of an issue that is present in a particular case and is addressed by a federal law. When working with children and families, many issues arise that require county departments of social services (DSS), the attorneys, and the courts to look to federal substantive laws that are outside the scope of North Carolina's Juvenile Code. Examples include federal education laws and federal entitlement and/or anti-discrimination laws.

Note, for purposes of this Manual, "department of social services" or "DSS" refers to a department as defined by G.S. 7B-101(8a) regardless of how it is titled or structured.

This Chapter identifies and discusses selected federal laws that the parties, the attorneys, and the courts encounter most frequently in abuse, neglect, dependency, and TPR cases. The Chapter does not attempt to address all the federal laws that may relate to an abuse, neglect, dependency, or TPR case or to provide a comprehensive discussion of the laws that are included here. Instead, this Chapter provides an overview of selected federal laws and includes links to additional resources.

13.2 Indian Child Welfare Act

A. Introduction, Purpose, and Continued Need

The Indian Child Welfare Act (ICWA), Pub. L. No. 95-608, 92 Stat. 3069, was enacted in 1978 and is codified at 25 U.S.C. 1901–1963. Federal regulations, effective December 12, 2016 and found at 25 C.F.R. Part 23, were promulgated by the Department of Interior Bureau of Indian Affairs (BIA). The regulations in Subpart I, which apply to ICWA implementation in state court proceedings, do not apply to proceedings that were initiated prior to December 12, 2016, but do "apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child." 25 C.F.R. 23.143; *In re M.L.B.,* 377 N.C. 335 (2021); *In re E.J.B*., 375 N.C. 95 (2020). The 2016 regulations are the first federal regulations implementing ICWA since its enactment in 1978. Complementary Guidelines for Implementing the Indian Child Welfare Act were issued by the BIA on December 30, 2016 (Guidelines, 2016). *See* 81 Fed. Reg. 96476. The Guidelines, 2016 explain the ICWA statute and regulations and provide examples of best practices for implementing ICWA.

Cautionary Note: Both federal and state appellate opinions interpreting ICWA for proceedings that occurred before December 12, 2016, will not address the federal regulations and may be superseded by those regulations. Some opinions refer to the BIA Guidelines that were in effect before December 2016 (Guidelines, 1979 and Guidelines, 2015), which were replaced by Guidelines, 2016.

ICWA was enacted in response to the alarmingly disproportionate large numbers of Native American and Alaska Native children who were removed from their families and communities, for often unwarranted reasons, by public and private child welfare and adoption agencies and placed in non-Indian foster and adoptive homes and institutions. *See* 25 U.S.C. 1901(4); *Haaland v. Brackeen*, 599 U.S. 255 (2023). One of Congress's findings in enacting ICWA is that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." 25 U.S.C. 1901(3); *Haaland*, 599 U.S. at 265. The purpose of ICWA is "to protect the best interests 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 from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture." 25 U.S.C. 1902. *See In re E.J.B.*, 375 N.C. 95 (discussing the reasons behind the enactment of ICWA). ICWA "aims to keep Indian children connected to Indian families." *Haaland*, 599 U.S. at 265.

Recently challenged as unconstitutional, the U.S. Supreme Court in *Haaland v. Brackeen*, 599 U.S. 255, held that Congress acted with authority when enacting ICWA under Article I of the Constitution, the Indian Commerce Clause, and case precedent that Congress had plenary and exclusive power to legislate with respect to Indian tribes. The U.S. Supreme Court also held that ICWA does not violate the anticommandeering principle of the Tenth Amendment.

Resource: For more information about *Haaland v. Brackeen*, 599 U.S. 255 (2023), see Sara DePasquale, *The U.S. Supreme Court Holds the Indian Child Welfare Act Is Constitutional*, UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (June 20, 2023).

Although ICWA has improved the crisis identified by Congress in 1978, Native American children continue to be disproportionately removed from their homes and communities. *In re E.J.B.*, 375 N.C. 95. This disproportionately exists on a national and state-wide level. In the 2023 fiscal year, nationally, Native American children represented one percent (1%) of all children in the United States, yet they represented two percent (2%) of the children in foster care.[1] Similarly, in North Carolina, Native American children represented two percent (2%) of children who were substantiated as victims of abuse, neglect, or dependency and three percent

[1] Annie E. Casey Foundation, KIDS COUNT DATA CENTER, National KIDS COUNT, "Child population by race and ethnicity in the United States" and "Children in foster care by race and Hispanic origin in the United States."

(3%) of children in foster care despite representing only one percent (1%) of children in the state.[2]

The federal minimum standards established by ICWA seek to correct the overrepresentation of Native American children in foster care. Because ICWA establishes minimum federal standards, when a provision in ICWA provides a higher standard of protection to the Indian family than is provided by state law, the standard under ICWA prevails. *In re E.G.M.*, 230 N.C. App. 196 (2013). When state law or another federal law has a higher standard of protection than ICWA provides to the rights of the Indian child's parent or Indian custodian, the state or other federal law applies. 25 U.S.C. 1921.

In 2025, Congress enacted the Supporting America's Children and Families Act (SACFA), Pub. L. No. 118-258, 138 Stat. 2947, effective October 1, 2025. Among other changes to Title IV-B of the Social Security Act, SACFA requires state agencies to consult with Indian tribes in the state to establish measures that ensure timely compliance with the federal standards established by ICWA. SACFA also directs the Secretary of the U.S. Department of Health and Human Services to develop a plan, in consultation with Indian tribes and states, to provide technical assistance to state agencies to ensure the effective implementation of ICWA.

Resources: For more information about SACFA, see

- "Supporting America's Children and Families Act" on the Child Welfare Information Gateway, U.S. Department of Health and Human Services website and
- U.S. DEP'T OF HEALTH AND HUM. SERVS., ADMIN. ON CHILD., YOUTH, AND FAM., ACYF-CB-IM-25-04 (June 18, 2025).

B. Applicability

ICWA applies whenever an "Indian child" is the subject of a "child custody proceeding" or an "emergency proceeding" as those terms are defined by the Act. 25 C.F.R. 23.103(a). *See* 25 C.F.R. 23.2 (definition section); *In re A.D.L.*, 169 N.C. App. 701 (2005). See section 3, below, discussing "Indian child." The federal regulations are clear that the qualifying condition for whether ICWA applies to a child custody or emergency proceeding is the child's status as an Indian child. When the child is determined to be an "Indian child," the court may not consider other factors (e.g., a parent's or child's participation in tribal culture or activities, the relationship between the child and parent including whether the parent ever had custody of the child, or the child's blood quantum) to decide whether ICWA applies. 25 C.F.R. 23.103(c).

The North Carolina Supreme Court has noted that "[a]ll participants should become familiar with the Indian Child Welfare Act of 1978, codified at 25 U.S.C. ch. 21, and the corresponding regulations, . . . to ensure compliance with the ICWA and to assert objections on the record if compliance in a proceeding has not occurred." *In re M.L.B.*, 377 N.C. 335,

[2] Annie E. Casey Foundation, KIDS COUNT DATA CENTER, National KIDS COUNT, "Children who are confirmed by child protective services as victims of maltreatment by race and Hispanic origin in North Carolina," "Children in foster care by race and Hispanic origin in North Carolina," & "Child population by race and ethnicity in North Carolina."

342 n.3 (2021). However, "state courts bear the burden of ensuring compliance with ICWA." *In re E.J.B.*, 375 N.C. 95, 101 (2020).

1. Proceedings covered by ICWA. ICWA applies to "emergency proceedings" and "child custody proceedings." For purposes of ICWA, "child custody proceedings" are defined at 25 U.S.C. 1903(1) as proceedings that *may result in a*

- foster care placement,
- termination of parental rights (TPR),
- preadoptive placement, or
- adoptive placement.

Foster care placement results from any action that removes an Indian child from their parent (whose rights have not been terminated) or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand with a simple verbal request. 25 U.S.C. 1903(1)(i); *see* 25 C.F.R. 23.2 (definition of "foster-care placement" and "upon demand"). If a child is placed in foster care or another out-of-home placement as a result of a status offense, which in North Carolina is an undisciplined juvenile proceeding, that proceeding is a child custody proceeding under ICWA. 25 C.F.R. 23.2; *see* G.S. 7B-1501(27) (definition of "undisciplined juvenile"); 7B-1902 through -1907 (nonsecure custody criteria, orders, placement, and hearings); 7B-2503(1)b. and c. (out-of-home placement dispositional alternatives for undisciplined juveniles).

"Parent" is defined under ICWA as a biological or adoptive parent (including adoptions under tribal law or custom) of an Indian child but does not include an unwed father who has not acknowledged or established paternity. 25 U.S.C. 1903(9); 25 C.F.R. 23.2. An unwed father could establish or acknowledge paternity by state law or tribal law or custom. *See* 25 U.S.C. 1911(d) (full faith and credit); 25 U.S.C. 1903(12) (definition of "tribal court").

An **"Indian custodian"** is any Indian person with legal custody under state law or tribal law or custom of an Indian child or to whom temporary physical care, custody, and control of the Indian child has been transferred by the parent. 25 U.S.C. 1903(6); 25 C.F.R. 23.2. The ICWA definition of "Indian custodian" is broader than the definition of "custodian" under the Juvenile Code. *See* G.S. 7B-101(8).

A preadoptive placement is the temporary placement of an Indian child in a foster home or institution that is made after a TPR, but it is not the permanent adoptive placement. 25 U.S.C. 1903(1)(iii); 25 C.F.R. 23.2.

An adoptive placement is the permanent placement of an Indian child for adoption, including an action that results in a final adoption decree. 25 U.S.C. 1903(1)(iv); 25 C.F.R. 23.2. An adoptive placement occurs in all adoption proceedings, including private, agency, and stepparent adoptions.

The same child may be the subject of multiple child custody proceedings because an action that may result in one of the four possible outcomes (foster care, preadoptive, or adoptive placements or a TPR) is a separate child custody proceeding from an action that may result in a different outcome. 25 C.F.R. 23.2 (definition of "child-custody proceeding"). For example, an adoption proceeding involving Child A is a separate child custody proceeding from a TPR

action involving Child A, just as a TPR action involving Child A is a separate child custody proceeding from an abuse, neglect, or dependency action involving Child A. The same child may be the subject of each of these three different child custody proceedings, which in this example are adoption, TPR, and foster care proceedings. The applicable ICWA provisions apply to all three proceedings. *See In re A.L.*, 378 N.C. 396 (2021) (in underlying neglect action, trial court determined the juvenile was a member of a state recognized, and not federally recognized, tribe; TPR for same juvenile remanded when the record in the TPR did not show the trial court complied with the mandatory ICWA inquiry regarding whether it had reason to know the child was an Indian child; this opinion was published prior to full federal recognition of the Lumbee Tribe of NC by Pub. L. No. 119-60, sec. 8803, 139 Stat. 718, making that tribe subject to ICWA effective December 18, 2025). *Cf. In re C.C.G.*, 380 N.C. 23 (2022) (no reversible error when trial court did not make the inquiry at the TPR hearing but did make it at the underlying neglect adjudication hearing; despite reference to Cherokee ancestry by a relative, there was no reason to know the child was an Indian child).

ICWA distinguishes between voluntary and involuntary child custody proceedings and emergency proceedings. ICWA applies regardless of whether the proceeding is voluntary or involuntary. *Haaland v. Brackeen*, 599 U.S. 255 (2023).

- An involuntary proceeding is a child custody proceeding in which the parent (1) does not consent to the foster care, preadoptive, or adoptive placement or the TPR or (2) consents to the foster care, preadoptive, or adoptive placement when under threat of the child's removal by DSS or court action. 25 C.F.R. 23.2.
- Voluntary proceedings are those child custody proceedings that are not involuntary proceedings and are freely consented to by either or both parents or the Indian custodian without any threat of removal by DSS. 25 C.F.R. 23.2. One example of a voluntary proceeding is an initial voluntary foster care placement agreement entered into between the parent and DSS without the threat of a DSS removal or need for a petition alleging abuse, neglect, or dependency. *See* G.S. 7B-910. ICWA applies to a voluntary proceeding that prohibits the parent (or Indian custodian) from regaining custody of the child upon demand with a simple verbal request. 25 C.F.R. 23.103(a)(1)(ii). For example, parents who execute a consent for a direct placement adoption vest legal and physical custody of their child to the prospective adoptive parent(s) such that the parents may not regain custody of their child with a simple verbal request. *See* G.S. 48-3-607(b). Similarly, parents who execute a relinquishment of their child to a child-placing agency (this may include a DSS when child protective services are not involved) vest legal and physical custody of their child with that agency such that the parents may not regain custody of their child with a simple verbal request. *See* G.S. 48-3-705(b). See section 13.2.K, below (discussing ICWA requirements for consents and relinquishments for adoption).
- An emergency proceeding is any court action that involves an emergency removal or placement of an Indian child. 25 C.F.R. 23.2; *see* 25 U.S.C. 1922; 25 C.F.R. 23.113. See section 13.2.E, below.

Although ICWA applies to voluntary and involuntary child custody and emergency proceedings, different provisions of the Act will apply depending upon the type of proceeding. *See* 25 C.F.R. 23.103(a) (setting out the proceedings to which ICWA does/does not apply) and 23.104 (table listing sections of the ICWA regulations as applied to the type of child custody

proceeding). The U.S. Supreme Court recognized that "[i]nvoluntary proceedings are subject to especially stringent safeguards." *Haaland*, 599 U.S. at 266.

2. Proceedings not covered by ICWA. ICWA does not apply to

- actions involving custody, including divorce, between the child's parents;
- voluntary placements chosen by either or both parents (or the Indian custodian), made of their free will and without a threat of removal by DSS, and subject to the parent (or Indian custodian) regaining custody of the child upon demand by a simple verbal request;
- juvenile delinquency proceedings and criminal prosecutions of juveniles as adults; and
- tribal court proceedings.

25 U.S.C. 1903(1); 25 C.F.R. 23.103(b).

3. "Indian child." ICWA applies to an "Indian child," which is defined at 25 U.S.C. 1903(4) and 25 C.F.R. 23.2 as an unmarried child under the age of 18 who is either

- a member of a federally recognized Indian tribe or
- eligible for membership in an Indian tribe *and* the biological child of a member of an Indian tribe.

The child's status as an "Indian child" is based upon political affiliation (or citizenship) with a federally recognized tribe and not merely on the child's or parent's ancestry. Guidelines, 2016, B.1 (p. 10); *In re C.C.G.,* 380 N.C. 23 (2022); *In re M.L.B*., 377 N.C. 335 (2021).

Each federally recognized tribe establishes its own membership criteria and decides membership issues for the child and biological parent. Enrollment in a tribe may open and close at any time set by the tribe, and the standards for enrollment can change. The tribe's determination is conclusive; the court may not substitute its own determination as to whether a child or parent is a member of the tribe or whether the child is eligible for membership in the tribe. 25 C.F.R. 23.108(a), (b); *In re E.J.B*., 375 N.C. 95 (2020). The court does, however, determine whether the child is an Indian child triggering the application of ICWA based on the information that is provided to it regarding the child's membership status or the biological parent's membership status *and* the child's eligibility for membership. The court may rely on facts or documentation (e.g., tribal enrollment documentation) that indicates tribal membership or eligibility for membership. 25 C.F.R. 23.108(c).

(a) Federally recognized Indian tribes. ICWA applies to federally recognized Indian tribes, meaning those tribes (including Alaska native villages) that are recognized by the Secretary of the Interior as eligible for services that are provided to Indians. 25 U.S.C. 1903(8).

There are 575 federally recognized tribes in the U.S., two of which are located in North Carolina: the Eastern Band of the Cherokee Indians (EBCI) and the Lumbee Tribe of North Carolina. The Lumbee Tribe of NC was given full federal recognition on December 18, 2025 when the President of the United States signed the National Defense Authorization Act, which included the Lumbee Fairness Act (S.107/H.R.474). *See* Pub. L. No. 119-60, sec. 8803, 139 Stat. 718.

The EBCI has over 13,000 enrolled members, most of whom live on the Qualla Boundary, which is located in Jackson, Cherokee, Graham, Haywood, and Swain counties.[3] The Qualla Boundary is a reservation for purposes of ICWA. The Lumbee Tribe of NC has over 62,000 enrolled members and does not have a reservation.[4] As demonstrated by the Lumbee Tribe of NC, not every federally recognized tribe has a reservation as there are only approximately 326 reservations.[5] Although the Lumbee Tribe of NC does not have a jurisdictional reservation, the Lumbee Fairness Act recognizes members who reside in Cumberland, Hoke, Scotland, and Robeson counties as being on or near a reservation for purposes of obtaining federal benefits and services from the Bureau of Indian Affairs, such as health, education, housing, and other services. *See* Pub. L. No. 119-60, sec. 8803, 139 Stat. 718.

Although there are only two federally recognized tribes in North Carolina, an Indian child who is the subject of a child custody proceeding under ICWA may be from any federally recognized tribe regardless of where that tribe is located.

Resources:

Each year, the Bureau of Indian Affairs (BIA) publishes a list of federally recognized Indian tribes, organized by region. As of the publication of this Manual, the most recent notice was published in the Federal Register on January 30, 2026. *See* 91 Fed. Reg. 4102. This list includes the Lumbee Tribe of NC, fully federally recognized on December 18, 2025.

The BIA maintains a Tribal Leaders Directory (organized through a map) with contact information for the tribes on the BIA website.

Practice Note Regarding EBCI: Family Safety is the agency of the Eastern Band of Cherokee Indians (EBCI) that handles cases that involve children who are Indian children in the Cherokee community. Family Safety may be able to assist a participant in a state child custody or emergency proceeding by checking with the enrollment office to determine whether the child is an "Indian child," whether the Family Safety program is or will be working with the family, and whether tribal court action will be taken. The contact information for Family Safety is 117 John Crowe Hill Drive, Cherokee, North Carolina 28719; Telephone: (828) 359-1520. Any contact with Family Safety is separate from the notice that must be sent to the tribe pursuant to 25 U.S.C. 1912(a) and 25 C.F.R. 23.11, discussed in section 13.2.F, below.

Lumbee Full Federal Recognition and ICWA: See Sara DePasquale, *The Lumbee Tribe of NC Is Fully Federally Recognized; ICWA Now Applies in A/N/D and TPR Actions for Indian Children Affiliated with the Lumbee*, UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (Jan. 16, 2026).

(b) State recognized tribes not covered by ICWA. ICWA does not apply to tribes that have state recognition but are not fully recognized for ICWA purposes by the federal

[3] Information obtained from the Eastern Band of Cherokee Indians, Public Health and Human Services website.

[4] Communication from Dr. Cherry Beasley, Director of Lumbee Health and Human Services (Jan. 13, 2026).

[5] "What is a federal Indian reservation?," U.S. Department of the Interior Bureau of Indian Affairs.

government. *In re A.D.L.*, 169 N.C. App. 701 (2005) (holding ICWA did not apply to children were who registered members of the state recognized Lumbee tribe); *see In re A.L.*, 378 N.C. 396 (2021) (remanded for compliance with mandatory ICWA inquiry; juvenile was member of Lumbee tribe and TPR would be undisturbed if inquiry as to whether there was reason to know if the child was an Indian child showed juvenile was only eligible for membership with state recognized versus fully federally recognized tribe). Note these opinions were published prior to full federal recognition of the Lumbee Tribe of NC, making that tribe subject to ICWA effective December 18, 2025. *See* Pub. L. No. 119-60, sec. 8803, 139 Stat. 718.

There are six state recognized tribes in North Carolina to which ICWA does not apply. Those tribes are the

- Coharie Tribe,
- Haliwa-Saponi Indian Tribe,
- Meherrin Indian Tribe,
- Occaneechi Band of the Saponi Nation,
- Sappony, and
- Waccamaw Siouan Tribe.

See G.S. Chapter 71A (Indians); 143B-407(a).

Resource: For information about the Indian Tribes in North Carolina, see "NC Tribal Communities" under "Divisions" and the "American Indian Affairs" section of the N.C. Department of Administration website.

Even though ICWA is inapplicable to tribes with only state recognition, North Carolina's Juvenile Code provides for special placement consideration and notice in an abuse, neglect, or dependency proceeding for children who are members of a tribe recognized by North Carolina. The court may consider the role of "nonrelative kin," which for child members of a North Carolina recognized tribe includes any member of a state or federally recognized tribe, even when there is not a substantial relationship between the child and the adult tribal member. G.S. 7B-101(15a).

At both the nonsecure custody and dispositional stages of an abuse, neglect, or dependency action, the court may consider "nonrelative kin" as a placement option if the court is not placing the child with a parent or relative and placement with a nonrelative kin is in the child's best interests. G.S. 7B-505(c) (nonsecure custody); 7B-506(h)(2a) (continued nonsecure custody); 7B-903(a4) (dispositional alternatives). The court may also order DSS to notify the child's North Carolina recognized tribe of the need for nonsecure custody or custodial care for the purpose of locating relatives or nonrelative kin for placement options for the child. G.S. 7B-505(c); 7B-506(h)(2a); 7B-903(a4).

The North Carolina Department of Health and Human Services (NCDHHS) Division of Social Services must collaborate with the Department of Administration Commission of

Indian Affairs, and the North Carolina Association of County Directors of Social Services to develop effective processes to accomplish a number of goals, including

- identifying a reliable process through which Indian children in the child welfare system can be identified;
- enabling state recognized tribes to receive reasonable notice when Indian children are being placed in foster care or adoptive placements or otherwise enter the child protective services system, and to be consulted on policies and matters related to the placement of Indian children in foster care or adoption;
- identifying and recruiting North Carolina Indians to become foster care and adoptive parents; and
- teaching cultural, social, and historical perspectives associated with Indian life to appropriate child welfare workers and foster and adoptive parents.

G.S. 143B-139.5A; *see* G.S. 143B-404 through -411 (State Commission on Indian Affairs).

NCDHHS DSS Forms:

- DSS-5335, Consent to Explore American Indian Heritage (with Instructions)
- DSS-5336, Fostering Connections/Tribal Relative Search (with Instructions)

These forms may assist in determining whether a child is a member of any tribe, including a North Carolina recognized tribe, and in finding relatives of that child.

Resource: For more information about the Indian Child Welfare Program including a list of Tribal Contacts for the state recognized tribes in North Carolina, see "Indian Child Welfare Program" on the "American Indian Affairs" section of the North Carolina Department of Administration website.

C. Inquiry at Commencement of Every Proceeding as to "Indian Child" Status

Under the regulations, an inquiry at the commencement of every emergency and child custody proceeding must be made by the court to determine whether the child is an Indian child. 25 C.F.R. 23.107(a); *see* 25 C.F.R. 23.2 (definition of "child-custody proceeding"). *See also In re L.Q.*, 298 N.C. App. 540 (2025) (holding trial court made inquiry at commencement of TPR proceeding when first opportunity for court to make the inquiry was at the pre-trial hearing that was held after twelve continuances over seventeen months were granted due to COVID-related delays); *In re A.L.*, 378 N.C. 396 (2021) (in underlying neglect action, trial court determined the juvenile was a member of a state recognized, and not federally recognized tribe; termination of parental rights (TPR) for same juvenile remanded when inquiry regarding whether the trial court had reason to know the child was an Indian child was not part of the TPR proceeding record; this opinion was published prior to full federal recognition of the Lumbee Tribe of NC by Pub. L. No. 119-60, sec. 8803, 139 Stat. 718, making that tribe subject to ICWA effective December 18, 2025). *Cf. In re C.C.G.*, 380 N.C. 23 (2022) (no reversible error when trial court did not make inquiry at TPR hearing but did make it at the

underlying neglect adjudication hearing; despite reference to Cherokee ancestry by a relative, there was no reason to know the child was an Indian child).

The inquiry is made of all the participants, including the attorneys, in the proceeding as to whether they know or have reason to know that the child is an Indian child. The responses must be made on the record. The court must instruct the parties to inform it of information a party subsequently receives that provides reason to know the child is an Indian child. 25 C.F.R. 23.107(a).

The North Carolina Supreme Court has addressed this mandatory inquiry requirement regarding each participant's knowledge of whether the child is an Indian child or whether there is reason to know the child is an Indian child. The trial court must make the inquiry as it has the burden to ensure compliance with ICWA. *In re M.L.B.,* 377 N.C. 335 (2021) (reversing and remanding TPR; trial court did not ask participants on the record and on remand must do so); *In re E.J.B*., 375 N.C. 95 (2020); *In re N.K.,* 375 N.C. 805 (2020). Failure to make the inquiry when there is reason to know a child is an Indian child will result in a remand. *See In re M.L.B*., 377 N.C. 335. *Cf. In re C.C.G*., 380 N.C. 23 (no reversible error when trial court did not make inquiry at TPR hearing but did make it at the underlying neglect adjudication hearing; despite reference to Cherokee ancestry, there was no reason to know the child was an Indian child).

Because an "Indian child" is defined by citizenship status with a federally recognized tribe, the court's inquiry is not based on race but instead is based on any indications that the child or parent(s) may have a political affiliation (citizenship) with the tribe. As such, the inquiry focuses on (1) whether the child is a member (or citizen) of a tribe or (2) whether the child's biological parent is a member (or citizen) of a tribe and whether the child is eligible for citizenship. *In re C.C.G*., 380 N.C. 23; *In re M.L.B.,* 377 N.C. 335.

As part of the inquiry, if there is no reason to know the child is an Indian child at the commencement of the proceeding, the court instructs the parties to inform the court of information a party subsequently receives that provides reason to know the child is an Indian child. 25 C.F.R. 23.107(a); *In re E.J.B*., 375 N.C. 95; *In re N.K*. 375 N.C. 805. For example, the court inquiry may result in the discovery that the child is not an Indian child for purposes of ICWA because neither biological parent is a member of a tribe, but the child is eligible for membership. The child may be eligible for certain benefits and services if the child becomes an enrolled member of an Indian tribe. As a result, the child's guardian ad litem, parent, guardian, or custodian or DSS may take responsibility for pursuing the child's membership. If the child becomes a member of a federally recognized tribe during the proceeding, the court must be notified as ICWA will then apply since the child will satisfy the criteria of "Indian child." *See* 25 U.S.C. 1903(4); *In re C.P*., 181 N.C. App. 698 (2007); Guidelines, 2016, B.1 (p. 11). Additionally, in cases where the child is a member of the Lumbee Tribe of NC or is eligible for membership and one of their biological parents is a member of a federally recognized tribe, that child became an Indian child under ICWA as of December 18, 2025 when the Lumbee Tribe of NC was fully federally recognized. *See* Pub. L. 119-60, sec. 8803, 139 Stat. 718.

AOC Forms: These form orders include sections addressing the ICWA inquiry.

- AOC-J-150, Order for Nonsecure Custody (Abuse/Neglect/Dependency)
- AOC-J-151, Order on Need for Continued Nonsecure Custody (Abuse/Neglect/Dependency)

NCDHHS DSS Form: This form may assist DSS in determining Indian child status.
DSS-5335, Consent to Explore American Indian Heritage (with Instructions)

Practice Note: Because the court must inquire at the beginning of every abuse, neglect, or dependency; termination of parental rights; and adoption proceeding whether the participants know or have reason to know whether the child is an Indian child, DSS should explore the child's Indian heritage with the child and family before the specific court action is initiated. DSS may find it helpful to ask parents, guardians, custodians, and/or caretakers and the child (if appropriate) to complete the DSS form or a family tree that specifically includes information about Native American heritage and tribal enrollment information. If the parent is driving a vehicle with an Eastern Band of Cherokee license plate, that could be an indication that the child is an Indian child. To obtain this special license plate, a tribal identification card must be shown to the Division of Motor vehicles. G.S. 20-79.4(b)(72).

Practice Note Regarding Lumbee Tribe of NC: With full federal recognition of the Lumbee Tribe of NC, participants in any abuse, neglect, dependency, or termination of parental rights proceedings may know or have reason to know the juvenile involved is now an Indian child. That participant must notify the court of this new information so that the court can act appropriately under ICWA, starting with an inquiry as to the child's status as an Indian child.

Resource: See Sara DePasquale, *The Lumbee Tribe of NC Is Fully Federally Recognized; ICWA Now Applies in A/N/D and TPR Actions for Indian Children Affiliated with the Lumbee*, UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (Jan. 16, 2026).

1. Reason to know child is an "Indian child." The regulations address when a court has reason to know a child is an Indian child. Identified factors are when

- the court is informed by a participant in the proceeding, officer of the court involved in the proceeding, or Indian tribe that the child is an Indian child or that they have discovered information indicating the child is an Indian child;
- the child gives the court reason to know they are an Indian child; or
- the court is informed that
  - the child, the child's parent, or Indian custodian is domiciled or resides on an Indian reservation or in an Alaska Native village;
  - the child is or has been a ward of a tribal court; or
  - either parent or the child possesses an identification card indicating membership in an Indian tribe.

25 C.F.R. 23.107(c); *see In re Adoption of K.L.J.*, 266 N.C. App. 289 (2019) (defining "ward of tribal court").

When there is reason to know but insufficient evidence for the court to determine that the child is an Indian child, the court must treat the child as an Indian child and comply with

ICWA requirements until and unless it is determined on the record that the child does not meet the definition of "Indian child" at 25 U.S.C. 1903(4). 25 C.F.R. 23.107(b)(2); *In re E.J.B.*, 375 N.C. 95 (2020). The court must also confirm on the record through a report, declaration, or testimony that DSS or another party in the proceeding has used due diligence to identify, work with, and obtain verification from the tribes of which there is reason to know the child (1) may be (or is) a member or (2) is eligible for membership *and* a biological parent is a member of a tribe. 25 C.F.R. 23.107(b)(1); *In re N.K.*, 375 N.C. 805 (2020). See section 13.2.F, below (discussing notice requirements to the tribe and regional Bureau of Indian Affairs office). The information from the tribe will allow the court to determine whether the child is an Indian child. *See* 25 C.F.R. 23.108(c).

The criteria addressing a trial court's reason to know whether the child is an Indian child does not refer to the child's Native American ancestry. *See* 25 C.F.R. 23.107(c). The Guidelines, 2016 state a child's status as an "Indian child" is based upon political affiliation (or citizenship) with a federally recognized tribe and not merely on the child's or parent's ancestry. Guidelines, 2016, B.1 (p. 10). The North Carolina Supreme Court examined the federal regulation specifying when a court has reason to know the child is an Indian child – 25 C.F.R. 23.107(c). In *In re C.C.G.*, 380 N.C. 23 (2022), the supreme court rejected the parent's argument that the trial court had reason to know the child was an Indian child based on information from two DSS court reports mentioning a "possible distant Cherokee relation on her mother's side of the family" and a service agreement where the mother reported "Cherokee Indian Heritage." *In re C.C.G.*, 380 N.C. at 29. The supreme court differentiated race, culture, and heredity from political tribal membership when determining the statements do not give the trial court reason to know the child is an Indian child under 25 C.F.R. 23.107(c). There was no information about the child's or her biological parents' citizenship (or membership) with an Indian tribe. The court had no reason to know the child was an Indian child. *But see In re L.Q.*, 298 N.C. App. 540 (2025) (citing *In re C.C.G.*, 380 N.C. 23 but relying on *In re A.P.*, 260 N.C. App. 540 (2018), that Indian heritage warrants notice to the claimed tribes).

Prior to this supreme court opinion, the question of whether an indication of Native American ancestry by itself constitutes "reason to know" had been addressed by the court of appeals. The court of appeals held that there is " 'reason to know the child could be an Indian child' in instances where 'it appears that the trial court had at least some reason to suspect that an Indian child may be involved.' " *In re K.G.*, 270 N.C. App. 423, 425 (2020) (quoting *In re A.R.*, 227 N.C. App. 518, 523 (2013)); *see In re A.P.*, 260 N.C. App. 540 (2018). In relying on opinions published prior to the enactment of the 2016 federal regulations, the court of appeals held there is reason to know the child is an Indian child when there is a suggestion that the child has Indian heritage with a federally recognized tribe. *In re K.G.*, 270 N.C. App. 423 (mother indicated she has Cherokee ancestry but does not know the specific tribe); *In re A.P.*, 260 N.C. App. 540 (mother indicated "Cherokee" and "Bear foot" ancestry). The court of appeals reasoned it was better to err on the side of caution and send the notice even when it was unlikely that the child was an Indian child. *In re K.G.*, 270 N.C. App. 423; *In re A.P.*, 260 N.C. App. 540. Without providing an analysis of the reason to know regulation, 25 C.F.R. 23.107, the North Carolina Supreme Court stated that ancestry with a federally recognized tribe constitutes reason to know the child is an Indian child. *In re N.K.*, 375 N.C. 805 (maternal grandmother had ancestry with a tribe in upstate New York); *In re E.J.B.*, 375 N.C.

95 (father indicated he had Cherokee heritage). However, the portions of these opinions that address reason to know the child is an Indian child appear to be superseded by implication by *In re C.C.G.*, 380 N.C. 23, which specifically examined the definition of "Indian child" and the federal regulation addressing the factors to consider for whether a court has reason to know the child is an Indian child. *See In re N.C.-L.L.S.*, 284 N.C. App. 205 (2022) (unpublished) (holding court did not know or have reason to know the child was an Indian child when father could not name any tribe he or any of his ancestors were a member of; DNA testing showing a percentage of indigenous Mexican ancestry, if accurate, do not include federally recognized tribes by the United States).

Practice Note: Because the child's status as an "Indian child" is conditioned upon political affiliation (or citizenship) with a federally recognized tribe, when Native American ancestry is raised, the court should inquire of the participants if either of the biological parents or the child is a member of a federally recognized tribe.

When there is reason to know the child is an Indian child, the trial court must direct DSS to send a notice under ICWA to the applicable tribe(s) and regional director of the Bureau of Indian Affairs. *In re E.J.B.*, 375 N.C. 95; *In re N.K.,* 375 N.C. 805; *In re K.G.*, 270 N.C. App. 423; *In re A.P.* 260 N.C. App. 540 (all remanded for the trial court to order that DSS comply with the notice provisions). Although the remand instructions focused on the notice provisions of ICWA, the regulations state that when the trial court has reason to know the child is an Indian child, it must treat the child as such until it is determined on the record that the child does not meet the definition of "Indian child" – this means all the provisions of ICWA apply during that time. *See* 25 C.F.R. 23.107(b)(2).

2. Burden of establishing "Indian child" status. Anyone may raise the question of whether ICWA applies to the proceeding because the child is an Indian child. The burden starts with an inquiry by the district court. *See* 25 C.F.R. 23.107(a); *In re E.J.B.*, 375 N.C. 95 (2020); *In re N.K.*, 375 N.C. 805 (2020); *In re L.W.S.*, 255 N.C. App. 296 (2017). North Carolina appellate opinions examining the 2016 federal regulation, 25 C.F.R. 23.107(a), differ from previous opinions published by the court of appeals that held that the party who seeks to invoke ICWA has the burden of showing that ICWA applies. *See In re L.W.S.*, 255 N.C. App. 296; *In re C.P.,* 181 N.C. App. 698 (2007); *In re Williams*, 149 N.C. App. 951 (2002); (all holding parent that raised Native American ancestry did not meet their burden to show ICWA applied). Although the burden now starts with the trial court, ultimately, the burden of proof may be with the party raising the child's Indian child status and thus the applicability of ICWA.

When the court has reason to know the child is an Indian child but does not have conclusive evidence that the child is an Indian child,

> the court must [c]onfirm by way of a report, declaration, or testimony included in the record that the agency or other party used due diligence to identify and work with all of the Tribes of which there is reason to know the child may be a member (or eligible for membership), to verify whether

> the child is in fact a member or a biological parent is a member and the child is eligible for membership.

25 C.F.R. § 23.107 *quoted in In re E.J.B.*, 375 N.C. at 101–02; *In re N.K.*, 375 N.C. at 823.

A party exercises due diligence and meets its burden by complying with the ICWA provisions that require notice be sent to the applicable tribes and director of the regional office of the Bureau of Indian Affairs (BIA) and makes additional written membership inquiries. *See In re D.J.*, 378 N.C. 565 (2021); *In re N.K.*, 375 N.C. 805; *In re E.J.B.*, 375 N.C. 95; *In re K.G.*, 270 N.C. App. 423 (2020). See section 13.2.F, below, discussing the ICWA notice.

Each tribe that receives notice should address the child's status in a response to that notice. The North Carolina appellate opinions refer to the failure of a tribe and BIA to respond to multiple written requests rather than the singular notice that is required to be sent by registered or certified mail, return receipt requested. *See In re E.J.B.*, 375 N.C. 95; *In re N.K.*, 375 N.C. 805; *In re K.G.*, 270 N.C. App. 423. When a tribe fails to respond to the notice and written inquiries, assistance should be sought from the BIA. 25 C.F.R. 23.105(c); *In re D.J.*, 378 N.C. 565; *In re E.J.B.*, 375 N.C. 95; *In re N.K.*, 375 N.C. 805.

The regulations do not address what happens when a tribe or the BIA fails to timely respond to the notice or other written requests for information about the child's membership status, which includes the child's eligibility for membership when a biological parent is a member of a tribe. The length of time a trial court must wait for a tribe or BIA to respond is also not specifically addressed in the regulations.

The North Carolina Supreme Court has not identified the time that a trial court must wait for a response but cites to the regulation that allows the trial court to make an independent determination of a child's status as an Indian child when the relevant tribe(s) repeatedly fail to respond to written inquiries. *See In re N.K.*, 375 N.C. 805. However, the need to recognize that TPR hearings should not be needlessly delayed waiting for a tribe or the BIA to respond is discussed in a dissent. *See In re E.J.B.*, 375 N.C. 95 (Newby, J. dissenting).

The court of appeals has addressed the timing issue in two opinions: *In re A.P.*, 260 N.C. App. 540 (2018) and *In re C.P.*, 181 N.C. App. 698. In both opinions, the court of appeals looked to the time requirements under ICWA for when a hearing can be held after notice is received by the tribe. Under ICWA, the trial court may not hold a hearing until at least ten days after the tribe receives notice, and if requested, the trial court must grant a continuance of an additional twenty days. 25 U.S.C. 1912(a); *In re E.J.B.*, 375 N.C. 95 (Newby, J. dissenting). Combined, the time period is thirty days. See section 13.2.G, below (discussing timing).

If each tribe fails to timely respond, the burden to introduce evidence showing the child is an Indian child is on the party who is asserting ICWA applies. *See In re A.P.*, 260 N.C. App. 540 (DSS must send notice; respondent mother must meet her burden if no response received); *In re C.P.*, 181 N.C. App. 698 (holding the trial court complied with ICWA when the length of time granted by two continuances exceeded thirty days; the court did not abuse its discretion in denying a third continuance and determining ICWA did not apply when the tribe had still

not responded and the respondent mother offered no additional evidence showing the child was an Indian child).

When considering the evidence available to it, the trial court makes "a judicial determination as to whether the child is an 'Indian child'." 25 C.F.R. 23.108(c). If the child is an Indian child, ICWA applies. 25 C.F.R. 23.107. The determination requires that the court decide whether the evidence provided is sufficient to prove that the child meets the criteria of an "Indian child" under 25 U.S.C. 1903(4). Documentation or testimony from a tribal representative are evidence that the child is an Indian child. 25 C.F.R. 23.108(c) (court may rely on facts or documentation such as tribal enrollment documentation that indicates tribal membership or eligibility for membership when determining whether the child is an Indian child). The court of appeals has recognized there are other methods of proof but has stated the "equivocal testimony of the party seeking to invoke the Act, standing alone, is insufficient to meet this burden." *In re Williams,* 149 N.C. App. 951, 957 (2002) (holding father did not meet his burden with his testimony and no supporting evidence, such as documentation or testimony from a tribal representative); *see In re C.P.*, 181 N.C. App. 698 (holding mother did not meet her burden of proof when the only evidence was her word, without any supporting documentation, that she and the children were tribal members).

Practice Note: The application of a time period for a tribe to respond before allowing the court to determine whether the child is an Indian child for purposes of ICWA gives meaning to 25 C.F.R. 23.108(c). Until there is clarity from the appellate courts about how long the court must wait for a response from all relevant tribes and the regional BIA office that received a legally sufficient notice, a court may want to consider designating a time period, which should be a minimum of thirty days, for when DSS must complete additional written inquiries to a tribe or BIA if there has been no response from a particular tribe or BIA. After that time period has expired and no response from the tribe and/or BIA has been received, the court may want to put the parties on notice that the issue of the child's status as an Indian child will be heard at a hearing scheduled for a date certain. This will help prevent the court from waiting in perpetuity for a response from a tribe or BIA. Based on the court of appeals opinions, the party who asserts there is reason to know the child is an Indian child will have the burden of proof at that hearing assuming a response from the tribe or BIA has not been received by that date.

D. Jurisdiction

Arguments have been raised before the North Carolina appellate courts that the district court lacks subject matter jurisdiction when the court fails to make the mandatory inquiry about whether a participant knows or has reason to know the child is an Indian child, or when the required notice to the tribe(s) and director of the regional office of the Bureau of Indian Affairs (BIA) has not been sent. *See In re E.J.B.*, 375 N.C. 95 (2020); *In re K.G.*, 270 N.C. App. 423 (2020); *In re A.P.*, 260 N.C. App. 540 (2018). The supreme court looked to 25 U.S.C. 1911, which addresses exclusive tribal court jurisdiction (discussed in subsection 1, immediately below), in *In re D.J.*, 378 N.C. 565 (2021) and stated, "[t]o the extent respondent argues the trial court's prior noncompliance with the ICWA deprived the trial court of jurisdiction to enter orders addressing the custody of [the juvenile], this argument fails." 378 N.C. at 575. In that case, at the time of the termination of parental rights (TPR) hearing, DSS

had not sent ICWA notices to all of the applicable tribes and regional Bureau of Indian Affairs office but did send notices after the TPR order was entered. The notices were admitted in evidence at the post-TPR review hearings.

Subject matter jurisdiction is not at issue when the required ICWA notice is not sent as the supreme court has allowed for the deficiency to be cured. Two opinions address sending required notices after the TPR, during the post-TPR review hearing phase. *See In re D.J.*, 378 N.C. 565; *In re E.J.B.*, 375 N.C. 95. Other opinions remand the cases for compliance with the mandatory notice provisions of ICWA (discussed in section 13.2.F, below). In a remand mandate, the "the trial court shall reaffirm" the TPR order if the children are not Indian children, and if the children are Indian children, the "trial court shall proceed in accordance with the relevant provisions of the Act." *In re E.J.B.*, 375 N.C. at 106; *see In re N.K.*, 375 N.C. 805 (2020) (remanding TPR for compliance with ICWA notice provisions).

1. Exclusive tribal court jurisdiction. The tribal court has exclusive jurisdiction of a child custody proceeding when an Indian child

- resides or is domiciled on a reservation (even if visiting elsewhere) or
- is a ward of the tribal court (regardless of where the child resides or is domiciled).

25 U.S.C. 1911(a); *see* 25 C.F.R. 23.2 (definition of "domicile"); *see also Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989) (vacating an adoption decree after holding the state court did not have jurisdiction when the Indian children's domicile was the reservation); *Haaland v. Brackeen*, 599 U.S. 255 (2023) (citing 25 U.S.C. 1911(a)).

When a tribal court has exclusive jurisdiction of a child custody proceeding, the state court must expeditiously notify the tribal court of its pending dismissal of the state court action based on the jurisdictional issue, dismiss the state court action, and ensure the tribal court is sent all the information, including court pleadings and any record, regarding the state court action. 25 C.F.R. 23.110(a).

The court of appeals addressed the issue of exclusive jurisdiction of a tribal court in *In re Adoption of K.L.J.*, 266 N.C. App. 289 (2019). In this North Carolina adoption proceeding, ICWA applied because the two children who were the subject of the proceeding are members of the Cheyenne River Sioux Tribe. The children had also been the subject of child custody proceedings in the tribal court where their parents' rights were terminated and custody was ordered to a "paternal aunt," after which the case was dismissed by the tribal court. The "aunt," as custodian, placed the children with the adoption petitioners in North Carolina and ultimately sought a G.S. Chapter 35A guardianship for the children with the petitioners through the North Carolina courts. The guardians subsequently initiated adoption proceedings in North Carolina. After notice of the adoption proceeding was sent to the Tribe and to the "aunt," the "aunt" intervened and raised subject matter jurisdiction under ICWA as an issue. The district court determined it had subject matter jurisdiction and granted the adoptions. The court of appeals affirmed.

The court of appeals held that the exclusive jurisdiction provision of ICWA did not apply because the criteria of 25 U.S.C. 1911(a) did not exist. In its opinion, the court of appeals focused on whether the children were wards of the tribal court giving that court exclusive subject matter jurisdiction over the adoption proceedings since the children did not meet the

jurisdictional criteria of residing or being domiciled within the reservation. Recognizing that ICWA does not define "ward of tribal court," the court of appeals adopted the definition of "ward of the state" from Black's Law Dictionary. As applied to ICWA, an Indian child is a "ward of tribal court" when the child "is housed by or provided protections and necessities from the tribe" and when that stops, the Indian child "will cease being its ward for purposes of 25 U.S.C. § 1911(a)." *In re Adoption of K.L.J.*, 266 N.C. App. at 293. The court of appeals held the children were not wards of the tribal court; they lived outside of the reservation and were not provided protections and necessities from the tribe after custody was ordered to the "aunt."

The "aunt" raised a second issue related to full faith and credit of a tribal court order as part of her argument that the North Carolina court lacked subject matter jurisdiction under ICWA. The court of appeals held that the district court did not err when it failed to give full faith and credit to a tribal court order that concluded the children were wards of the tribal court – an order the "aunt" obtained two days before the adoption hearing.

ICWA requires every state to give full faith and credit to an Indian tribe's judicial proceedings that are applicable to Indian child custody proceedings to the same extent that the state gives full faith and credit to judicial proceedings of any other entity. 25 U.S.C. 1911(d). The case law in North Carolina addressing foreign judgments requires compliance with the Uniform Enforcement of Foreign Judgments Act (UEFJA). In applying UEFJA to the tribal court order, the "aunt" as the party seeking to enforce that order was required to "file a properly authenticated foreign judgment with the office of the [C]lerk of [S]uperior [C]ourt in any North Carolina county along with an affidavit attesting to the fact that the foreign judgment is both final and unsatisfied in whole or in part. . . ." *In re Adoption of K.L.J.*, 266 N.C. App. at 294 (citations omitted). The "aunt" did not comply with this requirement; she only provided an unauthenticated faxed copy that was purportedly entered by the tribal court. Additionally, the court of appeals determined there was a lack of due process for the adoption petitioners and the children, who were not given notice of or an opportunity to participate in the alleged hearing in tribal court.

Practice Note: As *In re Adoption of K.L.J.* demonstrates, ICWA does not automatically divest a North Carolina court of subject matter jurisdiction over a child custody proceeding. *See also In re J.H.S.*, 257 N.C. App. 388 (2018) (unpublished) (tribe intervened in North Carolina neglect and dependency and TPR actions involving two Indian children). North Carolina courts lack subject matter jurisdiction when either (1) the Indian child resides on the reservation, (2) the Indian child is domiciled on the reservation, or (3) the Indian child is a ward of a tribal court. If there is any doubt, addressing the following questions on the record is one way to determine which court has subject matter jurisdiction:

- Where does the child reside; is it a reservation?
- Where is the child's domicile (where is the domicile of the child's parents or if applicable Indian custodian or guardian, *see* 25 C.F.R. 23.2 (defining "domicile")); is it a reservation?

- Is the child a ward of tribal court? Has the child ever been the subject of a child custody proceeding in a tribal court? If so, what is the status of that proceeding? Is there an order? What does the order provide? Has the order been modified? If so, in what court (the tribal court or a state court)?
- If the tribal court has exclusive jurisdiction, does an exception (as discussed immediately below) apply?

(a) Exception to tribal court's exclusive jurisdiction: emergency removal. Although a tribal court has exclusive jurisdiction of a child custody proceeding, a state court may act in an emergency proceeding, which is any court action that involves the emergency removal or emergency placement of an Indian child. *See* 25 U.S.C. 1922; 25 C.F.R. 23.2 and 23.113. To protect an Indian child who resides or is domiciled on a reservation but is temporarily located off the reservation from imminent physical damage or harm, ICWA allows for the emergency removal of that child from their parent or Indian custodian or emergency placement in a foster home or institution under applicable state law. See section 13.2.E, below, for a discussion of emergency proceedings.

(b) Exception to tribal court's exclusive jurisdiction: agreement between tribe and state. Another exception to a tribe's exclusive jurisdiction of a child custody proceeding is when the state and tribe enter into an agreement that relates to the care and custody of Indian children and jurisdiction over child custody proceedings. The agreements may provide for the orderly transfer of jurisdiction on a case-by-case basis and allow for concurrent jurisdiction between the courts of the state and the tribe. Any agreement may be revoked by a party with 180 days written notice. 25 U.S.C. 1919. The North Carolina Court of Appeals has held that it will not take judicial notice of an agreement between the tribe and state because it is a "legislative fact" that is not subject to judicial notice. *In re E.G.M.*, 230 N.C. App. 196 (2013) (remanding the case for findings on a determination of subject matter jurisdiction under ICWA where the Indian child's domicile was that of her parents' on Eastern Band of Cherokee Indians tribal land and the agreement was not introduced into evidence). As a result, the memorandum of agreement must be admitted as evidence in each state court case where an Indian tribal court would have exclusive jurisdiction.

Practice Notes: Prior to 2015, the Eastern Band of Cherokee Indians (EBCI) entered into a memorandum of agreement (MOA) with the NCDHHS Division of Social Services and four county departments of social services located within what was at that time Judicial District 30 (Cherokee, Swain, Jackson, and Graham). The MOA deferred the exclusive jurisdiction of child welfare cases involving an Indian child of the EBCI from the EBCI tribal court to the North Carolina courts. In 2015, the MOA was revoked, and the EBCI tribal court began to exercise exclusive jurisdiction in child welfare cases involving an Indian child of the EBCI who resides or is domiciled on the Qualla Boundary and Tribal Trust Lands or is a ward of the EBCI tribal court.

It is important that the petitioner (or movant in a termination of parental rights (TPR)) and the state court determine whether the state court has jurisdiction to proceed in an abuse,

neglect, dependency; TPR; and/or adoption action. For all federally recognized Indian tribes, the ICWA point of contact is named in the Designated Tribal Agents for Service of Notice in the Federal Register. That person should have information on whether the tribe exercises exclusive jurisdiction. *See* 90 Fed. Reg. 30950 (July 11, 2025). This list does not include the Lumbee Tribe of NC since that tribe was not fully federally recognized until December 18, 2025. *See* Pub. L. No. 119-60, sec. 8803, 139 Stat. 718. However, the BIA maintains the ICWA Designated Agent Listing, which includes the agent for the Lumbee Tribe of NC, on its website.

2. Concurrent jurisdiction in tribal and state court, intervention by tribe, transfer. In cases where the tribal court does not have exclusive jurisdiction, meaning that the child is not (1) residing or domiciled on a reservation or (2) a ward of a tribal court, state and tribal courts have concurrent jurisdiction. Both the state court and the tribal court have subject matter jurisdiction, and the state action may proceed. *See Haaland v. Brackeen*, 599 U.S. 255 (2023) (citing 25 U.S.C. 1911(b)).

(a) The tribe's right to intervene in a state court action. The Indian child's tribe has the right to intervene at any time in a state court proceeding for foster care or termination of parental rights (TPR). 25 U.S.C. 1911(c). *See In re E.J.B.,* 375 N.C. 95 (2020), *In re C.P.,* 181 N.C. App. 698 (2007), *In re A.R.,* 227 N.C. App. 518 (2013) (all addressing the tribe's right to intervene under ICWA); *see also In re J.H.S.*, 257 N.C. App. 388 (2018) (unpublished) (tribe intervened in North Carolina neglect and dependency and termination of parental rights actions involving two Indian children). The right of the Indian child's tribe to intervene in the state court proceeding under ICWA is in addition to the intervention statute in North Carolina's Juvenile Code applying to abuse, neglect, or dependency proceedings. *See* G.S. 7B-401.1(h) (right to intervene; Indian tribe is not included as a party who may intervene).

(b) Transfer of ICWA case to tribal court. The parent, the Indian custodian, or the Indian child's tribe may request (orally or in writing) that the state court transfer jurisdiction of a proceeding for foster care placement or termination of parental rights to the tribal court at any stage in the proceeding. 25 U.S.C. 1911(b); 25 C.F.R. 23.115. A transfer request must be granted unless (1) either parent objects (including a non-Indian parent), (2) the tribal court declines jurisdiction, or (3) the state court finds "good cause to the contrary." 25 C.F.R. 23.117.

In making a good cause determination, the state court cannot consider

- whether the proceeding is at an advanced stage if the child's parent, Indian custodian, or tribe did not receive notice of the child custody proceeding until an advanced stage;
- prior proceedings involving the child where a request for transfer was not made;
- whether the transfer could affect the child's placement;
- the child's cultural connection to the tribe or its reservation; or
- the socioeconomic conditions or negative perceptions of tribal or Bureau of Indian Affairs social services or judicial systems.

25 C.F.R. 23.118(c).

Practice Note Regarding EBCI: Family Safety is the Eastern Band of Cherokee Indians (EBCI) agency that handles child welfare cases for the tribe. Family Safety receives Title IV-E funding and is independent of any North Carolina state agency, including the North Carolina Department of Health and Human Services. If a state court case is transferred to the EBCI tribal court, Family Safety is the agency responsible for proceeding with the tribal court action and working with the family. DSS is no longer involved. The contact information for Family Safety is 117 John Crowe Hill Drive, Cherokee, North Carolina 28719; Telephone: (828) 359-1520.

E. Emergency Proceedings

ICWA distinguishes an emergency proceeding from a child custody proceeding and establishes different procedures for the two types of proceedings. An emergency proceeding is "any court action that involves an emergency removal or emergency placement of an Indian child." 25 C.F.R. 23.2. In North Carolina, an emergency removal and emergency placement result from a nonsecure custody order. *See* G.S. 7B-502 through -508.

The procedures, findings, and time requirements that apply to emergency proceedings are set forth at 25 C.F.R. 23.113. An emergency removal or emergency placement requires the court to find that the removal or placement "is necessary to prevent imminent physical damage or harm to the child" and must terminate when the removal or placement is no longer necessary to prevent imminent physical harm or damage to the child. 25 C.F.R. 23.113(a), (b)(1), (b)(4). This standard differs from the criteria required for a nonsecure custody order. *See* G.S. 7B-503. Hearings during the emergency proceeding, which in North Carolina are hearings on the need for continued nonsecure custody, must determine whether the removal or placement is no longer necessary to prevent imminent physical damage or harm to the child. 25 C.F.R. 23.113(b); *see* G.S. 7B-506. When the court determines that emergency removal or placement is no longer necessary to prevent imminent physical damage or harm to an Indian child, the emergency proceeding must be terminated, by either transferring the case to tribal court, commencing a child custody proceeding, or returning the child to their parents or Indian custodian. 25 C.F.R. 23.113(b)(4), (c). The emergency proceeding should not last longer than thirty days. 25 C.F.R. 23.113(e).

AOC Forms: The AOC form orders for nonsecure custody and continued nonsecure custody include sections addressing the finding of imminent physical damage or harm to the Indian child when that finding is required under ICWA.

- AOC-J-150, Order for Nonsecure Custody (Abuse/Neglect/Dependency)
- AOC-J-151, Order on Need for Continued Nonsecure Custody (Abuse/Neglect/Dependency)

Practice Note: In North Carolina, a child custody proceeding is commenced when the petition alleging abuse, neglect, or dependency is filed with the district court. G.S. 7B-405. The ICWA regulations do not address emergency removals and placements that are part of a child custody proceeding when the state court has concurrent jurisdiction to hear the action and do not specify which requirements apply. Unlike child custody proceedings, emergency proceedings allow for immediate court action to protect a child from imminent harm. Emergency proceedings do not require (i) formal notice to the Indian child's tribe, parent, and Indian

custodian and the ten-day time period before a hearing may be scheduled (see sections 13.2.F and G, below), (ii) the provision of active efforts to prevent the breakup of the Indian family before a placement may be made (see section 13.2.H, below), (iii) testimony from a qualified expert witness about the child's likelihood of experiencing serious emotional or physical damage from continued custody with a parent or Indian custodian (see section 13.2.I, below), or (iv) the use of placement preferences (see section 13.2.J, below). However, those requirements will apply when the emergency proceeding is terminated and the child custody action proceeds. Section C.3 of the Guidelines, 2016 briefly discusses the termination of the emergency proceeding and the initiation of a child custody proceeding, where the child's actual placement does not change.

F. Notice to the Tribe, Parent, Indian Custodian, and Bureau of Indian Affairs

In any involuntary foster care placement or termination of parental rights (TPR) proceeding to which ICWA applies, the party seeking the placement or TPR must send notice and a copy of the petition (for each proceeding) by registered or certified mail, return receipt requested, to

- the parents;
- the Indian custodian, if applicable; and
- the Indian child's tribe, the tribes to which the child may be a member, or the tribes that the child may be eligible for membership of if a biological parent is a member.

25 U.S.C. 1912(a); 25 C.F.R. 23.11(a) and 23.111; *see Haaland v. Brackeen*, 599 U.S. 255 (2023).

Copies of the notices must be sent to the appropriate Bureau of Indian Affairs (BIA) Regional Director by either registered or certified mail, return receipt requested or personal delivery. 25 C.F.R. 23.11(a). There is no provision for service by publication.

The content of the notice is specified in 25 C.F.R. 23.111(d). Each notice must include all the necessary information required by the regulation and statute. *In re E.J.B.*, 375 N.C. 95 (2020) (holding the notices that failed to include all the required information were legally insufficient and failed to comply with ICWA); *In re N.K.*, 375 N.C. 805 (2020) (remanded for trial court to determine whether ICWA notice requirements were complied with; appellate record did not contain the ICWA notices to allow for a determination of whether notice requirements were satisfied); *see* 25 U.S.C. 1912(a); 25 C.F.R. 23.111(d). A tribe's response to a legally insufficient notice appears to be sufficient to establish that the child is or is not an Indian child based on a political affiliation with that tribe. *See In re E.J.B.*, 375 N.C. 95 (remanded for notice to one of three tribes that was sent a legally insufficient notice and did not respond; response by two of the three tribes that received a legally insufficient notice that child was not affiliated with their respective tribes accepted; court no longer had reason to know child might be an Indian child based on affiliation with those two tribes).

If notice has been sent to a tribe and that tribe has not responded, notice must be sent to the regional BIA office seeking assistance in contacting the tribe. 25 C.F.R. 23.105(c); *In re D.J.*, 378 N.C. 565 (2021) (affirming TPR; trial court complied with ICWA after initial noncompliance when notices were sent to tribes and regional BIA director after TPR order was entered but during post-TPR hearings; BIA responded that notices were sent, two tribes

had not responded, and DSS did its due diligence and completed its ICWA responsibilities); *In re E.J.B.*, 375 N.C. 95; *In re N.K*, 375 N.C. 805.

If the identity or location of the parents, Indian custodian, or tribes in which an Indian child is a member or eligible for membership cannot be determined, but there is reason to know the child is an Indian child, notice must be sent to the appropriate BIA Regional Director. That notice should include as much information as is known regarding the child's direct lineal ancestors. The purpose of this notice is to seek assistance from the BIA in identifying and notifying the tribes to contact and in identifying, locating, and notifying the child's parents and Indian custodian (if applicable). 25 U.S.C. 1912(a); 25 C.F.R. 23.11(c), (d) and 23.111(e). The BIA will not make a determination of tribal membership. 25 C.F.R. 23.111(e). Within fifteen days of receiving the ICWA notice, the BIA will make reasonable documented efforts to locate and notify the child's tribe and parents or Indian custodian of the proceeding and send a copy of the notice it provides to the state court. 25 C.F.R. 23.11(c); *see* 25 U.S.C. 1912(a). If the BIA is unable to locate the parents or Indian custodian or verify that the child meets the criteria of an Indian child within the fifteen-day period, the BIA must inform the state court of such and include the additional time it will need. 25 C.F.R. 23.11(c).

An original or copy of each notice together with return receipts or other proof of service is filed with the court. 25 C.F.R. 23.111(a). A trial court ensures compliance with the ICWA notice provisions when the court record contains copies of the notices and the return receipt of notice from the tribe(s). *See In re K.G.*, 270 N.C. App. 423 (2020) (remanded to require notice complying with 25 C.F.R. 23.111 be sent). Failure to properly send a legally sufficient notice to the applicable tribe(s) and regional BIA director may result in a remand. *See In re E.J.B.*, 375 N.C. 95; *In re N.K.*, 375 N.C. 805. If a notice is not timely sent to the applicable tribe(s) and BIA, the error may be cured while the court maintains subject matter jurisdiction by sending a legally sufficient notice by registered or certified mail, return receipt requested, when it becomes apparent that a notice should have been sent. *In re D.J.*, 378 N.C. 565 (deficiency cured at post-TPR phase when notices were sent after TPR order was entered; notices were admitted in evidence at the post-TPR review hearing); *In re E.J.B.*, 375 N.C. at 106 (concluding in an appeal of a TPR that notices sent for the post-TPR hearings did not comply with the ICWA requirements and "did not cure the trial court's failure to comply with the Act prior to terminating respondent-father's parental rights").

Although only one notice is required to be sent by registered or certified mail, return receipt requested to each applicable Indian tribe and the regional BIA director, North Carolina appellate courts have referred to an Indian tribe's and the BIA's failure to respond to "multiple written requests." *See In re E.J.B.*, 375 N.C. 95; *In re N.K.*, 375 N.C. 805; *In re K.G.*, 270 N.C. App. 423; *see also* 25 U.S.C. 1912(a); 25 C.F.R. 23.111 (written notice). When a tribe fails to respond to a notice, assistance should be sought from the BIA. 25 C.F.R. 23.105(c); *see In re D.J.*, 378 N.C. 565. This request for assistance is in addition to the original notice that must be sent to the director of the BIA, appearing to constitute more than one (or multiple) notices.

The reference to multiple written requests in the appellate opinions appears to place the burden on the petitioner to provide more than the one mandatory notice to the tribes and BIA. The form of the subsequent written requests for information about the child's status is not addressed in the regulations or by the North Carolina appellate courts. However, the

regulations recognize notice may be sent by email or personal service. These alternative methods do not replace the requirement that notice be sent by registered or certified mail, return receipt requested. 25 C.F.R. 23.111(c). Because the regulations only require one notice be sent by registered or certified mail, return receipt requested, and address notice by email, it is reasonable to believe that follow up written inquiries may be made by email or other written forms such as regular mail or fax. Although not required, verification of those subsequent written requests should be part of the record to show those follow-up inquiries were made. As a practical matter, although email does not substitute for the formal notice ICWA requires, email or telephone contact may result in a faster response to the issue of whether the child is an "Indian child" and timely assistance in identifying placement options and services.

Resources:
To determine the ICWA point of contacts for the BIA Regional Directors and the various federally recognized tribes, see the annual Designated Tribal Agents for Service of Notice in the Federal Register. The most recent version as of this writing is 90 Fed. Reg. 30950 (July 11, 2025). This list does not include the Lumbee Tribe of NC since that tribe was not fully federally recognized until December 18, 2025. *See* Pub. L. No. 119-60, sec. 8803, 139 Stat. 718. However, the BIA maintains the ICWA Designated Agent Listing, which includes the agent for the Lumbee Tribe of NC, on its website. If a tribe has not designated a tribal agent for service of an ICWA notice, contact the tribe to be directed to the appropriate office or person. 25 C.F.R. 23.105(b). The BIA maintains a Tribal Leaders Directory with contact information for tribes on its website.

For child custody proceedings in North Carolina, notice is sent to the

Eastern Regional Director
Bureau of Indian Affairs
545 Marriott Drive, Suite 700
Nashville, TN 37214
Telephone: (615) 564-6500; Fax: (615) 564-6701.

Practice Note: Tribes may have names in common, requiring notice to be provided to more than one tribe if a specific tribe is not identified. For example, if a participant has reason to know the child is Cherokee without additional information regarding a region or tribe, notice should be given to the Eastern Band of Cherokee Indians in North Carolina, the Cherokee Nation in Oklahoma, and the United Keetoowah Band of Cherokee Indians in Oklahoma. *See In re E.J.B.*, 375 N.C. 95 (2020) (notice sent to three Cherokee tribes).

1. Right to intervene in a state court action. The parent, Indian custodian, and tribe have the right to intervene in any involuntary foster care placement or termination of parental rights (TPR) proceeding, and the notice must inform them of that right. 25 U.S.C. 1912(a); 25 C.F.R. 23.11(a), 23.111(d)(6)(ii) and (iii). *See Haaland v. Brackeen*, 599 U.S. 255 (2023), *In re E.J.B.,* 375 N.C. 95 (2020), *In re C.P.,* 181 N.C. App. 698 (2007), *In re A.R.,* 227 N.C. App. 518 (2013) (all addressing the tribe's right to intervene under ICWA); *see also In re J.H.S.*, 257 N.C. App. 388 (2018) (unpublished) (tribe intervened in North Carolina neglect and dependency and TPR actions involving two Indian children). The right to intervene in the

state court proceeding under ICWA is in addition to the statutory right to intervene in North Carolina's Juvenile Code. *See* G.S. 7B-401.1(h).

Under ICWA, an indigent parent or Indian custodian has the right to court-appointed counsel in any removal, placement, or TPR proceeding. 25 U.S.C. 1912(b); 25 C.F.R. 23.111(d)(6)(iv), (g); *see Haaland*, 599 U.S. 255. An Indian custodian will have the right to court-appointed counsel even though the statutory right to appointed counsel in an abuse, neglect, dependency, or TPR proceeding under North Carolina's Juvenile Code is limited to parents. *See* G.S. 7B-602; 7B-1101.1.

2. Voluntary and adoption proceedings. The notice requirements do not explicitly apply to adoption proceedings or voluntary proceedings. But, if there is reason to believe the child is an Indian child, the state court must ensure that the party seeking placement has taken reasonable steps to verify the child's status, which may include contacting the tribe(s) of which the child is believed to be a member or eligible for membership when a biological parent is a member of a tribe. 25 C.F.R. 23.124(b). Because parents, Indian custodians, and the Indian child's tribe have certain rights and protections under ICWA, regardless of whether the proceeding is voluntary, involuntary, or an adoption (e.g., placement preferences), it may be prudent to provide the notice.

G. Timing of Court Proceedings

An involuntary proceeding for foster care placement or termination of parental rights may not be held until ten days after the required notice is received by the parent or Indian custodian and the tribe(s) or Bureau of Indian Affairs Regional Director. The parent, Indian custodian, and tribe(s) may request additional time to prepare, and the request must be granted for up to twenty additional days, resulting in a total of thirty days from receipt of the notice. 25 U.S.C. 1912(a); 25 C.F.R. 23.112.

H. "Active Efforts" Required

Before ordering an involuntary foster care placement or a termination of parental rights (TPR), the court must find that "active efforts" have been made to provide remedial services to prevent the breakup of the Indian family and that those efforts proved unsuccessful. 25 U.S.C 1912(d); 25 C.F.R. 23.120; *see Haaland v. Brackeen*, 599 U.S. 255 (2023) (holding the provision requiring active efforts does not violate the anticommandeering principle of the Tenth Amendment; the requirement applies to both state and private actors who initiate an involuntary child custody proceeding).

Active efforts are defined at 25 C.F.R. 23.2 and consist of thorough, active, affirmative, and timely efforts that are intended primarily to maintain or reunite an Indian child with their family and are provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's tribe. Active efforts are conducted in partnership with the Indian child, parents, extended family members, Indian custodians, and the tribe. Eleven specific examples of active efforts are included in the definition; one example is that DSS not only identify appropriate services for the parent but actively assist the parent in obtaining the services. 25 C.F.R. 23.2; *see In re N.D.M.*, 288 N.C. App. 554 (2023).

Active efforts apply to both the Indian and non-Indian parent. *In re N.D.M.*, 288 N.C. App. 554. Active efforts must be documented in detail in the court record. 25 C.F.R. 23.120(b).

The court of appeals examined whether active efforts were provided in *In re N.D.M.*, 288 N.C. App. 554. There, the child had been adjudicated neglected and dependent based on circumstances created by mother. Father was incarcerated for the majority of the case and while incarcerated, his paternity was established. The court ordered father to comply with the case plan. Ultimately, DSS filed a petition to terminate father's rights, which was granted on all the grounds alleged and with a determination that DSS made active efforts to prevent the breakup of the Indian family. In reviewing the findings about the efforts DSS made, the court of appeals determined the findings about the efforts made by DSS are more appropriately labeled conclusions of law and conducted a de novo review. The court of appeals explained that active efforts are more than passive efforts. Rather than create a case plan and expect the parent to find and access the resources, DSS must assist the parent through the steps of a case plan, including accessing needed services and resources. Whether active efforts are made is determined on a case-by-case basis, and although incarceration will limit what active remedial efforts can be made, DSS is still obligated to provide active efforts. The court of appeals reversed the trial court's conclusion that active efforts were made when DSS simply created a case plan. There was no evidence that DSS (1) contacted father or the prison to determine what services may be available to father; (2) facilitated communication by phone or letters between the father and child, or (3) attempted to locate or communicate with father when he was not incarcerated. Father showed an interest in the case and his child, appearing at almost every court hearing, complying with DNA testing, and asking for pictures of his child. The court of appeals also stated that some other state courts have looked to the efforts provided to the other parent when making a determination about whether active efforts to prevent the breakup of the family have been made. In looking at what efforts were provided to mother, the court of appeals determined they were not active efforts. The TPR was reversed and remanded because active efforts as required by ICWA were not made.

Active efforts are different from reasonable efforts, which are required by the federal Adoption and Safe Families Act (ASFA) and are included in North Carolina's Juvenile Code. See Chapters 1.3.B.6 (discussing ASFA, reasonable efforts, and the Juvenile Code) and 7.9 (discussing reasonable efforts). The North Carolina Court of Appeals addressed whether a court, in a case where ICWA applies, may order the cessation of reasonable efforts before the final stage of a case. *In re E.G.M.,* 230 N.C. App. 196 (2013). The court of appeals looked to the standards regarding reasonable efforts and the cessation of those efforts and held that the order ceasing reasonable efforts as authorized by the Juvenile Code (and ASFA) does not conflict with the minimum federal standards established by ICWA regarding active efforts. ICWA does not prohibit a trial court from ordering the cessation of reasonable efforts in an abuse, neglect, or dependency action, before a TPR proceeding is commenced if the court finds that "[s]uch efforts clearly would be futile" or are "clearly inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time." *In re E.G.M.*, 230 N.C. App. at 210 (citing the former G.S. 7B-507(b)(1), which has been replaced with G.S. 7B-901(c) and 7B-906.2(b)). In examining court opinions from other states, the court of appeals stated there was a consensus that "although the state must make 'active efforts' under the ICWA, it need not 'persist with futile efforts.' " *In re E.G.M.*, 230 N.C. App. at 210 (citations omitted). In addressing the required ICWA finding, both before

ordering a foster care placement and before terminating parental rights, that "active efforts" to prevent the disruption of the Indian family "proved unsuccessful," the court of appeals stated if those efforts were ceased at the time of the foster care placement, the trial court may cite the pre-foster-care active efforts when making the necessary findings at the TPR proceeding. *In re E.G.M.,* 230 N.C. App. 196.

I. Finding of Serious Emotional or Physical Damage

No Indian child may be placed in foster care or be the subject of an order terminating parental rights (TPR) unless the court determines that continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. For foster care placements, the determination must be supported by clear and convincing evidence; for TPR, the evidence supporting the determination must be beyond a reasonable doubt. The evidence must include testimony from one or more "qualified expert witnesses" (QEW). 25 U.S.C. 1912(e), (f); 25 C.F.R. 23.121(a), (b); *see Haaland v. Brackeen,* 599 U.S. 255 (2023) (holding this provision does not violate the anticommandeering principle of the Tenth Amendment; the requirement applies to both state and private actors who initiate an involuntary child custody proceeding); *In re J.H.S.*, 257 N.C. App. 388 (2018) (unpublished) (affirming TPR; holding expert's opinion along with the evidence presented at the TPR hearing supported trial court's determination under ICWA standards; discussing qualification of expert and expert's opinion testimony; noting respondent's failure to timely object to the expert's testimony at the hearing). The qualified expert testimony on which the court's finding is made must be part of the hearing that results in the foster care placement and cannot be based on testimony heard at an earlier hearing. *In re E.G.M.*, 230 N.C. App. 196 (2013) (holding that the requirement of qualified expert testimony was not met when the expert testimony was given at the disposition hearing and not at the permanency planning hearing that resulted in the order placing the child in DSS custody).

To satisfy the requirements of ICWA, the evidence must show a causal relationship between the particular conditions in the home and the likelihood that continued custody with a parent or Indian custodian will result in serious emotional or physical damage to the child. 25 C.F.R. 23.121(c). Evidence only showing family or community poverty, single parenthood, inadequate housing, substance use, nonconforming social behavior, isolation, or a custodian's age without a causal relationship to the child's likelihood of suffering serious emotional or physical damage will not be sufficient under the applicable evidentiary standards. 25 C.F.R. 23.121(d).

The ICWA statute does not define qualified expert, but the regulations state that the person should be qualified to testify to the prevailing social and cultural standards of the Indian child's tribe. This person may be designated by the tribe as being so qualified. 25 C.F.R. 23.122(a). The social worker who is regularly assigned to the Indian child may not be the qualified expert in a proceeding related to that child. 25 C.F.R. 23.122(c). Any party, or the court, may request that the tribe or the appropriate Bureau of Indian Affairs regional office assist in locating a qualified expert. 25 C.F.R. 23.122(b). The Guidelines, 2016 point out that the federal regulation does not limit qualified experts to only those persons with particular knowledge of the Indian child's tribe and gives an example of an expert on the sexual abuse of children as being qualified to testify to whether the child's return to a parent who has a history of sexually abusing the child is likely to result in serious emotional or physical damage to the

child. Note that the North Carolina Court of Appeals addressed the qualifications of an expert in *In re E.G.M.,* 230 N.C. App. 196, but the Guidelines, 1979 that were relied upon were replaced with the federal regulations and Guidelines, 2016.

In addressing the requirement that serious emotional or physical damage to the child must be proved beyond a reasonable doubt in a TPR proceeding, the North Carolina Court of Appeals held that that burden of proof is not required to prove the ground to TPR. ICWA creates a dual burden of proof, where the ICWA requirement must be satisfied separately from the requirements in the Juvenile Code, which establishes the standard of clear and convincing evidence to prove an alleged ground. *In re Bluebird*, 105 N.C. App. 42 (1992); *see* G.S. 7B-1109(f); 7B-1111(b).

J. Placement Preferences

An Indian child placed in foster care or a preadoptive placement must be in the least restrictive setting that approximates a family and considers sibling attachment; is within reasonable proximity to the child's home, extended family, or siblings; and allows the child's special needs (if any) to be met. Listed in order of priority, preference must be given, in the absence of good cause to the contrary, to

- a member of the child's extended family;
- a foster home licensed, approved, or specified by the child's tribe;
- an Indian foster home approved by a non-Indian authority; or
- an institution for children approved by a tribe or operated by an Indian organization that has a program that is suitable to meet the child's needs.

25 U.S.C. 1915(b); 25 C.F.R. 23.131; *see* 25 U.S.C. 1903(2) (definition of "extended family member"), (3) (definition of "Indian"), and (7) (definition of "Indian organization"); 25 C.F.R. 23.2 (definition of "Indian foster home") and 23.124(c) (application of placement preferences to voluntary proceedings).

For an adoptive placement, ICWA requires that absent good cause to the contrary, the placement preference for an Indian child is made in the following order:

- a member of the child's extended family,
- other members of the child's tribe, or
- another Indian family.

25 U.S.C. 1915(a); 25 C.F.R. 23.130(a); *see* 25 C.F.R 23.124(c) (application of placement preferences to voluntary proceedings).

In *Haaland v. Brackeen*, 599 U.S. 255 (2023), the U.S. Supreme Court discussed the placement preferences and held they do not violate the anticommandeering principle of the Tenth Amendment. The U.S. Supreme Court explained that these placement preferences are hierarchical; "[s]tate courts may only place the [Indian] child with someone in a lower-ranked group when there is no available placement in a higher-ranked group." *Haaland*, 599 U.S. at 267. As a result, "Indians from any tribe (not just the tribe to which the child has a tie) outrank unrelated non-Indians for both adoption and foster care." *Haaland*, 599 U.S. at 267. The state court must apply the placement preferences as Congress can require state courts to enforce federal law under the Supremacy Clause. However, the placement preferences do not apply

when an alternative placement that is eligible for a preference has not come forward. *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013) (cited in *Haaland*, 599 U.S. 255). A tribe or other party objecting to a placement has the burden of producing a higher ranked placement.

A tribe may designate by resolution a different placement preference order. When an Indian child's tribe has a different placement preference order, the agency or state court making the placement must follow the tribe's placement preferences so long as the placement is the least restrictive setting appropriate to the child's needs. 25 U.S.C. 1915(c); 25 C.F.R. 23.130(b) and 23.131(c); *see Haaland*, 599 U.S. 255.

The court may also consider the placement preference of the Indian child or parent, but their preferences are not determinative. 25 U.S.C. 1915(c); 25 C.F.R. 23.130(b), (c); *see* 25 C.F.R. 23.132(c)(1) and (2) (good cause to deviate from placement preference based on request of parent or child). The U.S. Supreme Court has stated that for a relinquishment, "a biological parent who voluntarily gives up an Indian child cannot necessarily choose the child's foster or adoptive parents" because the tribe has a right to intervene and "can sometimes enforce ICWA's placement preferences against the wishes of one or both biological parents, even after the child is living with a new family." *Haaland*, 599 N.C. at 256.

The placement preferences must be applied at the initial placement and any subsequent change to a foster care, preadoptive, or adoptive placement absent a determination by clear and convincing evidence made on the record that good cause exists not to apply the preferences. 25 C.F.R. 23.129(c); *see* 25 U.S.C. 1916(b); 25 C.F.R. 23.132. Note that the Juvenile Code prioritizes placement with the child's relative, which aligns with ICWA's first preferred placement priority – an extended family member. *See* G.S. 7B-506(h)(2); 7B-903(a1); 25 U.S.C., 1903(2) (definition of "extended family member"); G.S. 7B-101(18a) (definition of "relative"). For a discussion of the consideration of relative placement at disposition, see Chapter 7.4.C.1.

Good cause to deviate from the ICWA placement preferences is addressed in 25 C.F.R. 23.132. Placement in a non-Indian foster home or preadoptive home that is licensed by a non-Indian licensed authority is not included in the placement preferences and requires a determination that good cause to deviate from the preferences exists. The office of the clerk of superior court, the district court, and the superior court are all courts of competent jurisdiction to determine whether there is good cause to deviate from a placement preference. G.S. 48-3-605(g)(ii).

ICWA requires the state court to record each placement and include a description of the efforts that were made to comply with the placement preferences. The child's tribe and the Bureau of Indian Affairs have the right to request this record at any time. 25 U.S.C. 1915(e); *Haaland*, 599 U.S. 255 (holding this recordkeeping requirement does not violate the Tenth Amendment anticommandeering principle as it is ancillary to the state court proceeding).

K. Consent to Foster Care Placement, TPR, and Adoption including Relinquishment

ICWA sets forth specific procedures for when a parent or Indian custodian voluntarily consents to a foster care placement, a termination of parental rights (TPR), or the child's adoption (which includes both a consent to and relinquishment of a child for an adoption under North Carolina law). The consent must be in writing and recorded before a court of

competent jurisdiction. In North Carolina, a court of competent jurisdiction for a judicial proceeding to accept a voluntary consent to or relinquishment for an adoption includes the office of the clerk of superior court, the district court, and the superior court. G.S. 48-3-605(g)(i); *see* G.S. 48-3-702(b). The court must (1) explain to the parent or Indian custodian the terms and consequences of the consent and the limitations on the withdrawal of the consent and (2) certify that the terms and consequences were fully explained and understood by the parent or Indian custodian. 25 U.S.C. 1913(a); 25 C.F.R. 23.125(a)–(c); *see Haaland v. Brackeen,* 599 U.S. 255 (2023). The contents of a consent to a foster care placement are addressed in 25 C.F.R. 23.126, and the consent to the voluntary foster care placement may be withdrawn at any time, for any reason, resulting in the return of the child to the parent or Indian custodian. 25 C.F.R. 23.125(b)(2)(i) and 23.127(a). A voluntary consent to a TPR or an adoption may be withdrawn for any reason at any time before the entry of the applicable final decree (TPR or adoption), and the child is returned to the parent or Indian custodian when the consent or relinquishment to adoption is withdrawn. 25 C.F.R. 23.125(b)(2)(ii)–(iii) and 23.128(a), (b).

There are several important differences between adoption procedures under ICWA and North Carolina law. When ICWA applies, its provisions supersede the procedures under state law. G.S. 48-1-108; *see* G.S. 48-3-605(f) (consent must meet the requirements of ICWA); 48-3-702(b) (relinquishment must meet requirements of ICWA). Some of the differences between the adoption laws and procedures under ICWA and the North Carolina statutes include the following:

- Under ICWA, adoption consents may not be given until ten days after the child's birth; any consent given before then is invalid. 25 U.S.C. 1913(a); 25 C.F.R. 23.125(e). In contrast, North Carolina law allows the father to consent pre-birth and the mother to consent immediately after birth. G.S. 48-3-604.
- Under ICWA, adoption consents may be revoked at any time for any reason before the final decree of adoption. 25 U.S.C. 1913(c); 25 C.F.R. 23.125(b)(2)(iii) and 23.128(b). In contrast, North Carolina law provides for a seven-day revocation period of a consent or relinquishment. G.S. 48-3-608(a) (consent); 48-3-706(a) (relinquishment); *see In re Ivey*, 257 N.C. App. 622 (2018) (holding seven-day period for revocation starts to run when the parent who signed the consent receives an original or copy of the consent they executed). After the seven-day time period to revoke a consent or relinquishment under North Carolina law has expired, a revocation may be made under ICWA by filing a written document with or testifying before the court. 25 C.F.R. 23.128(c). The court must promptly notify the person or agency who arranged for the voluntary preadoptive or adoptive placement of the parent's withdrawal of consent, and the child must be returned to the parent or Indian custodian as soon as practicable. 25 C.F.R. 23.128(d).
- The adoption of an Indian child resulting from a consent or relinquishment that was obtained through fraud or duress can be challenged for up to two years after a final adoption decree is entered by filing a petition in state court to vacate the decree. The court must give notice to the parties in the adoption proceeding and the Indian child's tribe and hold a hearing. If the court finds the consent or relinquishment was obtained through fraud or duress, the adoption must be vacated and the child returned to the parent. 25 U.S.C. 1913(d); 25 C.F.R. 23.136. North Carolina law limits the right to void a consent or relinquishment for fraud or duress to the period before the entry of the adoption decree or

if the adoption was granted, within six months of when the fraud or duress is or should reasonably have been discovered. G.S. 48-3-609(a)(1); 48-3-707(a)(1); 48-2-607(c).

- After an adoption of an Indian child, the court must notify the biological parent or prior Indian custodian and the Indian child's tribe when the adoption decree has been vacated or set aside or the adoptive parent has voluntarily terminated their parental rights. The notice must be sent by certified or registered mail, return receipt requested. When the biological parent or prior Indian custodian receives the notice, they may petition the court in a proceeding under 25 U.S.C. 1912 for the return of custody of the Indian child, which must be granted absent a showing that it is not in the child's best interests. 25 U.S.C. 1916(a). A biological parent or Indian custodian may execute a revocable written waiver to their right to receive such notice and file it with the court. 25 C.F.R. 23.139(c). This issue is not addressed in North Carolina law.
- Within thirty days of a state court entering a final decree of adoption, it must provide a copy of the decree along with other required information designated in 25 C.F.R. 23.140(a), marked "Confidential," to the Bureau of Indian Affairs, Chief, Division of Human Services, 1849 C Street NW, Mail Stop 3645 MIB, Washington, DC 20240. In addition to the final adoption decree, the state court must provide information that is necessary to show the child's name and tribal affiliation, the names and addresses of the biological and adoptive parents, and the identity of any agency that has information related to the adoptive placement. 25 U.S.C. 1951(a); s*ee Haaland*, 599 U.S. 255 (holding this recordkeeping requirement does not violate the anticommandeering principle of the Tenth Amendment as it is ancillary to the state court proceeding). There may be an affidavit of the biological parent(s) that their identity remain confidential. 25 U.S.C. 1951(a). This issue is not addressed in North Carolina law.
- Upon the application of an Indian adoptee who has reached age 18, the court entering the final decree must inform the adoptee of the tribal affiliation of their biological parents and provide any other information necessary to protect any rights resulting from tribal membership. 25 U.S.C. 1917; 25 C.F.R. 23.138. The Indian adoptee who is 18 or older, the adoptive or foster parents, or the Indian tribe may request that the Bureau of Indian Affairs disclose necessary information for the child's tribal enrollment or for determining any rights or benefits that are associated with becoming a tribal member. 25 U.S.C. 1951(b). This issue is not addressed in North Carolina law.

L. Impact of ICWA Violation

Violations of certain (not all) ICWA provisions may result in the action being invalidated; specifically, violations of 25 U.S.C. 1911 (jurisdiction, transfer, intervention), 1912 (notice, time for proceeding, appointment of counsel, active efforts, findings about serious damage to the child), and 1913 (consents, withdrawal of consent, voluntary TPR). A petition to invalidate a proceeding for foster care placement or a termination of parental rights may be brought in any court of competent jurisdiction by

- the Indian child who is or was the subject of the suit,
- a parent or Indian custodian from whose custody the child was removed, or
- the Indian child's tribe.

25 U.S.C. 1914; 25 C.F.R. 23.137(a). *See In re A.R.*, 227 N.C. App. 518 (2013) (recognizing tribe's right to seek invalidation of court's action).

The petitioner alleging a violation of a provision of 25 U.S.C. 1911, 1912, or 1913 is not required to show that their rights were violated. 25 C.F.R. 23.137(c). ICWA does not establish a time period in which a petition to invalidate an action must be filed. If a petition to vacate is based on a jurisdictional challenge, in unrelated cases, the North Carolina appellate courts have held that subject matter jurisdiction can be raised at any time. *See, e.g., In re T.R.P.*, 360 N.C. 588 (2006). If the petitioner shows that a provision of 25 U.S.C. 1911, 1912, or 1913 was violated, the court must determine if it is appropriate to invalidate the action. 25 C.F.R. 23.137(b).

Resources:
The U.S. Department of the Interior Bureau of Indian Affairs (BIA) website includes a section on ICWA that includes many resources.

DIV. OF SOC. SERVS., N.C. DEP'T OF HEALTH & HUM. SERVS., CHILD WELFARE MANUAL "Cross Function", available on the Child Welfare Services section of the North Carolina Department of Health and Human Services website.

The National Council of Juvenile & Family Court Judges website includes information on ICWA including the INDIAN CHILD WELFARE ACT JUDICIAL BENCHBOOK (Reno, NV 2017).

The National Indian Child Welfare Association website includes a "Resource Library" for families, service providers, and tribal leaders on its website.

13.3 Multiethnic Placement Act

The Howard M. Metzenbaum Multiethnic Placement Act (MEPA), Pub. L. No. 103-382, sec. 551–554, 108 Stat. 4056, was enacted in 1994 and was amended by the Removal of Barriers to Interethnic Adoption provisions (IEP), Pub. L. No. 104-188, sec. 1808, 110 Stat. 1755, 1903, in the Small Business Job Protection Act of 1996 (collectively referred to here as "MEPA-IEP").

MEPA-IEP is an anti-discrimination law that focuses on race, color, and national origin. It conditions federal funding, specifically funding under Titles IV-B and IV-E of the Social Security Act, on compliance with its provisions. MEPA-IEP is designed to

- prevent discrimination in the placement of children in foster care or for adoption on the basis of race, color, or national origin;
- decrease the length of time that children wait to be adopted; and
- facilitate the identification and recruitment of a diverse pool of foster and adoptive parents.

Two provisions in the North Carolina Juvenile Code specifically require compliance with MEPA-IEP when making an out-of-home placement of a child in an abuse, neglect, or dependency proceeding. *See* G.S. 7B-505(d); 7B-506(h)(2). Similarly, G.S. 131D-10.1(a1),

which applies to placement in foster care, and G.S. 48-3-203(a1)(1), which applies to placements for adoption, states that no agency or other State entity shall deny or delay (i) the opportunity to become a foster or adoptive parent or (ii) the placement of a child in foster care or for adoption on the basis of race, color, or national origin of the person or the child involved.

Under MEPA-IEP, states and other entities involved in foster care or adoption placements that receive federal financial assistance are prohibited from

- delaying or denying a child's foster care or adoptive placement on the basis of the child's or the prospective parent's race, color, or national origin or
- denying to any individual the opportunity to become a foster or adoptive parent on the basis of the prospective parent's or the child's race, color, or national origin.

42 U.S.C. 671(a)(18); *see* 42 U.S.C. 674(d)(2); 42 U.S.C. 1996b.

Race and ethnicity are not factors to be considered by agencies or the court when making placement decisions. However, federal policy recognizes that placements of children are based on protecting the child's best interests. A child's best interests may allow for an individualized determination of facts and circumstances to address the child's individualized needs where special circumstances may indicate the consideration of race or ethnicity is required in a specific case. Any such rationale is subject to strict scrutiny. Generalizations about the needs of children of a particular race or ethnicity, or about the abilities of prospective parents of one race or ethnicity to care for a child of another race or ethnicity, may not be used in making placement decisions.

MEPA-IEP does not affect the requirements of the Indian Child Welfare Act (ICWA) in child custody and emergency proceedings that involve an "Indian child" (as defined by ICWA). 42 U.S.C. 674(d)(4); 42 U.S.C. 1996b(3); *see* 25 U.S.C. 1901 *et seq*. (ICWA). ICWA includes placement preferences designated by the Indian child's tribe or by the ICWA statute and regulations, discussed in section 13.2.J, above. However, ICWA only applies to an "Indian child," which requires membership in a federally recognized Indian tribe or eligibility for membership in a federally recognized Indian tribe when the child's biological parent is a member of a federally recognized Indian tribe. 25 U.S.C. 1903(4). ICWA does not apply to children of state only recognized tribes or to children with American Indian ancestry who are not an "Indian child" as defined by ICWA. See section 13.2, above (discussing ICWA).

MEPA-IEP also requires states to diligently recruit foster and adoptive parents who reflect the racial and ethnic diversity of the children in the state who need foster and adoptive homes. 42 U.S.C. 622(b)(7). A state's compliance with this provision is part of the federal Child and Family Service Review (CFSR). See Chapter 1.2.D.1 (discussing the CFSR). The North Carolina Department of Health and Human Services (NCDHHS) Division of Social Services policy addresses recruitment plans pursuant to MEPA-IEP (see Resources, below).

Compliance with MEPA-IEP is a civil rights issue, and noncompliance is deemed a violation of Title VI of the Civil Rights Act. 42 U.S.C. 1996b. Any individual child, parent, relative, or (prospective) foster or adoptive parent who has been aggrieved by a violation of MEPA-IEP can bring a civil rights action. For more information about Title VI, see section 13.4, below, and specifically 13.4.E for complaints. Additional sanctions for noncompliance include

corrective action, a reduction in federal funding, and the repayment of federal funds. 42 U.S.C. 674(d)(1) and (2). The U.S. Department of Health and Human Services Office for Civil Rights may investigate a possible violation and take corrective action and impose penalties as provided for in 45 C.F.R. 1355.38. An aggrieved individual also has a right to sue in state or federal court within two years of an alleged MEPA-IEP violation. 42 U.S.C. 674(d)(3).

Resources:
The NCDHHS Division of Social Services child welfare policies, which are available on the Child Welfare Services section of the NCDHHS website, address

- MEPA-IEP at DIV. OF SOC. SERVS., N.C. DEP'T OF HEALTH & HUM. SERVS., CHILD WELFARE MANUAL "Cross Function" (which is cross referenced in "Permanency Planning") and "Adoptions;" and
- the impact of cultural diversity at DIV. OF SOC. SERVS., N.C. DEP'T OF HEALTH & HUM. SERVS., CHILD WELFARE MANUAL "Cross Function" and "Permanency Planning."

For federal policy in a Q&A format related to recruitment, enforcement, compliance, and guidance on MEPA-IEP, see the CHILD WELFARE POLICY MANUAL under the "Laws and Policies" section of the Children's Bureau, U.S. Department of Health and Human Services website, specifically "4. MEPA/IEAP".

For guidance on the application of MEPA (1994) to child welfare services, see the "Protection from Discrimination in Child Welfare Activities" section of the U.S. Department of Health and Human Services website.

13.4 Title VI of the Civil Rights Act

A. Introduction

Section 601 of Title VI of the Civil Rights Act of 1964 (Title VI), Pub. L. No. 88-352, 78 Stat. 252, prohibits discrimination on the basis of race, color, or national origin by any program or activity that receives federal financial assistance. 42 U.S.C. 2000d *et seq.* Federal regulations implementing the provisions of Title VI are found at 28 C.F.R. 42.101 *et seq*. and 28 C.F.R. 50.3. Additional federal regulations applying Title VI nondiscrimination requirements for programs receiving federal financial assistance through the U.S. Department of Health and Human Services (U.S. DHHS) (e.g., funding under Titles IV-B and IV-E of the Social Security Act) are found at 45 C.F.R. Part 80.

This section provides a general overview of Title VI and its application to child welfare programs and services in North Carolina. Section 13.3, above, discusses the Multiethnic Placement Act as amended (MEPA-IEP), which prohibits discrimination in the placement of children in foster care and adoptive homes and in the opportunity for an individual to become a foster or adoptive parent because of the race, color, or national origin of the child or the prospective parent. Violations of MEPA-IEP are Title VI violations.

Resources:
For guidance on the application of Title VI to child welfare services, see the "Protection from Discrimination in Child Welfare Activities" section of the U.S. Department of Health and Human Services website.

For more general information about Title VI, see CIV. RTS. DIV., U.S. DEP'T OF JUST., TITLE VI LEGAL MANUAL, available on the U.S. Department of Justice website.

B. Applicability

Title VI applies to any public or private agencies that receive any federal financial assistance. Federal financial assistance may be received directly or indirectly through a grant, contract, or subcontract but is not limited to monetary disbursements such as grants or loans. Federal financial assistance includes grants, donations, or permission to use federal property or an interest in the property (this may include equipment) without any or with nominal or reduced consideration; a federal contract for the provision of assistance; or the detail of federal personnel. 28 C.F.R. 42.102(c); 45 C.F.R. 80.2, 80.4(a)(2), and 80.13(f); *see* 28 C.F.R. Part 42, Subpart C, Appendix A (list of financial assistance provided by the U.S. Department of Justice); 45 C.F.R. Part 80, Appendix A (list of financial assistance provided by U.S. DHHS). As a condition to approval, every application for federal financial assistance must contain an assurance that the applying program will comply with Title VI requirements. 28 C.F.R. 42.105; 45 C.F.R. 80.4(a).

As applied to child welfare, recipients of federal financial assistance include the North Carolina Department of Health and Human Services, county departments of social services, child-placing agencies, the court system, and programs within the North Carolina Administrative Office of the Courts such as the North Carolina Guardian ad Litem Program and Indigent Defense Services. Examples of less obvious recipients of federal financial assistance that provide services to families involved in the child welfare system include medical, mental health, and substance use treatment providers and a public or private managed care organization (e.g., receipt of Medicaid funding); the school system (e.g., Title I funding); domestic violence programs; shelters and public housing programs; parent education programs; and visitation centers.

Title VI states "no person" shall be discriminated against because of race, color, or national origin. 42 U.S.C. 2000d. This universal language provides protection to the various participants in a child welfare case, including the child, parents, guardians, custodians, caretakers, relatives, placement providers (including foster parents and kinship and nonrelative kinship placements), prospective adoptive parents, the child's guardian ad litem, DSS employees, etc. Title VI applies to both U.S. citizens and non-citizens. CIVIL RIGHTS DIVISION, U.S. DEPARTMENT OF JUSTICE, Title VI Legal Manual, Section V.A. Therefore, unless a specific program conditions eligibility requirements on U.S. citizenship or a specific immigration status (e.g., Medicaid), Title VI protections apply to a non-citizen who is accessing programs or benefits, including child protective and child welfare services, and prohibit discrimination on the basis of race, color, or national origin.

Covered services and activities may include protective services: screening of reports, assessments, casework, and counseling services. *See* G.S. 7B-300. Covered services also

include court-related activities, such as mediation and hearings, and actions resulting from a court order, such as the child's removal and placement, visitation, conditions imposed on a party, and a party's participation in treatment, parent education, or similar programs. Title VI protections apply to an individual who is participating in services required by DSS or court order when those contracted service providers receive any federal financial assistance. The prohibition against discrimination on the basis of race, color, or national origin extends to services purchased or otherwise obtained by the grantee (for example, DSS contracting with a community service provider). 45 C.F.R. 80.5(a).

C. Prohibited Discrimination

Title VI prohibits discrimination on the basis of race, color, or national origin. The federal regulations list examples of specific discriminatory actions that are prohibited, which include

- denying a service or participation in a program,
- providing a different service or a service in a different manner from that provided to others,
- subjecting an individual to separate (or segregated) treatment,
- restricting an individual in any way from enjoying a service that others enjoy, or
- treating an individual differently when determining what criteria or conditions must be satisfied to be provided a service.

28 C.F.R. 42.104; 45 C.F.R. 80.3(b); *see* 45 C.F.R. 80.5(a).

There are three types of discrimination:

- intentional discrimination resulting in disparate treatment,
- disparate impact (or effect) resulting from executing facially neutral actions or policies (*see Lau v. Nichols*, 414 U.S. 563 (1974)), and
- retaliatory actions or discrimination directed against an individual for the purpose of interfering with a Title VI right or because the person complained or participated in any manner in an investigation or proceeding involving an alleged Title VI violation (*see* 45 C.F.R. 80.7(e)).

Resource: For a discussion of the three types of discrimination, see Section VI (Proving Discrimination - Intentional Discrimination), Section VII (Proving Discrimination – Disparate Impact), and Section VIII (Proving Discrimination – Retaliation) of the Title VI Legal Manual by the Civil Rights Division of the U.S. Department of Justice.

D. Requirements

1. Compliance. The U.S. DHHS must provide assistance and guidance to recipients of its federal financial assistance to help those recipients voluntarily comply with Title VI requirements. 45 C.F.R. 80.6(a). The recipient must also keep and submit compliance reports to the U.S. DHHS and allow U.S. DHHS officials or designees to access information that may be necessary to determine whether the recipient is complying with Title VI. Confidentiality does not bar access, and redisclosure is not authorized unless it is necessary in a formal enforcement proceeding or otherwise authorized by law. 45 C.F.R. 80.6(b), (c); *see* 45 C.F.R. 80.7 (compliance investigations). Similar compliance and access to information provisions

apply to federal financial assistance provided by responsible departments other than the U.S. DHHS. *See* 28 C.F.R. 42.106. *See also* 28 C.F.R. 50.3 ("Guidelines for the enforcement of Title VI, Civil Rights Act of 1964"). See section 13.4.E, below (discussing the North Carolina Department of Health and Human Services Voluntary Compliance Agreement entered into with the U.S. DHHS after a compliance review and the North Carolina Administrative Office of the Courts letter of finding of a violation).

NCDHHS DSS Forms:

- DSS-1464, Statement of Assurance of Compliance with Title VI of the Civil Rights Act of 1964 For Agencies, Institutions, Organizations or Facilities
- DSS-1464a, Statement of Assurance of Compliance with Title VI of the Civil Rights Act of 1964 For Other Agencies, Institutions, Organizations or Facilities

2. Outreach. Recipients must make available to participants, beneficiaries, and other interested persons information about anti-discrimination provisions and their applicability to the programs the recipient provides in a manner that will notify the persons of the Title VI protections. 28 C.F.R. 42.106(d); 45 C.F.R. 80.6(d).

3. Language access. Discrimination on the basis of national origin may occur when a person or group is denied a meaningful opportunity to participate in the program or service because of language access issues. *See Lau v. Nichols*, 414 U.S. 563 (1974) (holding minority group of 1,800 students of Chinese ancestry who speak, read, write, and understand Chinese and not English were denied a meaningful opportunity to obtain education generally obtained by the majority of English-speaking students in the school system where English language instruction was not provided; further holding minority group of students were discriminated against under Title VI on basis of national origin; requiring school district to take affirmative steps to rectify language deficiency). Recipients of federal financial assistance must provide meaningful access to persons with limited English proficiency (LEP) who apply for and/or receive benefits and services from the recipient, and the federal agency must give those recipients guidance on how to do that. Language assistance measures may include oral interpretation and/or the translation of written vital documents.

Past federal guidance by both the U.S. Department of Justice (U.S. DOJ) and U.S. DHHS specified a four-factor test for recipients of federal financial assistance to use when determining what steps to take to provide LEP individuals with meaningful access to programs and activities. That guidance has been rescinded and new guidance is forthcoming.

Practice Notes: Regarding language access, it is important to ask the individual what is their primary language rather than assume the language they speak based upon a country of origin. For example, Guatemala has over twenty official languages, one of which is Spanish but other common Mayan languages include K'iche, Q'eqchi, Kaqchikel, Mam, and Ixil. See "GUATEMALA: New Law Recognises Indigenous Languages" (IPS, May 30, 2003) on the Inter Press Service News Agency website.

A parent attorney, child's guardian ad litem, or other respondent in the court proceeding may need to file a motion to translate documents and/or provide an interpreter. Additionally, if a respondent or the child believes DSS is not providing accurate and/or timely language access services, they may raise the issue with the court and seek a provision in an order that specifies

the language access service to be provided as a necessary measure or possibly as part of DSS's provision of reasonable efforts.

NCDHHS DSS Forms:

- DSS-1463, Title VI, Federal Civil Rights Act of 1964 (Explanation)
- DSS-10001, Language Services Agreement (For Limited English Proficiency (LEP) Customer And Sensory Impaired Customer) with Instructions

Cautionary Note: Federal guidance addressing language access is currently changing due to Executive Order 14224, 90 Fed. Reg. 11363 (March 1, 2025) and the Attorney General's implementation memo (July 14, 2025), both of which are available on the U.S. Department of Justice Civil Rights Division website.

Resources:
For federal guidance, including a discussion on requirements related to interpreters and document translation, see "Summary of Guidance to Federal Financial Assistance Recipients Regarding Title VI and the Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons" and "Protection from Discrimination in Child Welfare Activities" on the U.S Department of Health and Human Services website.

For information about language access services in North Carolina courts, see the "Office of Language Access Services" Programs section of the North Carolina Judicial Branch website.

For further discussion about court interpreters, see Jonathan Holbrook, *Courtroom Interpreter: Need vs. Want*, UNC SCH. OF GOV'T: NORTH CAROLINA CRIMINAL LAW BLOG (Feb. 11, 2020).

E. Violations

1. Complaint. Any person who believes they were discriminated against on the basis of race, color, or national origin by a recipient of federal financial assistance from the U.S. DHHS may file a written complaint with the U.S. DHHS. The person must file the complaint within 180 days from the date of the alleged discrimination, unless the U.S. DHHS extends the time for filing. 45 C.F.R. 80.7(b). The same provisions apply to alleged discrimination by recipients receiving federal financial assistance from other federal departments, where the complaint would be filed with the responsible department. *See* 28 C.F.R. 42.107(b). The complainant's identity is confidential except to the extent necessary to carry out the investigation and any resulting hearing or judicial proceeding. 45 C.F.R. 80.7(e); 28 C.F.R. 42.107(e).

The responsible department investigates the complaint, and the investigation should include a review of the practices and policies, the circumstances of the alleged noncompliance, and other relevant factors. 45 C.F.R. 80.7(c); 28 C.F.R. 42.107(c). The possible outcomes of an investigation are (1) the recipient complied with Title VI (meaning there was no discrimination) and the responsible department informs the recipient and complainant in writing or (2) the recipient failed to comply with Title VI (meaning there was discrimination)

and the responsible department informs the recipient and when possible, resolves the matter informally. 45 C.F.R. 80.7(d); 28 U.S.C. 42.107(d).

When the matter involving discrimination by a recipient of financial assistance from the U.S. DHHS cannot be resolved informally, the U.S. DHHS may take action to effect compliance, including withholding funding and referring the matter to the Department of Justice with a recommendation for enforcement proceedings. 45 C.F.R. 80.8. Before funding is withheld, a hearing is required. *See* 45 C.F.R. 80.8 through 80.11. For matters involving other responsible departments, the provisions of 28 C.F.R. 42.107 through 42.111 apply. Other available options to obtain compliance include court enforcement and administrative action. *See* 28 C.F.R. 50.3 ("Guidelines for the enforcement of title VI, Civil Rights Act of 1964").

2. Findings of violations. Effective in 2003, the North Carolina Department of Health and Human Services (NCDHHS) entered into a Voluntary Compliance Agreement with the U.S. DHHS Office for Civil Rights. *See* OCR Reference NO: 04-01-700. The agreement occurred after a 2001 compliance review was conducted by the U.S. DHHS, which raised concerns about Title VI discrimination on the basis of national origin related to persons' with limited English proficiency (LEP) lack of meaningful access to programs and services at the county social services and health departments. NCDHHS policy requires that each county DSS develop a Title VI/LEP compliance plan. NCDHHS has a Title VI compliance attorney in the Office of General Counsel, who works with a Title VI Advisory Committee, and provides assistance to county departments of social services in meeting their obligations under Title VI.

In 2012, the U.S. Department of Justice Office of Civil Rights (U.S. DOJ) issued a letter of finding to the North Carolina Administrative Office of the Courts (AOC) of a Title VI violation based on failing to provide individuals with limited English proficiency with meaningful access to state court proceedings and operations. The U.S. DOJ resumed its investigation in 2017, and in 2022, the AOC entered into a Memorandum of Agreement with the U.S. DOJ to voluntarily resolve complaints # 171-54M-8 and 171-54-26.

Resources:
For information about NCDHHS language access services related to child welfare, including the complaint procedure and forms, see "Civil Rights" under Social Services in the Division portion of the NCDHHS website.

See the "Office of Language Access Services" on the North Carolina Judicial Branch website for information on available services including requesting an interpreter; a language access benchcard; an online complaint form; the standards applying to language access services in the courts; and interpreter recruitment, training, and certification.

North Carolina is not the only state that has been identified as failing to comply with Title VI protections in the administration of a child welfare program. For example, in 2020, the Arizona Department of Child Safety entered into a Voluntary Resolution Agreement with the U.S. DHHS Office of Civil Rights (OCR Transaction Number 17-279437). OCR identified systemic deficiencies related to language access after it received complaints alleging that the Arizona Department of Child Safety did not provide adequate or timely language interpreters resulting in a delay in reunification services and that the agency failed to provide a Spanish translation of vital documents. The resolution agreement requires the Arizona Department of Child Safety to complete an assessment of the linguistic needs of and provide language access

to the affected population it serves; designate a LEP Coordinator; review its policies and provide staff training; strengthen its process for the identification of needed language services; and timely provide language services that do not use friends or family for interpretation and do use a qualified translator for written translation of documents.

13.5 The Americans with Disabilities Act

A. Introduction

The Americans with Disabilities Act (ADA), 101 Pub. L. 336, 104 Stat. 327, was enacted in 1990 and prohibits disability-based discrimination with the purpose of ensuring that individuals with disabilities have full and equal opportunities to participate in all aspects of society. In 2008, Congress made significant amendments to the ADA to ensure the broad coverage of the Act's protections and to explicitly reject narrow and restrictive court interpretations of who is a person with a disability protected by the Act (ADAAA), 122 Stat. 3553. The ADA is codified at 42 U.S.C. 12101 *et seq.* Federal regulations implementing the provisions of the ADA in state and local government services are found at 28 C.F.R. Part 35. Note that North Carolina also has its own "Persons with Disabilities Protection Act," which is codified at G.S. Chapter 168A. The state law is not discussed in this Manual.

The ADA is a comprehensive federal civil rights law that protects persons with physical or mental disabilities from discrimination in various areas including employment, public services, and public accommodations and services operated by private entities. There are five titles to the ADA. The discussion in this Manual is limited to a general overview of, with links to various resources for, Title II, Public Services (codified at 42 U.S.C. 12131 through 12134), and its application to child welfare agencies and the state court system in North Carolina. Note that a private entity involved with the child welfare system may be covered by Title III of the ADA (42 U.S.C. 12181 through 12189).

The U.S. Department of Justice (U.S. DOJ) and U.S Department of Health and Human Services (U.S. DHHS) recognize a 2012 report from the National Council on Disability that found parents with disabilities are disproportionately and often inappropriately involved in the child welfare system with permanent separation from their children as an outcome. Stereotypes about dangerousness or deficient parenting abilities, lack of individualized assessments, and failure to provide services were identified as negatively affecting parents with disabilities.[6] The ADA applies to parents with disabilities. It also applies to children with disabilities and current and prospective foster and adoptive parents (including relatives) with disabilities. For a discussion of early intervention and special education eligibility and services for infants, toddlers, and children who have qualifying disabilities, see section 13.8, below (discussing the Individuals with Disabilities Education Act).

There is another federal law that prohibits discrimination on the basis of disability: Section 504 of the Rehabilitation Act of 1973, 93 Pub. L. 112, 87 Stat. 355 (Section 504). *See* 29 U.S.C. 794; *see also* 45 C.F.R. Part 84 (regulations implementing Section 504 regarding

[6] NATIONAL COUNCIL ON DISABILITY, "Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children" (2012).

federal financial assistance administered by U.S. DHHS). The federal regulations governing Section 504 were significantly amended effective July 8, 2024. *See* 89 Fed. Reg. 40066 (May 9, 2024). One of the amendments includes the new 45 C.F.R. 84.60, which explicitly addresses children, parents, caregivers, and foster and prospective parents who are involved in the child welfare system. Section 504 has the same definitions and prohibitions as Title II of the ADA, but its application is conditioned on the receipt of any federal financial assistance, which is not a criterion under the ADA. The discussion in this Manual is limited to the ADA; however, the protections and remedies that are discussed may be available under both laws.

Resources:
For guidance on the application of the ADA to child welfare services, see the "Protection from Discrimination in Child Welfare Activities" section of the U.S. Department of Health and Human Services website.

For information, generally, about the ADA, see ADA.gov, a website that is part of the U.S. Department of Justice Civil Rights Division.

For information about Section 504 of the Rehabilitation Act related to child welfare, see CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., Information Memorandum ACF-ACYF-CB-IM-25-01 (Jan. 15, 2025).

B. Applicability

1. Public entities. Title II of the ADA applies to "public entities," which is defined as any state or local government and their departments and agencies. 42 U.S.C. 12131(1); 28 C.F.R. 35.104. This includes the North Carolina Department of Health and Human Services, every county department of social services (DSS), and the state courts. Note that the federal government is not included in the definition of "public entity."

2. Disability defined. Protections under Title II of the ADA apply to a "qualified individual with a disability," defined as "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. 12131(2).

The ADA defines disability in three ways. An individual

- has a physical or mental impairment that substantially limits one or more major life activities (e.g., hearing, vision, mobility, cognitive skills, communication, daily activities of self-care, or the operation of a major bodily function such as the immune system, normal cell growth, digestive, bowel, bladder, neurological, respiratory, circulatory, endocrine, and reproductive functions),
- has a record of such an impairment, or
- is regarded (or perceived) as having such an impairment (regardless of whether the individual has an impairment).

U.S.C. 12102; 28 C.F.R. 35.108.

The definition of disability is meant to be construed broadly to give expansive coverage of the protections of the Act. 28 C.F.R. 35.101(b) and 35.108(a)(2)(i). Determining whether an individual has a disability should not require extensive analysis – "the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of 'disability.' " 28 C.F.R. 35.101(b).

There is an exception to the definition of an "individual with a disability," which is when an individual is currently using illegal drugs, and the public entity (e.g., DSS) is acting on the basis of the individual's current drug use. 42 U.S.C. 12210(a); 28 C.F.R. 35.104. However, an individual may be disabled when they have been successfully rehabilitated or are participating in a supervised rehabilitation program and are not currently using illegal drugs. 42 U.S.C. 12210(b); 28 C.F.R. 35.131(a). A rehabilitation program, or treatment, includes medication assisted treatment (MAT) (also referred to as medication for opioid use disorder, (MOUD)), as MAT is not the illegal use of drugs. *See* A Voluntary Resolution Agreement between the U.S. DHHS Office of Civil Rights (OCR) and the Pennsylvania Department of Human Services (OCR Transaction No. 20-359940) and a Voluntary Resolution Agreement between the U.S. DHHS Office of Civil Rights (OCR) and the West Virginia Department of Health and Human Resources (Department) (OCR Transaction No. 18-306552); *see also* Unified Judicial System of Pennsylvania, Letter of Findings, dated February 2, 2022 (DJ# 204-64-170) (discussing MOUD and discrimination by Pennsylvania courts in mandating parties stop taking medication for their opioid use disorder).

The ADA does not "encourage, prohibit, restrict, or authorize" drug testing. 28 C.F.R. 35.131(c)(2). "Illegal use of drugs" means using, possessing, or distributing drugs (defined in schedules I through V of the Controlled Substances Act) in a manner that is unlawful under the Controlled Substances Act or other federal law. 42 U.S.C. 12210(d); *see* 21 U.S.C. 812 *et seq.* (Controlled Substances Act). It does not include using drugs when taken under the supervision of a licensed health care professional or when used as authorized by federal law. 28 C.F.R. 35.104.

Practice Note: A disability may not be obvious or known. In some cases, it will be clear. For example, the disability may be included in the allegations of the juvenile petition (e.g., dependency), or an individual may inform DSS or the court of their disability or of the child's disability. When it is less obvious, information is available to both the court and DSS that may assist in determining whether the individual has a disability, such as an individual's receipt of SSI, an Individual Educational Program (IEP) (discussed in section 13.8, below), medical records, or the results of any evaluations (past or current). In other cases, the disability will not be known or suspected initially but will be discovered during the course of the child welfare case.

Resource: For more information about Medication-Assisted Treatment and Opioid Use Disorder, see The National Center on Substance Abuse and Child Welfare website discussing Medication for Substance Use Disorders under "Explore Topics" including the "Medication-Assisted Treatment in the Courtroom: A Bench Card for Judicial Professionals Serving Parents and Children Affected by Opioid Use Disorders" (2021).

C. Prohibited Discrimination

The ADA recognizes the numerous ways that an individual with a disability may be discriminated against, including intentional exclusion or segregation, barriers that have a discriminatory effect, overprotective rules or policies, the failure to make modifications to practices and facilities, and the provision of lesser services or opportunities. 42 U.S.C. 12101(a)(5). *See* 28 C.F.R. 35.130.

Title II of the ADA uses broad language to address the various types of discrimination experienced by individuals with disabilities by requiring that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132; *see* 28 C.F.R. 35.149 (related to accessibility of facilities); *In re A.P.*, 281 N.C. App. 347, 353 (2022) (quoted in appeal of permanency planning order in a neglect proceeding). Retaliatory discrimination against a person who made a complaint or assisted or participated in an investigation or proceeding of a complaint is explicitly prohibited. A person who aids or encourages another to exercise rights under the ADA is also protected by the ADA. 42 U.S.C. 12203; 28 C.F.R. 35.134. In addition to the individual with a disability, a person who has a relationship with or associates with another person who has a disability may not be discriminated against as a result of that relationship or association. 28 C.F.R. 35.130(g).

The federal regulations list examples of specific discriminatory actions that are prohibited at 28 C.F.R. 35.130. Such actions include denying the opportunity to participate, affording an opportunity that is not equal to that of others, providing different or separate benefits or services, or limiting a qualified individual with a disability of any advantage or opportunity enjoyed by others who receive the benefit or service.

Additionally, the ADA now explicitly requires web content and mobile apps that a public entity (e.g., DSS, the North Carolina Judicial Branch, North Carolina Department of Health and Human Services) makes available be readily accessible to and usable by individuals who have disabilities. *See* 28 C.F.R. Part 35, Subpart H "Web and Mobile Accessibility" (effective April 24, 2026 or April 26, 2027, depending on the size of the public entity's population).

D. Requirements

1. Access and opportunity. A qualified individual with a disability must have an equal opportunity to participate in programs or services provided by the public entity. *See* 28 C.F.R. 35.130(b). This means the parent, child, relative, foster parent, etc. must be able to participate equally in the programs provided by DSS and the state courts. Title II provisions apply to all the activities and programs of the public entity, which includes the state court system, county DSSs, and the North Carolina Department of Health and Human Services. *See* 28 C.F.R. 35.102. It also includes services or activities provided through a contract or other arrangement with the public entity (e.g., a private agency under contract with DSS). 28 C.F.R. 35.130(b)(3). As related to child welfare and DSS, the ADA applies to protective services: screening of reports, assessments, casework, and counseling services. *See* G.S. 7B-300. In addition, DSS provides reasonable efforts to parents and others so that a permanent plan for the child is achieved. *See, e.g.,* G.S. 7B-101(18); 7B-507(a)(2), (a) (5); 7B-903(a3); 7B-

906.2(b). Adoption and foster care services are provided by DSS as well. *See* G.S. 108A-14(a)(6), (12), and (13). The ADA also applies to the court proceedings that arise from an abuse, neglect, or dependency petition.

The North Carolina Court of Appeals noted in an abuse, neglect, or dependency case that the "two principles that are fundamental to Title II of the ADA and Section 504 are: (1) individualized treatment; and (2) full and equal opportunity." *In re S.A.*, 256 N.C. App. 398 n.2 (2017) (unpublished) (quoting *In re Hicks*, 315 Mich. App. 251, 267 (2016), *aff'd in part, vacated in part, In re Hicks/Brown,* 500 Mich. 79 (2017)).

There are numerous provisions under Title II of the ADA that require a public entity to accommodate individuals with a disability in various ways, including policy or procedural modifications, facility design and relocation of inaccessible programs, and effective communication methods. *See* 28 C.F.R. 35.130. The public entity may not impose a surcharge on the individual or group of individuals with a disability for the costs of any anti-discrimination measures it must take to serve that individual or group. 28 C.F.R. 35.130(f). Services, programs, and activities must be provided in the most integrated setting that is appropriate to the needs of the qualified individual with a disability. 28 C.F.R. 35.130(d). Although made available, the individual with a disability is not required to accept the accommodation provided for under the ADA. 28 C.F.R. 35.130(e).

When necessary to avoid discrimination on the basis of a disability, the public entity must make reasonable modifications to policies, practices, or procedures (except when the individual meets the definition of disability solely on the basis of a perceived disability). 28 C.F.R. 35.130(b)(7). A reasonable modification is determined on an individualized basis by examining "whether a specific modification for a particular person's disability would be reasonable under the circumstances as well as necessary for that person…." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 688 (2001). Note that in addition to the ADA, North Carolina has codified provisions addressing service animals, which may require a modification of a policy that prohibits animals from a facility, at G.S. Chapter 168.

Programs and facilities must be readily accessible to individuals with a disability (e.g. wheelchair accessible). 28 C.F.R. 35.149 through 35.151; *see* 28 C.F.R. Part 35, Appendix A (providing section-by-section analysis of Title II revisions made in 2010).

The public entity must take steps to ensure that its communications with persons with disabilities are as effective as communications with others. This may require the provision of auxiliary aids and services, such as a qualified sign language interpreter, effective telecommunication systems for individuals with hearing or speech impairments, and audio recordings and/or large print materials for persons who are blind or have impaired vision. *See* 28 C.F.R. 35.160 through 35.163 and 35.130(f); *see* 42 U.S.C. 12103(1) and 28 C.F.R. 35.104 (definition of "auxiliary aids and services"). In North Carolina, G.S. Chapter 8B regulates interpreting services for deaf persons in judicial proceedings, including juvenile proceedings, when needed for any party or witness. North Carolina licensure requirements for interpreters and transliterators for individuals who are deaf, hearing impaired, or dependent on manual modes of communication are codified at G.S. Chapter 90D.

2. Exceptions. Title II of the ADA recognizes circumstances where the opportunity for participation by an individual with a disability may be limited. The authorized exceptions involve the following:

- The public entity is not required to take action that the public entity can demonstrate would cause (1) a fundamental alteration in the nature of the services, facilities, privileges, or accommodations involved or (2) undue financial and administrative burdens. 42 U.S.C. 12201(f); 28 C.F.R. 35.150(a)(3) and 35.164.
- The public entity is not required to allow an individual who poses a direct threat to the health or safety of others to participate in or benefit from services, programs, or activities. The criteria for making an individualized assessment of whether there is a direct threat to the health or safety of others is at 28 C.F.R. 35.139. A "direct threat" exists when there is a "significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." 42 U.S.C. 12111(3).
- A public entity may impose legitimate safety requirements that are necessary to operate its services, programs, and activities safely so long as the requirements are based on actual risks rather than speculation, stereotypes, or generalizations about individuals with disabilities. 28 C.F.R. 35.130(h).

3. Application to abuse, neglect, dependency, and TPR proceedings. The ADA is not a defense to a termination of parental rights (TPR) action. In a case of first impression, the North Carolina Court of Appeals held in *In re C.M.S.*, 184 N.C. App. 488 (2007), that the ADA did not preclude termination of parental rights of the respondent mother who had an intellectual disability (previously referred to as mental retardation). The court of appeals reviewed other state courts' treatment of the issue and adopted the rule followed by other states that TPR proceedings are not services, programs, or activities within the meaning of Title II of the ADA, and the ADA is not a defense to a TPR. *But see In re Hicks/Brown*, 500 Mich. 79 (2017) (vacating and remanding order terminating parental rights of a mother with an intellectual disability; under Michigan law, TPR is improper without reasonable efforts finding; holding the department's efforts are not reasonable unless modified to accommodate a parent's disability and determining trial court erred when making the reasonable efforts finding by failing to consider that department's reunification efforts did not provide mother with specific services ordered by the court to accommodate mother's disability (based on request by mother's attorney in earlier proceedings regarding specific services that would provide such accommodations) and whether the department's efforts that were provided to mother nonetheless reasonably accommodated her disability). See Chapter 9 (discussing TPR).

At the same time that the court of appeals held the ADA was not a defense to the TPR, it also found that the statutory requirements for and the trial court's findings about DSS making reasonable efforts to prevent or eliminate the need for the child's placement constituted compliance with the ADA. *In re C.M.S.*, 184 N.C. App. 488; *see In re A.P.*, 281 N.C. App. 347 (2022) (applying holding of *In re C.M.S.,* 184 N.C. App. 488; conclusion of law regarding DSS having made reasonable efforts complied with ADA). Other states have noted that although the ADA is not a defense to a TPR, "[t]his is not to say that the ADA plays no role in child welfare proceedings." *In re Elijah C.*, 326 Conn. 480, 508 (2017).

The North Carolina Court of Appeals relied on *In re C.M.S.* in an appeal challenging a permanency planning order in a neglect proceeding involving a mother with an intellectual disability. In *In re A.P.*, 281 N.C. App. 347, the court of appeals held the trial court's findings that DSS made reasonable efforts to reunify and eliminate the juvenile's need for placement was necessarily a finding that DSS complied with the anti-discrimination provision of the ADA in that the parent was not excluded from participation or denied the benefits of the programs or services of DSS. *See also In re S.A.*, 256 N.C. App. 398 (2017) (unpublished) (holding in appeal of permanency planning order, court complied with the ADA and Section 504 when it made proper findings regarding DSS making reasonable efforts under G.S. 7B-507(a)(2)). In *In re A.P.*, the court of appeals further determined that the findings of fact supporting the conclusion that DSS made reasonable efforts were supported by competent evidence, which included the DSS social workers' testimony and reports, the guardian ad litem report, and the mother's psychological assessment. DSS followed the recommendations of the mother's psychological assessment to assist the mother in her supervised visits, parenting and home skills, innovation services, assisted living, and mental health treatment.

The court of appeals has held that arguments about the adequacy of compliance with the ADA as it applies to case plan components and services offered by DSS or visitation provisions ordered by the court must be timely raised at the trial level and cannot be challenged for the first time on appeal. In *In re A.P.,* 281 N.C. App. 347, the mother waived the issue that services provided by DSS through the case plan were inadequate under the ADA because she did not raise it before or during the permanency planning hearing (that resulted in the order on appeal). In *In re A.J.J.*, 919 S.E.2d 711 (N.C. Ct. App. 2025), the mother waived the issue that the court allowing the visitation location to be selected by the child's custodian was an abuse of discretion because her physical disability required the visits be located close to her home was waived as mother did not raise the ADA issue for the court's consideration at the permanency planning hearing. *See also In re S.A.*, 256 N.C. App. 398 (unpublished) (*quoted and relied on in In re A.P.* and *In re A.J.J.*) (mother with a physical disability waived the issue of whether the services offered by DSS were adequate under the ADA when she did not raise it before or during the permanency planning hearing resulting in the order on appeal). The court of appeals looked to a Michigan opinion, *In re Terry*, for guidance in deciding this issue, and that opinion stated that an ADA violation "must be raised in a timely manner . . . so that any reasonable accommodation in services can be made . . . . [t]he time for asserting the need for accommodation in services is when the court adopts a service plan. . . ." 240 Mich. App. 14, 26, 27 (2000), *quoted in In re A.P.*, 281 N.C. App. at 358.

The court of appeals has also held that like TPR proceedings, "abuse, neglect, and dependency proceedings are not 'services, programs or activities' within the meaning of the ADA, and therefore, the ADA does not create special obligations in such child protection proceedings." *In re A.P.*, 281 N.C. App. at 362. The court of appeals rejected the mother's argument that the ADA requires the district court continue to conduct periodic hearings during the pendency of the juvenile proceeding such that further hearings cannot be waived. *In re A.P.*, 281 N.C. App. 347 (holding trial court complied with G.S. 7B-906.1(k) and 7B-905.1(d) in waiving further hearings when custody was awarded to father and court notified the parties of their right to file a motion to review visitation). The court of appeals stated, "the ADA did not 'change the obligations imposed by [these] unrelated statutes[,]' " meaning the requirements imposed by

the Juvenile Code. *In re A.P*. 281 N.C. App. at 362 (quoting *In re C.M.S.*, 184 N.C. App. at 492).

4. Notice of applicability. Public entities must make available to applicants, participants, beneficiaries, and other interested persons information about anti-discrimination provisions and their applicability to the programs, services, and activities the public entity provides in a manner that notifies the persons of the ADA protections. 28 C.F.R. 35.106. *See* 28 C.F.R. 35.163 (information and signage for persons with impaired hearing or vision).

Practice Notes: A party to the proceeding may make a reasonable accommodation request. For example, if the parent knows they require hands-on learning, they may request a reasonable accommodation as part of their full participation in a parenting education program, or if a parent needs an adaptive parenting program, they may make that request of DSS for inclusion in the case plan. An attorney for the parent may request an adaptive parenting capacity evaluation as a reasonable modification for their client. The child's guardian ad litem, parent, or placement provider may request a reasonable accommodation for the child, such as specialized transportation for the child. If a child is disabled and receiving special education services and/or reasonable modifications, the Individual Education Program (IEP) or 504 plan may provide information about the type of modifications the child will also need outside of the school setting. This may also apply to respondents who had an IEP or 504 plan when they were school age.

It may also be appropriate to raise a disagreement about whether modifications are reasonable such that they impact whether the efforts made by DSS are reasonable when the court hearing the abuse, neglect, or dependency action is determining whether DSS provided reasonable efforts. *See In re A.J.J.,* 919 S.E.2d 711, and *In re A.P.* 281 N.C. App. 347 (adequacy of services under the ADA must be timely raised before trial court and are waived if raised for the first time on appeal). The trial court has the authority to "order services or other efforts aimed at returning the juvenile to a safe home" at the nonsecure custody stage and to "specify efforts that are reasonable" at permanency planning hearings and in resulting orders. G.S. 7B-507(a)(5); 7B-906.2(b).

AOC Form:
AOC-G-116, Motion, Appointment, and Order Authorizing Payment of Sign Language Interpreter or Other Communication Access Service Provider

NCDHHS Form:
DSS-5333, Americans with Disabilities Act – Did you know?

Resources:
For federal guidance in a question and answer format with specific child welfare case examples, see Protecting the Rights of Parents and Prospective Parents with Disabilities: Technical Assistance for State and Local Child Welfare Agencies and Courts under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act (Aug. 2015) by the U.S. Department of Justice Civil Rights Division and U.S. Department of Health and Human Services, Office for Civil Rights, Administration for Children and Families.

For guidelines by the American Psychological Association that address evaluations that may be used in a child welfare case, see Guidelines for Psychological Evaluations in Child Protection Matters and Guidelines for Assessment of and Intervention with Persons with Disabilities.

For information regarding accommodations for persons who are deaf or hearing impaired, see the Division of Services for the Deaf and Hard of Hearing section of the N.C. Department of Health and Human Services website, which includes a statewide interpreter directory.

For general information about access to services, programs, and activities for individuals with disabilities in the courts, see "Disability Access" under the "Help Topics" "Disability and Language Access" section of the North Carolina Judicial Branch website.

For North Carolina Department of Health and Human Services Division of Social Services policy that specifically addresses issues related to children with disabilities (developmental delays, intellectual disability, motor impairment, sensory disability, learning disability, mental illness, and chronic illness) as well as consideration of a parent's disability, see DIV. OF SOC. SERVS., N.C. DEP'T OF HEALTH & HUM. SERVS., CHILD WELFARE MANUAL "Cross Function," available on the Child Welfare Services section of the N.C. Department of Health and Human Services website. Use control F to search the terms "disability" and "disabilities."

For various resources of documents or websites that are useful to persons with disabilities, see the "Resources" section of the NC Statewide Independent Living Council website.

E. Compliance

1. Filing a complaint. A person alleging a violation of Title II of the ADA may file a complaint with the appropriate federal designated agency within 180 days of the date of the alleged discrimination, unless the time is extended for good cause. 28 C.F.R. 35.170. The U.S. DHHS Office of Civil Rights and the U.S. DOJ both enforce Title II of the ADA as related to child welfare services and activities by DSS and the state courts. *See* 28 C.F.R. 35.190(b)(3) and (6). The complaint procedure is set forth at 28 C.F.R. 35.171 through 35.178. Title II utilizes the procedures and remedies set forth in the Civil Rights Act. 42 U.S.C. 12133 (referring to 29 U.S.C. 794a). See section 13.4.E, above (discussing violation procedures under Title VI of the Civil Rights Act).

A private lawsuit may also be filed in federal court, without the filing of a complaint with a federal agency. *See* 28 C.F.R. 35.172(d).

On a state and local level, when a public entity employs a minimum of fifty people, it must designate at least one employee to coordinate its ADA compliance efforts, which may include investigating complaints. The public entity must also adopt and publish grievance procedures regarding the resolution of any complaints. 28 C.F.R. 35.107.

Resources:
The grievance procedure and other information about disability access (including requesting a reasonable accommodation) in the North Carolina courts is available on the North Carolina Judicial Branch website under the "Disability Access" page of the "Help Topics" "Disability and Language Access" section of the website.

The grievance procedure for the N.C. Department of Health and Human Services is available under "Assistance" "ADA and Civil Rights Grievance Procedure" on its website.

2. Violations related to child welfare. Violations of Title II of the ADA in the child welfare context have been found in other states based on a variety of different types of discriminatory practices. Some of the violations are as follows:

Substance use and medication treatment.

- A voluntary resolution agreement between the U.S. DHHS Office of Civil Rights (OCR) and the Pennsylvania Department of Human Services (DHS). OCR Transaction No. 20-359940 (July 5, 2023). This agreement resolves a complaint filed by an individual who was discouraged from applying to be a foster parent because of her use of medically prescribed methadone for her opioid use disorder. Under the agreement, DHS will not discriminate against any participant in the child welfare system, including parents, foster parents, legal guardians, and adoptive parents, because of that participant's disability. Disability includes individuals with substance use disorders but does not include those currently using illegal substances. Safety requirements will be assessed for actual risks pertaining to the individual with a disability and not speculation, generalizations, or stereotypes. Reasonable modifications to policies, practices, and procedure that are tailored to the needs of the individual with a disability will be made, and auxiliary aids and services will be provided without any cost to the individual. New policies and procedures will be developed and training to all staff including contractors will be provided that address substance use disorders, medication assisted treatment, medication for opioid use disorder (which is not the use of illegal drugs), reasonable accommodations, and grievances.
- A finding by the U.S. Department of Justice of Title II violations by the Unified Judicial System of Pennsylvania. DJ # 204-64-170 (February 2, 2022). The courts discriminated against individuals who had opioid use disorder (OUD) and were under court supervision (probation and drug court) by prohibiting or limiting their use of medication to treat OUD. The findings letter discusses medication for opioid use disorder (MOUD); its safety and effectiveness; and need for individualized assessments and treatment plans, with a recognition that for some, treatment will continue indefinitely. Voluntary compliance negotiations are suggested that would include provisions addressing in part training and educating all court staff about OUD and the nondiscrimination requirements of Title II, paying compensatory damages to the complainants, and adopting or revising policies that explicitly exclude discrimination against qualified individuals receiving services from the courts because of OUD.
- A Voluntary Resolution Agreement between the U.S. DHHS Office of Civil Rights (OCR) and the West Virginia Department of Health and Human Resources (Department) (OCR Transaction No. 18-306552) (April 2020). This agreement addresses individuals who are

in recovery from opioid use disorder (OUD) through medication assisted treatment (MAT). OCR received a complaint from relatives who obtained a favorable home study for a kinship placement of a child but were determined by the Department social worker to be inappropriate due to one of the relative's history of taking Suboxone as part of his MAT. OCR identified systemic deficiencies in the Department's implementation of its nondiscrimination policies, practices, and procedures as applied to individuals who are in recovery for OUD. The agreement requires the Department to update its policies and procedures, create a training specifically addressing OUD recovery, and assure compliance with the ADA and Section 504 of the Rehabilitation Act. OCR will monitor and provide technical assistance to the Department to ensure compliance with the agreement.

Children placed in psychiatric residential facilities.

- A finding by the U.S. Department of Justice of Title II violations by the State of Alabama, including the Department of Human Resources and Department of Education. D.J. # 169-1-127 (October 12, 2022). The State of Alabama discriminated against children in foster care with disabilities who were placed in psychiatric residential treatment facilities (PRTF) by inappropriately segregating their educational services and denying those students equal educational opportunities. The PRTFs have "Specialized Treatment Centers" (STCs) referred to as "on-site schools" that is often the default educational placement when these students could receive educational and related services in general education schools. There is no adequate educational assessment to determine the appropriate school enrollment for these children. For those students who require a short-term restrictive STC placement, the educational services are not appropriate to meet their educational needs. The findings address (1) a lack of qualified employees; (2) services that are not evidence-based; (3) records are not properly shared with home schools; (4) services that focus on compliance with STC rules and only those supportive services that are available at the STC rather than on each student's needs; (5) the inappropriate use of restraints and seclusion to control student behavior; (6) the lack of grade appropriate services; (7) the reduced number of instructional hours when compared to general educational programs; (8) deficient resources, such as lack of science labs, gyms, playing fields, library, and cafeteria; and (9) the absence of sports, clubs, and the opportunities for field trips or school social events. Suggested remedial measures include enrolling the children in public school; developing child-specific education plans that include exit and transition plans; updating licensure and funding requirements to ensure STCs provide the same curricula, instructional hours, staff qualifications, and other public school standards under Alabama law; prohibiting seclusion and restricting the use of restraints; developing a complaint process; and creating a compensatory education plan for students who have not graduated.

Intellectual disability.

- A Voluntary Resolution Agreement between the U.S. DHHS Office of Civil Rights (OCR) and the Massachusetts Department of Children and Families (Department) (referring to DJ # 204-36-216 and HHS # 14-182176) (November 2020). This agreement resolves OCR's 2015 finding of discrimination based on a parent's intellectual abilities and subsequent substantiated complaints of the Department's failure to make reasonable modifications,

effective communication, and a denial of equal participation to parents with disabilities. The Agreement consists of several requirements the Department must implement. The letter of finding found violations involving the removal of a newborn from her mother, Sara Gordon, who has a developmental disability. Findings were that the Department engaged in ongoing and extensive violations over a period of two years when it failed to reasonably modify its policies, practices, and procedures to accommodate Sara's disability and implement appropriate reunification services. The Department's actions were based on assumptions and stereotypes of Sara's disability and failed to consider appropriate family-based support services. The remedial measures imposed by the letter of finding include withdrawing the petition to terminate parental rights; implementing appropriate services and supports for reunification; paying compensatory damages; developing and implementing procedures on the ADA and Section 504 for assessments, services planning, visitation and safety requirements; and implementing a training program for staff.

- The Office of Civil Rights (OCR) is providing technical assistance to the New Jersey Department of Children and Families to ensure parents with intellectual disabilities are not discriminated against (November 2020).
- A Voluntary Resolution Agreement between the U.S. DHHS Office of Civil Rights (OCR) and the Oregon Department of Human Services (Department) (OCR Transaction Numbers 18-290275, 18-291152, and 18-291153) (November 2019). The agreement addresses the rights of parents with disabilities. OCR received complaints alleging children were removed from their parents who have disabilities, and that the parents were denied effective and meaningful opportunities for reunification due in significant part to stereotypical beliefs and discriminatory assumptions about the parents' abilities to safely care for their children because of the parents' low IQ scores. The OCR identified systemic deficiencies in the Department's implementation of disability rights policies, practices, and procedures. The agreement requires an individualized assessment of a parent with a disability rather a determination of safety risk based on stereotypes or generalizations about persons with disabilities or a specific diagnosis. The Department agreed to update its policies and procedures, implement a new disability rights training plan, and make assurances it will comply with the anti-discrimination disabilities laws, and OCR will monitor the Department's efforts and provide technical assistance.

Hearing disability.

- As a result of an investigation by U.S. DHHS Office of Civil Rights (OCR), the Department of the Family's Administration for Families and Children (ADFAN) in Puerto Rico will implement several corrective actions for families with parents who are deaf or hard of hearing. ADFAN will provide auxiliary aids and services, some of which include establishing a disability coordinator; establishing a process for requesting auxiliary aids and services that does not require a local office to obtain prior approval from a regional office; contracting with a sign language interpreting agency that is available twenty-four hours a day, seven days a week; and providing training to staff about deaf culture and using interpreters. See the OCR closing letter for Reference No. 20-367326 and 21-411817.
- A Voluntary Resolution Agreement between the U.S. DHHS Office of Civil Rights (OCR) and the Rhode Island Department of Children, Youth, and Families (DCYF) (March 30, 2022). This agreement resolves complaints addressing the failure of DCYF to provide

appropriate auxiliary aids and services to address the communication needs of constituents who are deaf or hard of hearing. Under the Agreement, DCYF will create policies and procedures and train its staff on how to address communications needs. The auxiliary aids provided will address the individual's communication needs, with priority given to the communication method requested by the individual with a disability. DCYF will ensure a qualified interpreter (when needed) is promptly provided for an explanation of rights, testing and assessments, mandated and voluntary services for parents (including contract providers), visitation, and court appearances and mediations. DCYF will receive training on the proper use of video remote interpreting (VRI) when VRI is appropriate. DCYF will designate an ADA/Section 504 coordinator who will maintain a log of requested auxiliary aids and services. A grievance procedure will be created.

- A Settlement Agreement between the U.S. Department of Justice and the Washington State Department of Children, Youth, and Families (DCYF). DJ # 204-82-306 (April 16, 2021). This agreement resolves two complaints addressing the failure of DCYF to provide auxiliary aids and services, specifically qualified sign language interpreter services, to parents who are deaf. DCYF relied on note writing despite the parents' primary language of American Sign Language and the use of family members for interpretation. The failure occurred throughout the cases including during the agency investigation and at court ordered counseling services. The Agreement requires DCYF to pay a $300,000 settlement to the families for delays and barriers in receiving reunification services and emotional distress. DCYF must establish ADA policies, practices, and procedures on effective communication with clients who have communication difficulties; train staff; and coordinate with the Office of Deaf and Hard of Hearing to institute streamlined procedures for requesting and scheduling interpreter services.

Multiple disabilities.

- A finding by the U.S. Department of Justice of Title II violations by the Arizona Department of Child Safety (DCS). DJ # 204-8-264 (December 16, 2024). DCS discriminated against parents, caregivers, and children with hearing or vision disabilities by failing to provide effective communication with needed auxiliary aids and services and denying parents with reasonable modifications. DCS did not use sign language interpreters, misused Video Remote Interpreting and Video Relay Services, and did not provide large print written materials or other modifications (e.g., reading the materials aloud). DCS separated parents and children based on stereotypes and generalizations about disabilities, including mental health diagnoses and learning disabilities. DCS did not treat parents with disabilities on an individualized basis using facts and objective information but instead required unnecessary evaluations, interfered with parents' rights, and used derogatory and outdated terms when referring to parents with disabilities. DCS did not make reasonable modifications for services that parents with disabilities needed to complete case plans. DCS does not have policies or provide trainings that address the ADA and lacks a published grievance procedure. DCS must create policies, train staff, designate employees to coordinate ADA responsibilities, provide reasonable modifications and auxiliary aids and services, create a published grievance procedure, provide updated status reports, and pay compensatory damages.

13.6 Servicemembers Civil Relief Act

A. Introduction

The Servicemembers Civil Relief Act (SCRA), Pub. L. No. 108-189, sec. 1, Dec. 19, 2003, 117 Stat. 2835, was originally enacted in 1940 as the Soldiers' and Sailors' Civil Relief Act (SSCRA), ch. 888, 54 Stat. 1178. It is codified at 50 U.S.C. 3901 *et seq.* Prior to December 1, 2015, the SCRA and SSCRA were codified at 50 U.S.C. App. 501 *et seq.*

The SCRA's purpose is to protect servicemembers and strengthen our national defense. The law enables servicemembers to focus on defending the nation by providing for the temporary suspension of judicial and administrative non-criminal proceedings that may adversely affect servicemembers' rights during their military service.

Effective October 1, 2019, North Carolina enacted its own state Servicemembers Civil Relief Act (NC SCRA), which is codified at Article 4 of G.S. Chapter 127B. The NC SCRA incorporates the rights, benefits, and protections of the federal SCRA and also extends those rights to members of a state National Guard who are acting under a state's order of active duty for more than thirty consecutive days and who reside in North Carolina. G.S. 127B-26 (purpose); 127B-27 (definitions); 127B-28 (incorporation and expansion of SCRA). The NC SCRA is not discussed in detail here.

As of June 30, 2025, the United States had over 1.1 million active duty military members and almost 740,000 reservists living in the United States. Approximately 171,000 additional active duty military members and 27,000 additional reservists are oversees. In the U.S., North Carolina was the fourth state (following California, Virginia, and Texas) with the most active duty members of the military.[7] In 2023, thirty-five percent (35%) of active duty and forty percent (40%) of selected reserve members had children, the vast majority of whom were 11 years old or younger.[8] These numbers make it likely that some abuse, neglect, dependency, or termination of parental rights cases heard in the North Carolina courts will involve servicemembers who are parties in those actions.

Resource: For more information about the SCRA in abuse, neglect, dependency, and termination of parental rights proceedings, see Sara DePasquale, *The SCRA and Juvenile Proceedings*, UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (April 29, 2015).

B. Applicability

The SCRA applies to any non-criminal judicial or administrative proceeding that is commenced in a state (including a political subdivision), federal, or U.S. territory court or agency. 50 U.S.C. 3912. Child custody proceedings are specifically referenced in the SCRA. 50 U.S.C. 3931(a), 3932(a), 3938, and 3938a. Abuse, neglect, dependency, and termination of

[7] Statistical information was obtained from the Defense Manpower Data Center (DMDC), which collects data for the Department of Defense. See "Statistics & Reports" maintained under the DoD Data/Reports section of the DMDC website.
[8] Department of Defense, "2023 Demographics Profile of the Military Community," available at https://download.militaryonesource.mil/12038/MOS/Reports/2023-demographics-report.pdf.

parental rights (TPR) proceedings are custody proceedings. *See* G.S. 50A-102(4); *In re E.J.X.*, 191 N.C. App. 34 (2008), *aff'd per curiam*, 363 N.C. 9 (2009); *see also In re A.K.*, 360 N.C. 449 (2006) (referring to abuse, neglect, or dependency proceeding as child custody proceeding).

The SCRA applies to abuse, neglect, dependency, and TPR actions even when a servicemember is not a party. The specific SCRA requirements and the number of SCRA provisions that apply to the proceeding will depend on various factors, such as whether a party has appeared in the case, when a judgment is entered, and whether a party is a servicemember.

1. Servicemember defined. A servicemember is a member of the Army, Navy, Air Force, Marine Corps, Space Force, Coast Guard, and the commissioned corps of the National Oceanic and Atmospheric Administration (NOAA) or the commissioned corps of the Public Health Service. 50 U.S.C. 3911(1) (referring to 10 U.S.C. 101(a)(5)).

The NC SCRA specifies that its definition of servicemember is a servicemember as defined by the federal SCRA who resides in North Carolina and adds a member of the North Carolina National Guard. G.S. 127B-27(4).

2. Military service defined. For purposes of the SCRA, a member of the Army, Navy, Air Force, Marine Corps, Space Force, or Coast Guard is in military service when on active duty, which includes full-time training duty, annual training duty, and attendance while in active military service at a school designated as a military service school by law or the Secretary of the applicable military department. Active duty does not include full-time National Guard duty. A National Guard member is in military service when under a call to active service from the President or Secretary of Defense for at least thirty-one consecutive days for the purpose of responding to a national emergency that has been declared by the President and is supported by federal funding. A commissioned officer of NOAA or the Public Health Service who is in active service is in military service. Military service includes a period when a servicemember is absent from duty because of illness, wounds, leave, or other lawful reason. 50 U.S.C 3911(2); *see* 10 U.S.C. 101(d)(1).

Under the NC SCRA, military service also includes a member of a state National Guard who is under an order of *state active duty from the governor* of that state for more than thirty consecutive days. G.S. 127B-27(3).

C. SCRA Requirements

1. The SCRA affidavit. In a proceeding where the defendant has not made an appearance, before the court may enter a temporary or final judgment for the plaintiff, the court must require the plaintiff to file an affidavit that states

- whether the defendant is or is not in military service and the necessary facts to support the assertion or
- the plaintiff is unable to determine whether the defendant is in military service.

50 U.S.C. 3931(a), (b); *see* 50 U.S.C. 3911(9) (definition of "judgment").

The SCRA does not define making an appearance and does not specify what constitutes "necessary facts" to support the assertion in the affidavit.

Practice Note: The petitioner should exercise diligence in determining whether each respondent in the action is in military service, which under the federal SCRA and the NC SCRA must include *both* federal military service and state National Guard service. Necessary facts to support the petitioner's assertion may be the petitioner's personal knowledge (e.g., the father told the DSS social worker he was not in the military), inquiries made to others (e.g., the father informed the DSS social worker that the child's mother works full-time, lives with him in the home, and is not in the military), or search results of the Department of Defense active duty status records for purposes of federal military service. Regarding military service under a state order of active duty, the NC SCRA requires that the servicemember provide a written or electronic copy of the military order within thirty days of when that military service terminates. G.S. 127B-28. Including a statement in the affidavit that the petitioner has/has not received a copy of a state military order from the respondent clarifies whether the NC SCRA applies to a member of the National Guard.

To obtain this information, the DSS social worker or the petitioner/movant in the TPR proceeding can ask the respondent and others that know the respondent about the respondent's military service and the basis for that person's knowledge or belief.

Resource: To conduct a search as to whether one or multiple individuals are on active duty status under a federal military order, access the Servicemembers Civil Relief Act (SCRA) Website. This website does not provide information on state orders of active duty for state National Guard service for purposes of the NC SCRA.

The SCRA affidavit is only required if the respondent does not make an appearance before the court enters a judgment for the plaintiff. A judgment means any order or ruling that is temporary or final, which includes a nonsecure custody order in an abuse, neglect, or dependency action. *See* 50 U.S.C. 3911(9); G.S. 7B-506(a), (e). When DSS requests an ex parte nonsecure custody order, no respondent makes an appearance. The SCRA requires that the affidavit be filed for each named respondent before the court enters the ex parte nonsecure custody order. If a respondent has notice of the nonsecure custody request but does not make an appearance, the SCRA affidavit is required before the nonsecure custody order is entered. In those cases where a nonsecure custody order is not requested or is not granted, the SCRA affidavit will be required for any respondent who has not appeared in the action before an order for the plaintiff is entered (e.g., an adjudication order). If the respondent appears in the action before an order is entered, an SCRA affidavit for that respondent is not required.

The form of the affidavit may be a written statement, declaration, verification, or certificate that is subscribed and certified to be true under penalty of perjury. 50 U.S.C. 3931(b)(4). In an abuse, neglect, dependency, or TPR case, the initiating petition (or TPR motion) must be verified. G.S. 7B-403(a); 7B-1104; *see In re O.E.M.*, 379 N.C. 27 (2021) (holding TPR motion must be verified). The SCRA affidavit requirement may be satisfied by including the applicable statement and supporting facts in the verified pleading. It may also be a separate document, such as the form declaration created by the North Carolina Administrative Office of the Courts (AOC).

AOC Form:
AOC-G-250, Servicemembers Civil Relief Act Declaration

Practice Note: A petitioner should be mindful of how much time passes between the filing of the affidavit (or verified petition/motion) and the entry of the judgment. Although the SCRA does not specify how soon the affidavit must be filed before the judgment is entered, if the facts support the possibility that a respondent may have entered military service since the filing of the affidavit, the court may require that a new affidavit be filed. If the affidavit shows that the respondent is not in military service, the court may enter the order and proceed with the case.

If the court is unable to determine whether the respondent is in military service, the court may enter a judgment. Before entering a judgment, the court may require the petitioner to file a bond in an amount approved by the court. The bond remains in effect until the time to appeal and set aside a judgment expires. The bond is available to indemnify the respondent against any loss or damage suffered by the respondent because of a judgment entered for the petitioner against the respondent that is later set aside in whole or in part. The court may also enter any order it determines necessary to protect the respondent's rights under the SCRA. 50 U.S.C. 3931(b)(3).

If the affidavit shows the respondent is in military service, additional SCRA protections apply.

2. Additional SCRA requirements when respondent is in military service. Additional protections apply for servicemembers.

(a) Appointment of attorney. If it appears that the respondent who has not made an appearance in the proceeding is in military service, the court may not enter a judgment until after the court appoints an attorney to represent the respondent. 50 U.S.C. 3931(b)(2). The right to an attorney appointed under the SCRA is in addition to the right to appointed counsel provided to respondent parents under North Carolina's Juvenile Code. *See* G.S. 7B-602(a); 7B-1101.1(a). The SCRA right to an attorney continues even when the Juvenile Code requires that provisional counsel be dismissed if the parent does not appear at the hearing or does not qualify for appointed counsel. *See* G.S. 7B-602(a)(1) and (2); 7B-1101.1(a)(1) and (2). The SCRA right to an attorney also applies to respondents who are custodians, guardians, or caretakers even though those parties do not have a statutory right to appointed counsel under the Juvenile Code. The SCRA does not address payment for the appointed attorney.

The attorney that is appointed should (1) try to locate a servicemember who was unable to be located prior to the attorney's appointment and (2) determine whether a stay is necessary and apply for a stay when appropriate. The SCRA attorney represents the servicemember, but the extent of that representation outside of locating the servicemember and requesting a stay is not addressed by the SCRA. *See* 50 U.S.C. 3931(b)(2), (d).

(b) Stay of the proceeding. There are two different stay provisions in the SCRA: 50 U.S.C 3931 and 50 U.S.C. 3932. The SCRA does not define a stay of the proceeding or address whether in a child custody proceeding a temporary emergency order that protects a child or temporary custody order that addresses the child's best interests is permitted during the

pendency of the stay of the proceeding. The issue has not been addressed by the North Carolina appellate courts.

The 50 U.S.C. 3931 stay. A stay of the proceeding may be made pursuant to 50 U.S.C. 3931. The court, on its own motion or on the motion of the attorney appointed under the SCRA to represent a respondent, must grant a minimum ninety-day stay of the proceeding when

- the respondent is in military service and
- the court determines
    - there may be a defense but it cannot be presented without the respondent's presence or
    - after due diligence, the SCRA-appointed attorney has been unable to contact the respondent or otherwise determine if a meritorious defense exists.

50 U.S.C. 3931(d).

The 50 U.S.C. 3932 stay. A stay of the proceeding may also be made pursuant to 50 U.S.C. 3932. The court on its own or a party (a respondent or a petitioner/movant in a TPR) who is in military service and has received actual notice of the proceeding may apply for a stay of the proceeding at any stage before a final judgment is entered. The court must stay the proceeding for at least ninety days when the servicemember applies for a stay that includes

- a letter or other communication that sets forth the facts stating how the current military duty requirements materially affect the servicemember's ability to appear and states a date when the servicemember will be available to appear and
- a letter or other communication from the commanding officer stating the servicemember's current military duty prevents the servicemember from appearing and that military leave is not authorized for the servicemember at the time of the letter or communication.

50 U.S.C. 3932(b).

After the first mandatory 50 U.S.C. 3932 stay is granted, the servicemember may apply for another stay based on the continuing material effect of military duty on their ability to appear. An additional request for a stay must include the same information that was required for the first stay. 50 U.S.C. 3932(d)(1). The granting of an additional stay is not mandatory, but if the court denies the servicemember's request, the court must appoint an attorney to represent them in the proceeding. 50 U.S.C. 3932(d)(2). The scope of the representation and the costs for the attorney are not addressed by the SCRA.

Practice Note: The SCRA does not specifically address the servicemember's presence or ability to appear through alternative means such as videoconference, telephone, deposition, etc. The court and/or parties may want to inquire about the availability of such alternatives when requesting, objecting to, supporting, or deciding the motion to stay. Under G.S. 7A-49.6, the court is authorized to conduct proceedings by audio and video transmission. The Uniform Child-Custody Jurisdiction and Enforcement Act also authorizes testimony of a party or witnesses outside of North Carolina to be made by

alternative means and addresses the transmission of documentary evidence outside of North Carolina by technological means. *See* G.S. 50A-111.

(c) Reopen the judgment. If a default judgment is entered against a servicemember during the servicemember's military service (or within sixty days after being released from such service), the servicemember may seek to reopen the judgment to allow the servicemember to defend the action. The application to reopen the judgment must be made no later than ninety days after the servicemember is released from military service. The court must reopen the judgment if it appears that the servicemember (1) was materially affected by the military service in defending the action and (2) has a meritorious defense to all or part of the action. 50 U.S.C. 3931(g). A default judgment is not defined by the SCRA but is referred to in the provision that applies when a defendant does not make an appearance. *See* 50 U.S.C. 3931. Note that default judgments under the North Carolina Rules of Civil Procedure are not permissible in abuse, neglect, dependency, or termination of parental rights proceedings, but orders may be entered in those actions when a respondent does not appear. *See In re Thrift,* 137 N.C. App. 559 (2000); *In re Quevedo,* 106 N.C. App. 574 (1992).

(d) Child custody protection and deployment. The SCRA addresses child custody orders when a parent is or will be deployed. Under the SCRA, deployment is defined as the movement or mobilization of a servicemember to a location for 61 to 540 days pursuant to temporary or permanent official orders that are designated as unaccompanied, do not authorize dependent travel, or do not permit the movement of family members to the same location. 50 U.S.C. 3938(e). When a court enters a temporary custody order based solely on a parent's deployment or anticipated deployment, the order must expire no later than the period justified by the deployment. 50 U.S.C. 3938(a). When a motion or petition is filed seeking a permanent order to modify a child custody order, the court may not consider the servicemember's absence because of a deployment or the possibility of a deployment as the sole determination of the child's best interests. 50 U.S.C. 3938(b). Note that 50 U.S.C. 3938 was added to the SCRA by Pub. L. 113-291, Dec. 19, 2014.

Practice Note: In addition to the protections for deploying parents under the SCRA, North Carolina has the Uniform Deployed Parents and Custody and Visitation Act. *See* G.S. 50A-350 through -396. This Act is discussed briefly in Chapter 3.3.G.

Resource: Additional information about the Act is available on the website of the Uniform Law Commission at "Deployed Parents Custody and Visitation Act."

(e) Waiver of rights. A servicemember may waive their rights and protections provided by the SCRA. 50 U.S.C. 3918(a).

13.7 Every Student Succeeds Act

A. Introduction[9]

The Every Student Succeeds Act (ESSA), Pub. L. No. 114-95, 129 Stat. 1802, was enacted on December 10, 2015, and makes various amendments to 20 U.S.C. 6301 *et seq*. Implementing federal regulations are at 34 C.F.R. Parts 200 and 299 (effective in 2019).

ESSA reauthorizes the Elementary and Secondary Education Act (ESEA) and replaces the No Child Left Behind Act. ESSA is an education (as opposed to child welfare) law and conditions federal funding under ESEA on compliance with its requirements. The state educational agency, which in North Carolina is the Department of Public Instruction (DPI), must submit a state plan with the Secretary of the U.S. Department of Education (DOE) that contains criteria specified in ESSA. The DOE approved North Carolina's state plan on June 5, 2018 and approved amendments made thereafter.

Resource: Information about ESSA and North Carolina's state plan is available on the "Every Student Succeeds Act" section of the Department of Public Instruction website.

Although there are several different components of ESSA, the discussion in this Manual is limited to those provisions that apply to educational stability for children in foster care. Although not defined in ESSA, foster care is defined for federal funding purposes under Titles IV-B and IV-E of the Social Security Act. Foster care is 24-hour substitute care for children who are placed away from their parents and for whom the child welfare agency has placement and care responsibility and includes placements in family foster homes, relative foster homes, group homes, emergency shelters, residential facilities, child care institutions, and preadoptive homes, regardless of whether the foster care facility is licensed and/or foster care or adoptive subsidy payments are made. 45 C.F.R. 1355.20(a).

Compared to their peers, children in foster care are highly mobile and experience more unscheduled school changes. Children who change schools frequently make less academic progress than their peers and have difficulty developing and maintaining supportive relationships with adults and friendships with others. Children in foster care are more likely to be absent from school, receive special education services, receive a suspension or expulsion, and/or drop out of school. Children in foster care also have lower performance scores on academic assessments. Children in foster care take longer to graduate and have lower graduation rates than their peers. Sixty-four percent of youth in foster care complete high school or obtain a GED by age 18. An estimated thirteen to thirty-eight percent of foster youth who graduate from high school attend postsecondary school. Only two to eleven percent of former foster youth attain a bachelor's degree.

ESSA seeks to improve educational outcomes for children in foster care by requiring state and local child welfare and education agencies to work together to assure the educational stability of children in foster care. Under ESSA, children in foster care must be allowed to remain in

[9] The content in this section discussing educational outcomes for children in foster care is sourced from the "Data & Information Sharing" section of the Legal Center for Foster Care & Education website. Last visited November 26, 2025.

their school of origin when it is in their best interests to do so and when it is not, to immediately enroll in a new school when a school transfer is necessary. 20 U.S.C. 6311(g)(1)(E). These ESSA provisions became effective December 10, 2016. ESSA also requires states to annually report achievement and graduation rates for children in foster care. 20 U.S.C. 6311(h)(1)(C)(ii) and (iii).

There were 4,358 children in North Carolina who entered foster care during the 2023-2024 state fiscal year (July 1 through June 30).[10] Three out of four of those children experienced at least two placements and more than one out of four experienced four or more placements during their first year in care.

Number of placements in first year	1 placement	2 placements	3 placements	4+ placements
Percentage of children in foster care	26%	27%	17%	28%

The above table shows a number of placements in the first row and the corresponding percentage of foster children that experienced those number of placements in their first year of care in the second row.

Almost half of the children entering foster care in the 2023-2024 year were school age.

Age	0-5 years	6-12 years	13-17 years
Percentage of children entering foster care	52%	29%	19%

This above table shows age ranges on the first row and the corresponding percentage of children entering foster care within those age ranges on the second row.

Each placement, whether it is an initial or subsequent placement, may result in a child's relocation to a home that is located in a different school district than the school district the child was enrolled in at the time of their removal and/or change in placement. A change in

[10] Statistical information discussed in this section was obtained from D. F. Duncan, K.A. Flair, C. J. Stewart, S. Guest, R.A. Rose, K.M.D. Malley, W. Reives, A. Francis, and G. Seminara (2025), "Management Assistance for Child Welfare, Work First, and Food & Nutrition Services in North Carolina" (v3.2) for "Child Welfare." Individual county and judicial district data are also available on this website. Last visited November 26, 2025.

placement may also result in a child being assigned to a different school located within the same school district.

A total of 15,992 children were in foster care at some point during the 2023-2024 fiscal year in North Carolina. Most children who enter foster care in North Carolina remain in care for more than one year. While a child is in foster care, they are at risk of experiencing a change in placement. Data about the length of a child's placement in foster care is collected at regular intervals with the longest data point being 1,080 days (essentially three years) in care. Statistics from the 2022-2023 state fiscal year capture the most recent long-term data. Children who were in foster care during that fiscal year stayed in foster care a median number of 543 days (or 1.5 years); more than one in three of those children remained in care for more than 720 days (almost 2 years), and more than one in five remained in care for more than 1,080 days. The majority of those children were school age.

Age	0-5 years	6-12 years	13-17 years	18+ years
Percent of children in foster care	36%	30%	24%	10%

This above table shows age ranges on the first row and the corresponding percentage of children in foster care within those age ranges on the second row.

B. Companion to the Fostering Connections Act.

Although ESSA was enacted in December 2015, the educational stability of children in foster care is an issue that a child welfare agency has been required to consider and address in a child's case plan since the Fostering Connections to Success and Increasing Adoption Act of 2008 (Fostering Connections). See Chapter 1.3.B.9 (discussing Fostering Connections).

Fostering Connections requires DSS, as part of the child's case plan, to make an assurance that the child's foster care placement takes into account the appropriateness of the child's current educational setting and the proximity of the placement to the school the child was enrolled in at the time of the placement. 42 U.S.C. 675(1)(G)(i). In addition, DSS must make an assurance that it coordinated with the appropriate local school district(s) to ensure the child remains in the school the child was enrolled in at the time of each placement. 42 U.S.C. 675(1)(G)(ii)(I). Note that ESSA refers to this school as the "school of origin." *See, e.g.*, 20 U.S.C. 6311(g)(1)(E)(i). If remaining in the child's school of origin is not in the child's best interests, DSS and the new school district must assure the child's immediate and appropriate enrollment in the new school, with all the child's educational records being provided to that new school. 42 U.S.C. 675(1)(G)(ii)(II). For a discussion of access to and disclosure of educational records, see Chapter 14.5.

Best interest factors are not identified by Fostering Connections, but the child's case plan must be developed jointly with the child's parent(s) or guardian(s). 45 C.F.R. 1356.21(g)(1). As a result, the decision addressing the child's school placement and educational stability should be discussed with the child's parent or guardian. The U.S. Department of Health and Human Services (U.S. DHHS) issued Program Instruction on Fostering Connections that

encourages child welfare agencies to develop a standard and deliberate process for determining best interests and gives examples of factors the agency may consider. Suggested factors include the child's preference, the child's safety, and the appropriateness of the educational programs in the current and new school and how those programs meet the child's needs. *See* ACYF-CB-PI-10-11, sec. E (July 9, 2010).

Transportation to and from the child's school of origin is not specifically addressed by Fostering Connections, but the Act added to "foster care maintenance payments" payments to cover the cost of reasonable travel for the child to remain in the school in which the child was enrolled at the time of placement. 42 U.S.C. 675(4). Additionally, the Program Instruction on Fostering Connections addresses payments for school transportation and states that the cost of transportation should not be a factor in determining best interests when making the school selection.

Fostering Connections places conditions on Title IV-E funding, which directly affects child welfare agencies. ESSA applies to state and local educational agencies and their applicable funding and thus complements Fostering Connections. ESSA also fills some of the gaps in Fostering Connections, such as transportation. These two laws together address school- and system-level issues to improve educational outcomes for school-age children who are placed in foster care.

C. School Selection

ESSA requires that North Carolina's state plan include steps DPI will take to collaborate with North Carolina Department of Health and Human Services (the state agency responsible for supervising the state's child welfare system) to ensure the educational stability of children in foster care. Similar to Fostering Connections, there must be assurances that a child in foster care remains in their "school of origin" (the school the child is enrolled in at the time of the foster care placement), unless a determination is made that it is not in that child's best interest to do so. 20 U.S.C. 6311(g)(1)(E)(i). When a determination is made that it is not in the best interests of the child to remain in their school of origin, the child must be immediately enrolled in the new school, even if the educational records are not available at the time of enrollment. 20 U.S.C. 6311(g)(1)(E)(ii). The new school contacts the former school to obtain the child's relevant educational records. 20 U.S.C. 6311(g)(1)(E)(iii). The educational stability provisions apply for the child's duration in foster care and not just to a specific placement or a school district's academic year. *See* 20 U.S.C. 6312(c)(5)(B).

Practice Note: School selection decisions are made at each placement change, starting with the child's initial removal. A decision as to whether it is in the child's best interests to remain in the school of origin may differ based on new circumstances created by the subsequent placement change. It is also possible that the child's school of origin will change during the time the child is in foster care. For example, the child may transfer schools at the initial placement, making the new school the child's school of origin when a subsequent placement change is made.

Best interest factors regarding school selection include

- consideration of the appropriateness of the child's current educational setting and
- the proximity of the foster care placement to the child's school of origin.

20 U.S.C. 6311(g)(1)(E)(i).

Best interest factors are also discussed in the 2024 Non-Regulatory Guidance: Ensuring Educational Stability for Children in Foster Care that was jointly issued by the U.S. DOE and U.S. DHHS. Additional suggested best interests factors include

- the child's, the parent's, and if applicable the educational decision-maker's preferences;
- the child's attachment to the school of origin or persons in that school;
- the student's involvement in extracurricular activities in their school of origin;
- the placement of the child's siblings;
- how the school's climate impacts the child (including the child's safety);
- the availability and quality of the services that will meet the child's educational and socio-emotional needs;
- the child's history of school transfers and the impact of those transfers on the child;
- the length of the commute and its impact on the child;
- information about the child's immediate and long-term education plan;
- the child welfare permanency goal;
- whether the child is a student with a disability receiving services under the Individuals with Disabilities Education Act (IDEA) or Section 504 (see Section 13.8, below); and
- whether the student is an English Leaner who is receiving language services and whether those services are available in a school other than the school of origin.

ESSA does not specify the process for how the best interest determination is made or how to resolve a dispute. When read with the Fostering Connections Act, the decision is part of the child's case plan, which is developed by DSS in consultation with the parents and others. The jointly issued guidance from the U.S. DOE and U.S. DHHS addresses who should be involved in the best interests determination process and encourages each state's educational agency and child welfare agency to establish dispute resolution procedures. According to North Carolina Department of Health and Human Services (NCDHHS) Division of Social Services child welfare policy, the decision should be made in a Child and Family Team (CFT) meeting and Best Interest Determination (BID) meeting, which are both part of the child welfare case. *See* DIV. OF SOC. SERVS., N.C. DEP'T OF HEALTH & HUM. SERVS., CHILD WELFARE MANUAL "Permanency Planning," section. Joint guidance issued by DPI and NCDHHS also addresses a dispute resolution process, which states DSS makes the final decision. However, a parent, child, or custodian may request an informal review by the DSS director in consultation with the DSS ESSA point of contact. The child remains in the school of origin with transportation provided while the dispute is being resolved.

Practice Note: Although not addressed in the federal statute or state policy, a parent or child who disagrees with the DSS decision regarding the child's best interests may raise that issue before the court hearing the abuse, neglect, or dependency action. The Juvenile Code requires the court to consider the child's best interests, including whether the child should remain in their community of residence. G.S. 7B-900; 7B-505(d); 7B-903(a1). The court is also

authorized to delegate decision-making, including educational decisions, for a child who is in DSS custody to a parent, foster parent, or other individual. G.S. 7B-903.1(a).

D. Transportation

ESSA requires that local school districts submit a plan to, and receive approval of the plan from, the state education agency (in North Carolina, DPI). 20 U.S.C 6312(a). These local plans must provide assurances that the school district will develop and implement written procedures that govern how transportation will be arranged for, provided, and funded for children in foster care who remain in their school of origin. 20 U.S.C. 6312(c)(5)(B). The plan must ensure that children in foster care needing transportation

- will promptly receive transportation in a cost-effective manner and in accordance with the provisions regulating foster care maintenance payments and
- that when additional costs arise, the school will provide transportation if either the local DSS agrees to reimburse the school, the local school agrees to pay for the cost, or the school and DSS agree to share the costs.

20 U.S.C. 6312(c)(5)(B).

If an agreement cannot be reached, ESSA does not designate a mandated dispute resolution process, but NCDHHS Division of Social Services child welfare policy does. ESSA does not allow for a child's delay in "promptly" receiving transportation to their school of origin because of a dispute over transportation between the school district(s) and DSS.

Resource: For North Carolina guidance on the responsibility for and payment of transportation requirements under ESSA, see "Every Student Succeeds Act: Ensuring Educational Stability for Children and Youth in Foster Care in North Carolina" joint guidance issued by the North Carolina Department of Public Instruction and Division of Social Services.

E. Designated Points of Contact

ESSA requires collaboration between the state education agency (DPI) and child welfare agencies as well as between local schools and child welfare agencies. As such, DPI must designate an employee who will serve as a point of contact for child welfare agencies and who will oversee the implementation of DPI's responsibilities under ESSA. The point of contact must be someone other than the State's homeless student coordinator designated under the McKinney-Vento Homeless Assistance Act. 20 U.S.C. 6311(g)(1)(E)(iv).

A county DSS may designate an employee who will serve as a point of contact to local school districts. If DSS gives written notice to the school district of its (DSS) local point of contact, the school district must also designate a point of contact. 20 U.S.C. 6312(c)(5)(A). The joint guidance from the U.S. DOE and U.S. DHHS discusses the role of the local points of contact. Some of the suggested responsibilities include serving as primary contacts for the respective agencies, ensuring compliance with ESSA provisions, documenting best interest determinations, developing transportation procedures including cost agreements, managing

disputes, facilitating the transfer of needed records, and providing training to staff on ESSA provisions and the educational needs of children in foster care.

Resources:
Information about ESSA is available through SERVE at the University of North Carolina at Greensboro.
For a discussion about ESSA and North Carolina's education and child welfare laws, see Sara DePasquale, *School Stability for Children in Foster Care,* UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (Sept. 21, 2016).

For a variety of resources and information discussing laws, regulations, guidance, strategies, and data regarding educational stability for children in foster care, see "Education Stability" on the Legal Center for Foster Care & Education website.

For additional federal guidance, see U.S. DEP'T OF HEALTH AND HUM. SERVS. ADMIN. ON CHILD., YOUTH AND FAM., Interagency Collaboration between Child Welfare and Educational Agencies to Support Academic Success of Children and Youth in Foster Care, ACYF-CB-IM-23-09 (Nov. 15, 2023).

NCDHHS DSS Forms:

- DSS-5245, Child Education Status and Instructions
- DSS-5137, NC Best Interest Determination Form
- DSS-5135, Foster Child Immediate Enrollment Form
- DSS-5137a, Best Interest Determination Meeting Override
- DSS-5133, Foster Child Notification of Placement (Change) Form and Instructions

13.8 The Individuals with Disabilities Education Act

A. Introduction

The Individuals with Disabilities Education Act (IDEA), Pub. L. No. 108-446, 118 Stat. 2647, was enacted in 1975 and was first known as the Education for All Handicapped Children Act (EHA), Pub. L. No. 94-142, 89 Stat. 773. IDEA is codified at 20 U.S.C. 1400 *et seq*. with accompanying regulations at 34 C.F.R. Parts 300 and 303. In addition to the federal law, North Carolina laws that comply with IDEA are codified at G.S. 115C-106.1 *et seq*.

IDEA is both an anti-discrimination and entitlement law. Its purpose is to protect the rights of children with disabilities and their parents and to improve educational results for such children. Through IDEA, children with disabilities must have access to a free appropriate public education that emphasizes special education and related services that are designed to meet such children's unique needs and prepare them for further education, employment, and independent living. IDEA also requires states to have a statewide, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families. 20 U.S.C. 1400.

The purposes, eligibility criteria, services, and procedural requirements under IDEA vary depending on the child's age. The differences are set forth in two separate parts of the law:

- Part B: children with disabilities, ages 3 through 21, and
- Part C: infants and toddlers with disabilities, under 3 years of age.

The role of a parent under IDEA is important. Under both parts, parents are involved in the process of determining their child's eligibility for services, the development of individualized educational or family service plans, and the provision of services to their children. Parents may utilize procedural safeguards that are available to them to protect their rights and the rights of their children.

IDEA allows for a parent to continue to assert their rights under IDEA even when the child is placed in DSS custody through a court order. Additionally, IDEA prohibits a DSS employee from acting as the child's parent under IDEA, even though the DSS social worker is often a decision-maker for other school related issues involving a child who is placed in DSS custody. *See* 34 C.F.R. 300.30(a)(3) and 303.27(a)(3), (b)(2). *See also* G.S. 7B-903.1(a) ("[e]xcept as prohibited by federal law" language when authorizing DSS to make decisions for the child). Because the provisions of IDEA regarding the "parent" decision-maker differ from what is traditionally thought of when a court order in an abuse, neglect, or dependency action places the child in the custody of DSS or a third party, familiarity with the IDEA provisions regarding "parent" and "surrogate parent" are important. When understanding these provisions, DSS, the child's guardian ad litem, or the parent may raise the issue with the court hearing the abuse, neglect, or dependency action so that the court can enter an order designating who is the IDEA parent or when necessary, appointing a surrogate parent. See section 13.8.D, below (discussing parent and surrogate parent).

IDEA is a complex and comprehensive education law that consists of four parts (Parts A−D). The discussion in this Manual is limited to a general overview of selected portions of IDEA with an emphasis on those provisions that relate to children who have been substantiated for abuse, neglect, or dependency and/or have been placed in the custody of DSS as a result. The parties, attorneys, and the court involved in abuse, neglect, or dependency cases should be familiar with the IDEA provisions that specifically apply to children who are "wards of the state." *See*, *e.g.*, 20 U.S.C. 1401(36) and 1415(b)(2)(A)(i).

In addition, parties, attorneys, and the courts should be aware of the rights and protections under IDEA as thirty to fifty percent of children in foster care are receiving special education services compared to fourteen percent of children who are not in foster care.[11] Research studies also suggest that children in foster care who receive special education services are placed in more restrictive educational settings and have poorer quality educational plans, and some studies show children in foster care require more intensive services.[12]

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[11] LEGAL CENTER FOR FOSTER CARE AND EDUCATION, "Fast Facts: Foster Care & Education Data at a Glance" (Jan. 2022).

[12] LEGAL CENTER FOR FOSTER CARE AND EDUCATION, "Exploring Educational Outcomes: What Research Tells Us" (Jan. 2022).

Resources:
The N.C. Department of Public Instruction maintains on its website a section for "Exceptional Children," which contains resources, policies and other information about the implementation of IDEA in North Carolina. For the state policy, see Policies Governing Services for Children with Disabilities (Amended March 2021) under the "Policies and Procedures" tab. The policy is cited as NC 1500−1508.

For additional information about IDEA and children in foster care, see the "Special Education" section of the Legal Center for Foster Care & Education website by the ABA Center on Children and the Law.

B. Part B of IDEA: Children Ages 3–21

A child is eligible for the protections and services under IDEA if they are a "child with a disability" as that term is defined. Services and protections consist of

- comprehensive evaluations in all suspected areas of disability;
- the development and implementation of an individual education program (IEP), which provides special education and related services to a child with a disability, so that the child receives a "free appropriate public education" (FAPE) that meets their unique needs in the "least restrictive environment" (LRE); and
- procedural safeguards for parents and their children.

1. Qualifying disability. The definition of "a child with a disability" consists of two prongs. The child

- has at least one of the enumerated categories of disability and
- because of that disability requires special education and related services.

20 U.S.C. 1401(3); 34 C.F.R. 300.8(a); *see* G.S. 115C-106.3(1).

(a) Categories of disability. IDEA specifies fourteen categories of disability:

- Autism,
- Deaf-blindness,
- Deafness,
- Development delay,
- Emotional disturbance (also referred to as serious emotional disturbance),
- Hearing impairment,
- Intellectual disability (formerly referred to as mental retardation),
- Multiple disabilities,
- Orthopedic impairment,
- Other health impairment,
- Specific learning disability,
- Speech or language impairment,
- Traumatic brain injury, and
- Visual impairment including blindness.

20 U.S.C. 1401(3); 34 C.F.R. 300.8; *see* G.S. 115C-106.3(1), (2).

Each disabling condition has its own set of criteria under IDEA that can be found at 34 C.F.R. 300.8(b) and (c). *See also* 20 U.S.C. 1401(30) (definition of "specific learning disability"). States have discretion to determine the age range for children who qualify as having a developmental delay. 20 U.S.C. 1401(3)(B); 34 C.F.R. 300.111(b). In North Carolina, a developmental delay applies to children ages 3 through 7. G.S. 115C-106.3(2).

(b) Need for special education and related services. The existence of a condition (e.g., a mental health diagnosis or a clubfoot) does not in and of itself automatically qualify the child as a child with a disability under IDEA. IDEA requires that the child also need special education and related services because of the disabling condition. The need for special education, not the diagnosis (if there is one), is determinative. If a child only needs a related service without special education services, the child does not qualify as a student with a disability under IDEA. 34 C.F.R. 300.8(a)(2)(i). However, if the related service for that particular child is considered special education for that child (e.g., a child with a speech impairment requires speech therapy as their specialized instruction), then that child qualifies as a child with a disability under IDEA. 34 C.F.R. 300.8(a)(2)(ii).

Special education. IDEA defines special education as specially designed instruction that meets the unique needs of the child with a disability. Specially designed instruction involves adapting the content, methodology, or delivery of instruction and includes adaptive physical education. Special education may be provided in the classroom, home, hospital, institution, or other setting. It is provided at no cost to parents, although parents may be charged incidental fees that are normally charged to nondisabled students or their parents as part of the regular education program. 20 U.S.C. 1401(29); 34 C.F.R. 300.39; *see* G.S. 115C-106.3(20).

Related service. A related service is a needed supportive service that assists a child with a disability in benefitting from special education. Related services include transportation; speech-language pathology and audiology services; interpreting services for children with hearing impairments; psychological, social work, and counseling services; physical and occupational therapy; recreation services; orientation and mobility services; and school nurse and certain diagnostic medical services that assist a child with a disability to benefit from special education. 20 U.S.C. 1401(26); 34 C.F.R. 300.34.

Parent counseling and training is also a related service. It is given to parents to assist them in understanding the special needs of their children by providing information about child development and helping parents acquire necessary skills to support the implementation of their child's individual education plan (IEP). 34 C.F.R. 300.34(c)(8).

Practice Note: Services are determined on an individualized basis due to the child's unique needs. A child who is in foster care, which is a temporary placement, may require parent training for the foster parent who is currently caring for the child as well as for the parent, relative, guardian, or custodian with whom the child will be placed as their permanent plan.

(c) The child's evaluation and disability determination. The initial determination as to whether a child is an eligible child with a disability is based on a full and individual

evaluation. 20 U.S.C. 1414(a)(1); *see* 34 C.F.R. 300.301(a). A child must also be reevaluated at least once every three years unless the parent and school agree an evaluation is unnecessary, and a parent or teacher may request that a child be reevaluated sooner than every three years. 20 U.S.C. 1414(a)(2); 34 C.F.R. 300.303. A child may not be determined to no longer qualify as a child with a disability without a reevaluation. 20 U.S.C. 1414(c)(5)(A); 34 C.F.R. 300.305(e).

The evaluation cannot be based on one single assessment but instead must use a variety of assessment tools, including information provided by the parent, a classroom observation, and observations by teachers and related service providers. 20 U.S.C. 1414(b)(2), (c)(1)(A); 34 C.F.R. 300.304(b), 300.305(a), and 300.310(a). When a child is out of school or not school age, there must be an observation of the child in an environment that is appropriate for children that age. 34 C.F.R. 300.310(c). The evaluation must assess the child in all areas of suspected disability and include if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. 20 U.S.C. 1414(b)(3)(B); 34 C.F.R. 300.304(c)(4). The evaluation must gather relevant functional, developmental, and academic information to assist in the determination of (1) whether the child is a child with a disability and (2) if so, the components of the child's individual education program (IEP). 20 U.S.C. 1414(b)(2)(A); 34 C.F.R. 300.304(b).

If a parent disagrees with a school's evaluation, the parent has a right to obtain an independent educational evaluation at public expense. 20 U.S.C. 1415(b)(1); 34 C.F.R. 300.502. A parent may also provide to the school or public agency an evaluation they obtained for their child, and that evaluation must be considered when determining whether the child qualifies as a child with a disability. 34 C.F.R. 300.502(c).

Practice Note: As part of an abuse, neglect, or dependency case, a child may have received an evaluation that contains important information about their functional, developmental, or academic needs in addition to their social or emotional status. The information in the evaluation may be helpful in the determination of whether the child qualifies as a child with a disability under IDEA and if so, what services should be provided. Although confidentiality provisions apply to records obtained by DSS in an abuse, neglect, or dependency case, it is possible that the evaluation (or a redacted version) may be shared. Redisclosure by a parent who has obtained a copy pursuant to G.S. 7B-700 will be based on various factors that are specific to the case, including local court rules and any court orders. A clear avenue for sharing the evaluation (or a redacted version) is for DSS, on its own initiative or upon request by the school, parent, or other individual (e.g., foster parent), to provide a copy directly to the school pursuant to G.S. 7B-3100. Additionally, a court order may be requested by a party in the abuse, neglect, or dependency action that specifically authorizes the disclosure of the evaluation (or redacted version) to the school or public agency for the purpose of determining whether the child qualifies for special education services as a child with a disability, and if so, what services are needed.

The school-initiated evaluation requires informed parental consent and must be completed within sixty days of the school's receipt of that consent. Exceptions to that time limit are when (1) a parent fails to make the child available for the evaluation or (2) a child has

transferred schools during this time period and the parent and new school agree to a different specific time period for the evaluation to be completed. 20 U.S.C. 1414(a)(1)(C)(ii); 34 C.F.R. 300.301(c), (d).

After the evaluation has been completed, the determination of whether the child is or continues to be a child with a disability is made by the "individual education program (IEP) Team," which includes the parent. 20 U.S.C. 1414(b)(4). See subsection 3, below, for a discussion of the IEP Team.

Practice Note: A child who is diagnosed with a disability but does not qualify for special education services under IDEA may require reasonable accommodations and modifications under other federal anti-discrimination laws, such as Title II of the Americans with Disabilities Act or Section 504 of the Rehabilitation Act of 1973. See section 13.5, above, discussing the ADA.

Resource: For more information about Section 504 of the Rehabilitation Act, see "Section 504" on the U.S. Department of Education website.

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2. Services for children 3 to 21 years of age. Children with disabilities must receive a "free appropriate public education" in the "least restrictive environment" through the provision of special education and related services as designated in their "individual education program." A free appropriate public education must be available to all qualifying children with disabilities, including those who have been suspended or expelled. 20 U.S.C. 1412(a)(1)(A); 34 C.F.R. 300.101(a); G.S. 115C-107.1(a)(3). In addition, a school cannot require that a child with a disability be prescribed medication to attend school, receive an evaluation to determine if the child has a disability, or receive services under IDEA. 20 U.S.C. 1412(a)(25); 34 C.F.R. 300.174. A child's eligibility for special education and related services ends upon the first of (1) a child's graduation from high school with a regular diploma or (2) the end of the school year in which the student turns 22. 20 U.S.C. 1414(c)(5)(B)(i); G.S. 115C-107.1(a)(1) and (2).

(a) Free appropriate public education (FAPE). A FAPE involves the provision of special education and related services that are set forth in the child's "individual educational program" (IEP). There are four components:

- **Free -** without charge to the parents. For children who receive Medicaid or other public benefits, a school may use the child's Medicaid or other public benefit to provide or pay for covered services under IDEA if the parent gives written consent to do so and receives a procedural safeguards notice of rights addressing the school's use of the benefit. 34 C.F.R. 300.154(d)(1), (d)(2)(iv) and (v). Any co-pay or deductible must be paid by the school. *See* 34 C.F.R. 300.154(d)(2)(ii). However, a school may not condition a child's receipt of a FAPE on a parent enrolling their child in a public benefit program. 34 C.F.R. 300.154(d)(2)(i). A school may not charge Medicaid or other public benefits if the school's use would decrease the child's available lifetime coverage, result in the family paying for services that would otherwise be covered and are required for the child when the child is not in school, increase premiums or discontinue benefits, or risk loss of eligibility for home and community-based waiver programs because of aggregated health-related expenditures. 34 C.F.R. 300.154(d)(2)(iii).

- **Appropriate -** receives an educational benefit. The educational services must meet the standards of the state board. 20 U.S.C. 1401(9)(B); G.S. 115C-106.3(4)b. The services should be reasonably calculated to enable the child to receive an educational benefit but do not require that the child receive the maximum or optimal benefit. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176 (1982). The core of IDEA is a focus on the particular child, which contemplates that child's individual levels of achievement, disability, and potential for growth. *Endrew F. ex rel. Joseph F. v. Douglas County Sch. Dist. RE-1*, 580 U.S. 386 (2017).

  For children who are integrated in the regular education classroom, an educational benefit includes services that are reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester County*, 458 U.S. 176.

  For a child who is not fully integrated in the regular classroom and is not able to achieve grade level, an educational benefit is progress appropriate in the light of the child's circumstances. The progress must be more than de minimis and appropriately ambitious to meet challenging objectives that are based on the child's unique needs. *Endrew F. ex rel. Joseph F. v. Douglas County Sch. Dist. RE-1*, 580 U.S. 386.

- **Public -** at public expense and under public supervision and direction. IDEA applies to public schools including public charter schools. 20 U.S.C 1413(a)(5); 34 C.F.R. 300.209.

- **Education –** applies to preschool, elementary, and secondary school. Education includes academic and nonacademic programs to address a child's academic and functional needs. Children with disabilities must have available to them a variety of educational programs (e.g., art, music, industrial arts, and vocational education) that are available to children without disabilities and must have an equal opportunity to participate in nonacademic and extracurricular activities (e.g., athletics and special interest clubs). 34 C.F.R. 300.107 and 300.110.

20 U.S.C. 1401(9); 34 C.F.R. 300.17; G.S. 115C-106.3(4).

(b) Least restrictive environment (LRE). The LRE requires that a child with a disability is educated, to the maximum extent appropriate, with children who are not disabled. 20 U.S.C. 1412(a)(5)(A); 34 C.F.R. 300.114(a)(2)(i); G.S. 115C-106.3(10). The LRE addresses the setting or placement where a child with a disability receives educational services and consists of a continuum of placements, the least restrictive of which is the regular education classroom. The continuum of LRE placements include regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. 34 C.F.R. 300.115. When an alternative setting outside of the school is required, the LRE is the setting that is as close as possible to the child's home. 34 C.F.R. 300.116(b)(3).

A child with a disability should only be removed from the regular education environment when the nature or severity of the child's disability is such that their education cannot be satisfactorily achieved in that setting with the use of supplementary aids and services. 20 U.S.C. 1412(a)(5)(A); 34 C.F.R. 300.114(a)(2)(ii); G.S. 115C-106.3(10). *See* G.S. 115C-

107.2(b)(2). Although a child with a disability may not be able to remain in the regular education classroom for instruction, they may be able to participate with nondisabled peers in nonacademic settings and/or extracurricular activities such as meals and recess. 34 C.F.R. 300.117.

(c) Individual Education Program (IEP). The IEP is a written document for the child that is developed, reviewed, and revised according to the requirements set forth in 20 U.S.C. 1414(d); 20 U.S.C. 1401(14); 34 C.F.R. 300.22 and 300.320; and G.S. 115C-106.3(8). An IEP must be in place at the beginning of every school year and be reviewed at least annually. 20 U.S.C. 1414(d)(2)(A), (d)(4)(A)(i); 34 C.F.R. 300.323(a) and 300.324(b)(1)(i). Revisions may be needed as result of a lack of expected progress toward the annual goals, results of a reevaluation, information to or from the parent regarding the need for additional data about the child's needs, or the child's anticipated needs. 34 C.F.R. 300.324(b)(1)(ii).

The IEP details the student's educational program and includes the special education and related services and modifications that will be provided to the student. The IEP must consist of "an education program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F. ex rel. Joseph F. v. Douglas County Sch. Dist. RE-1*, 580 U.S. 386, 402 (2017).

IDEA requires that the IEP contain specific criteria, which are established in 20 U.S.C. 1414(d). Some of the required IEP content involve the identification of the student's problem areas, current level of academic and functional performance, annual academic and functional goals, and a description of how the child's progress toward meeting those annual goals will be periodically measured and reported (e.g., with quarterly report cards). The IEP must specify the LRE and when applicable, explain why the child will not participate with nondisabled peers in the regular education setting. *See* 20 U.S.C. 1414(d)(1)(A)(i); 34 C.F.R. 300.320(a)(5). When a child's behavior impedes their learning (or the learning of others), the IEP should include a positive behavior intervention plan and supports to address that behavior. 20 U.S.C. 1414(d)(3)(B)(i), (C); 34 C.F.R. 300.324(a)(2)(i) and (a)(3)(i). IEPs that are in effect when the child turns 16 years old and are developed or revised after the child is 16 years old must include transition services and postsecondary goals based upon age-appropriate assessments related to training, education, employment, and where appropriate, independent living skills. 20 U.S.C. 1414(d)(1)(A)(i)(VIII); 34 C.F.R. 300.320(b).

(d) Disciplinary action resulting in school removal. A child with a disability is subject to the school's student code of conduct and may be subject to disciplinary action for a violation of that code of conduct. *See* 20 U.S.C. 1415(k)(1); 34 C.F.R. 300.530(b), (c). When the disciplinary action for a child with a disability results in a "change in placement," additional procedures and protections apply to that child. The purpose of the additional procedures is to ensure that students with disabilities are not disciplined because of their disability. North Carolina disciplinary policies and procedures for students with disabilities must be consistent with federal law. G.S. 115C-107.7(a).

A change of placement results from a child's removal from school for more than

- ten consecutive days or
- ten cumulative days during the same school year when the series of shorter-term removals constitute a pattern, which is determined by considering whether the behaviors resulting in the removals are substantially similar and the proximity between and length of each removal. The school or public agency determines whether the cumulative removals are a change in placement.

34 C.F.R. 300.536.

When there is a change of placement, the parent and relevant members of the IEP Team must hold a "manifestation determination" meeting to determine

- was the conduct in question caused by, or did it have a direct and substantial relationship to the child's disability, or
- was the conduct in question the direct result of the school's failure to implement the IEP.

20 U.S.C. 1415(k)(1)(E)(i); 34 C.F.R. 300.530(e)(1).

If the answer to either question is yes, a manifestation exists, and the student cannot be disciplined. The student must be returned to the placement they were removed from unless the parent and school agree to a different placement. The student must also have a functional behavior assessment, and a behavior intervention plan (BIP) must be implemented or modified as necessary to address the child's behavior. 20 U.S.C. 1415(k)(1)(E)(ii), (F); 34 C.F.R. 300.530(e)(2), (f).

If the answer to both questions is no, there is no manifestation, and the student may be treated as any other student regarding disciplinary action. 20 U.S.C. 1415(k)(1)(C); 34 C.F.R. 300.530(c). A parent may appeal a manifestation determination by requesting a due process hearing. 20 U.S.C. 1415(k)(3); 34 C.F.R. 300.532(a).

Children who are suspended or expelled are entitled to a FAPE. 20 U.S.C. 1412(a)(1)(A); 34 C.F.R. 300.101(a); G.S. 115C-107.1(a)(3). As a result, educational and related services are required to be provided to enable the student to participate in the general curriculum (albeit in another setting) and to make progress on their IEP goals. 20 U.S.C. 1415(k)(1)(D)(i); 34 C.F.R. 300.530(d)(1)(i). The child should also receive a functional behavioral assessment and behavioral intervention services and modifications to address the behaviors in an effort to keep them from recurring. 20 U.S.C. 1415(k)(1)(D)(ii); 34 C.F.R. 300.530(d)(1)(ii). The IEP Team determines what services are appropriate. 34 C.F.R. 300.530(d)(5). Under North Carolina law, a student with a disability may not be placed on homebound instruction as a result of disciplinary action unless the IEP Team determines the homebound instruction is the least restrictive alternative environment for the student. If it is determined to be the least restrictive alternative environment, the homebound instruction must be evaluated by designees of the IEP Team on a monthly basis. G.S. 115C-107.7(b).

Regardless of whether there is a manifestation, a school may place a child in an "interim alternative educational setting" (IAES) for a maximum of forty-five school days when

- certain criteria involving weapons, drugs, or the infliction of serious bodily injury on another person at school or a school function exist or
- the school requests and proves at a due process hearing that the student remaining in their current placement is substantially likely to result in injury to self or others.

20 U.S.C. 1415(k)(1)(G), (k)(3)(A) and (B)(ii)(II), (k)(7); 34 C.F.R. 300.530(g), (i).

The IEP Team determines the IAES. 20 U.S.C. 1415(k)(2); 34 C.F.R. 300.531. If the parent disagrees with the IAES, they have a right to an expedited due process hearing. 20 U.S.C. 1415(k)(4)(B); 34 C.F.R. 300.532(a), (c).

All of these protections apply to a child who has not been determined to be eligible for special education and related services when the school had knowledge that the child was a child with a disability before the child engaged in the behavior that resulted in the child's removal. 20 U.S.C. 1415(k)(5)(A); 34 C.F.R. 300.534(a). Unless the child was determined to not be a "child with a disability" or the parent refused special education and related services for their child, a school is deemed to have knowledge when

- the parent wrote to the teacher or supervisory or administrative personnel about concerns that the child needs special education and related services;
- the parent requested an evaluation of the child; or
- the child's teacher or other school personnel expressed specific concerns to supervisory personnel about a pattern of behavior by the child.

20 U.S.C. 1415(k)(5)(B) and (C); 34 C.F.R. 300.534(b), (c).

North Carolina law also addresses "basis of knowledge." The school is deemed to have a basis of knowledge if prior to the behavior that precipitated the disciplinary action, the child's behavior and performance "clearly and convincingly" establishes the need for special education. Prior disciplinary infractions alone do not constitute clear and convincing evidence. G.S. 115C-107.7(c).

Children who are suspended or expelled may be referred for an evaluation to determine eligibility for services. 20 U.S.C. 1415(k)(5)(D)(ii); 34 C.F.R. 300.534(d)(2).

(e) School transfer. When a child with a disability transfers school districts or enrolls in a new school within the same school year, the new school must provide the child with a FAPE. The new school, after consulting with the parent, must provide services that are comparable to those described in the IEP that had been in effect at the previous school until

- the new school holds an IEP Team meeting and either adopts the IEP from the previous school or develops a new IEP in those cases where the school transfer is within North Carolina or
- the new school conducts an evaluation if it determines one is necessary and develops a new IEP when the transfer is from outside of North Carolina.

20 U.S.C. 1414(d)(2)(C)(i); 34 C.F.R. 300.323(e), (f).

Practice Note: The Every Student Succeeds Act and Fostering Connections Act (discussed in section 13.7, above) apply to children in foster care who, as a result of an initial removal or a change in placement, may now be living in a geographic area zoned to a different school or school district. Under those federal laws, a child remaining in the school in which they were enrolled at the time of an initial or changed placement is preferred. A school transfer should only occur after there has been a determination by the DSS social worker, parent, school district representative, child (if appropriate), and others that it is in the child's best interests to transfer schools.

3. Decision-making by the IEP Team. IDEA utilizes a team approach to decision-making. The team consists of a group of professionals and the child's parents and is referred to as the IEP Team. The IEP Team is responsible for

- reviewing the evaluations and determining whether a child is a child with a disability and if so, under what disabling condition (34 C.F.R. 300.306(a));
- developing, reviewing, and revising the child's IEP (34 C.F.R. 300.23 and 300.324); and
- conducting manifestation determinations and functional behavioral assessments, developing or modifying behavior intervention plans, and determining an interim alternative educational setting when there has been a change in placement resulting from disciplinary action (34 C.F.R. 300.530(e), (f) and 300.531).

20 U.S.C. 1414(b)(4)(A), (d)(3) and (4); 1415(k)(1)(E) and (F), (k)(2).

The IEP Team is composed of

- The child's parents;
- at least one regular education teacher for the child (if the child is or may be in the regular education setting);
- at least one special education teacher or provider for the child;
- a school district representative who knows about the general curriculum and the availability of the school's resources and is qualified to provide or supervise special education services;
- an individual who can interpret the instructional implications of the evaluation results (this may be someone who is a member of the team under different criteria);
- persons or agencies who have knowledge or special expertise about the child, including related services personnel, that are invited by the parent or school district; and
- the child, when appropriate.

20 U.S.C. 1414(d)(1)(B); 34 C.F.R. 300.321.

Practice Note: Children in DSS custody have a team of professionals and support persons, such as the court-appointed guardian ad litem, current and former placement providers, the DSS social worker, other service providers, and relatives. A parent or the school district may determine that any of these individuals have knowledge or special expertise about the child and invite them to be members of the IEP Team. *See* 34 C.F.R. 300.321(c). Their participation

as an IEP Team member may be especially helpful in situations where the child has experienced a number of placement changes or the need to transfer to a new school.

An IEP Team member may participate in the meeting by alternative means, such as video or conference calls. 20 U.S.C. 1414(f); 34 C.F.R. 300.322(c), 300.328, and 300.501(c)(3).

Parents are equal members of the IEP Team. IDEA requires that parents must be afforded an opportunity to inspect and review their child's educational records and to participate in meetings regarding the identification, evaluation, educational placement, and provision of a FAPE to their child. 34 C.F.R. 300.501 and 300.613; G.S. 115C-109.3(a). The school must take steps to ensure that one or both parents are present at each IEP Team meeting or afforded the opportunity to participate, and meetings should be scheduled at a mutually agreeable time and place. 34 C.F.R. 300.322(a). When a school is unable to convince a parent to attend, the IEP Team meeting may proceed without the parent, but the school must keep a record (e.g., notes of telephone calls made or attempted or visits to the home or workplace, copies of written correspondence) of its attempts to schedule a mutually agreed on time and place for the meeting. 34 C.F.R. 300.322(d) and 300.501(c)(4).

4. Procedural safeguards. There are various procedural protections under IDEA.

(a) Prior written notice. The school must provide parents with prior written notice of an IEP Team meeting. 34 C.F.R. 300.322(a)(1). Prior written notice must also be provided to a parent within a reasonable time before a school proposes or refuses to initiate or change a child's identification as a child with a disability, an evaluation, the educational placement, or the provision of a FAPE to the child. 20 U.S.C. 1415(b)(3), (c)(1); 34 C.F.R. 300.503; G.S. 115C-109.5. Parents of a child with a disability must also be given a copy of the procedural safeguards notice once per school year and at other times designated in 34 C.F.R. 300.504(a) and G.S. 115C-109.1.

(b) Mediation. A school must establish a mediation process to resolve disputes involving any matter under IDEA, even before a complaint or due process hearing is requested. 20 U.S.C. 1415(e)(1); 34 C.F.R. 300.506(a); *see* G.S. 115C-109.4(a). Participation in mediation is voluntary and cannot be used to delay or deny a complaint or due process hearing. 20 U.S.C. 1415(e)(2)(A); 34 C.F.R. 300.506(b); G.S. 115-109.4(b). The mediation must be held at a mutually convenient time and location and be conducted by a qualified and impartial mediator who is not an employee of the North Carolina Department of Public Instruction or the school district that is involved in the education or care of the child. 20 U.S.C. 1415(e)(2)(A)(iii) and (e)(2)(E); 34 C.F.R. 300.506(b)(1)(iii), (b)(5), (c); G.S. 115C-109.4(b)(3), (f).

(c) Due process hearings. Parents may appeal an IEP Team decision regarding eligibility, evaluation, services (FAPE), location of the program (LRE), and manifestation determination. 20 U.S.C. 1412(a)(6)(A), 1415(f) and (k)(3); 34 C.F.R. 300.507(a) and 300.536(b)(2); G.S. 115C-109.6(a). The appeal involves an administrative due process hearing before an administrative hearing officer. The request for a due process hearing is filed with the Office of Administrative Hearings and a copy must be provided to the designated contact at the North Carolina Department of Public Instruction (DPI) and the superintendent or director of special education for the school district or public agency.

G.S. 115C-109.6(a); *see* 34 C.F.R. 300.508(a)(2). Absent a statutory exception, the request for a due process hearing must be filed within one year of when the parent knew or should have known of the alleged action that is the basis of the hearing request. G.S. 115C-109.6(b), (c). Specific procedures, including the notice, dispute resolution, and the hearing are set forth in 34 C.F.R. 300.508 through 300.512 and G.S. 115C-109.6 and 115C-109.7. The administrative hearing decision is final unless an aggrieved party commences a civil action in state or federal court within the prescribed time period. 20 U.S.C. 1415(i)(1), (2) and (3)(A); 34 C.F.R. 300.516; G.S. 115C-109.6(f), (h2).

During the appeal process, unless the child is in an interim alternative educational setting under the disciplinary provisions of IDEA, the child remains in their then-current educational placement (commonly referred to as "stay put") unless the parties agree in writing to a different educational placement. 20 U.S.C. 1415(k)(4)(A), (j); 34 C.F.R. 300.518; G.S. 115C-109.6(h3).

(d) Complaint filed with the N.C. Department of Public Instruction (DPI). A parent, individual, or organization may file a complaint with DPI alleging that a school district, a public agency, or DPI has violated the provisions of IDEA. *See* 34 C.F.R. 300.151 and 300.152. Complaint procedures are set forth in 34 C.F.R. 300.152 and involve an investigation of the allegation by DPI. The complaint must be filed within one year of when the alleged violation occurred. 34 C.F.R. 300.153(c). Possible remedies for a school district's failure to provide appropriate services include a corrective action plan that would address the individual child's needs (e.g., compensatory services) and the future provision of appropriate services for all children with disabilities. 34 C.F.R. 300.151(b).

Practice Note: DSS, a child's guardian ad litem, a parent, and others have standing to file a complaint alleging violations of IDEA related to a specific child or resulting from an observed systemic pattern of noncompliance by a school, school district, or public agency.

Resource: The N.C. Department of Public Instruction has a "Dispute Resolution" section under "Exceptional Children" on its website.

C. Part C of IDEA: Children under 3 Years of Age

Part C of IDEA requires states to provide a coordinated multidisciplinary system of early intervention services for infants and toddlers with disabilities and their families to address the need to (1) minimize children's potential for developmental delay and need for special education and related services when these children become school age, (2) maximize the potential for individuals with disabilities to live independently, (3) enhance the capacity of families to meet the infants' and toddlers' special needs, and (4) enhance the capacity of the State and service providers to identify, evaluate, and meet the needs of all children, especially children who are minorities, low-income, live in rural or inner-city areas, or are in foster care. 20 U.S.C. 1431. *See* G.S. 143B-139.6A.

North Carolina's Early Intervention Branch (NCEI) is part of the North Carolina Department of Health and Human Services Division of Child and Family Well-Being and is the lead agency for the Infant and Toddler Program (NC ITP), which is North Carolina's early intervention program. There are sixteen regional Children's Developmental Service Agencies (CDSA) in the Infant and Toddler program. The CDSAs accept referrals, contact families,

determine eligibility, provide for services (including through contract agencies), and develop and review the "individualized family service plan" (IFSP).

Resources:
For more information about North Carolina's early intervention program, see

- The North Carolina Infant-Toddler Program website by the N.C. Department of Health and Human Services.
- "Special Needs" on the "Parents" section of the N.C. Department of Health and Human Division of Child Development and Early Education website.
- "Early Intervention" section of the N.C. Department of Health and Human Services NC Medicaid, Division of Health Benefits website.
- N.C. Department of Health and Human Services, NC Medicaid, Division of Health Benefits, Behavioral Health Policy 8-J, Children's Developmental Services Agencies (CDSAs).

For more information about IDEA Part C, see the Early Childhood Technical Assistance Center website.

For more information about Child Welfare and IDEA Part C, see

- CHILD WELFARE INFORMATION GATEWAY, "Addressing the Needs of Young Children in Child Welfare: Part C-Early Intervention Services" (Oct. 2018).
- The CHILD WELFARE POLICY MANUAL under the "Laws and Policies" section of the Children's Bureau, U.S. Department of Health and Human Services website, specifically "2.1I CAPTA, Assurances and Requirements, Referrals to IDEA, Part C."

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1. Children substantiated as abused or neglected. Both the Child Abuse Prevention Treatment Act (CAPTA) and IDEA make specific references to the need for infants and toddlers in foster care to be referred for and, when eligible, receive early intervention services. *See* 20 U.S.C. 1431(a)(5), 1434(1) and 1437(b)(7); 42 U.S.C. 5106a(b)(2)(B)(xxi). CAPTA requires that states have procedures for referring children younger than 3 years old who have been substantiated as abused or neglected to early intervention services under Part C of IDEA. 42 U.S.C. 5106a(b)(2)(B)(xxi); *see* 20 U.S.C. 1435(c)(2)(G) and 1437(a)(6)(A); 34 C.F.R. 303.303(b). In North Carolina, referrals are made to the local Children's Developmental Services Agency (CDSA).

2. Qualifying disability. An infant or toddler with a disability is a child younger than 3 years old who needs early intervention services because they

- are experiencing developmental delays in at least one developmental area
    - cognitive,
    - physical,
    - communication,
    - social or emotional, or
    - adaptive; or
- have a diagnosed physical or mental condition that has a high probability of resulting in developmental delay (referred to in North Carolina as an "established condition").

20 U.S.C. 1432(5); 34 C.F.R. 303.21.

A child may be screened or referred for early intervention services by parents, medical providers, social services staff, shelter staff, and others. 34 C.F.R. 303.303(c). Infants and toddlers must receive a timely comprehensive multidisciplinary evaluation of their functioning. 20 U.S.C. 1435(a)(3); 34 C.F.R. 303.321. No single procedure may be used as the sole determinant of whether the infant or toddler is eligible for services. Instead, the evaluation should include an evaluation instrument, information from parents and other sources, a record review, an observation of the child, and the identification of each developmental area level of functioning. 34 C.F.R. 303.321(b), (c); *see* 10A N.C.A.C. 27G.0903(1)[13]. There is also a family-directed assessment that is performed with those family members who are willing to participate. 34 C.F.R. 303.321(c)(2). The evaluation and assessment must be completed within forty-five days of when a referral is made unless an exception applies. Exceptions include the unavailability of the parent or child because of exceptional family circumstances or the parent not providing consent. 34 C.F.R. 303.310; 10A N.C.A.C. 27G.0903(1)(h), (i).

The lead agency determines whether the child is eligible. 34 C.F.R. 303.322. Criteria to meet either a developmental delay or an established condition is set forth in 10A N.C.A.C. 27G.0902. *See* 34 C.F.R. 303.10 and 303.111.

3. Early intervention services (EI). Eligible infants and toddlers receive early intervention services. EI are services that are provided by qualified personnel and are designed to meet the developmental needs of an infant or toddler with a disability in any of the following areas: physical, cognitive, communication, social or emotional, or adaptive development. 20 U.S.C. 1432(4)(C), (F); 34 C.F.R. 303.13(a), (c).

The services include early identification, screening, and assessment services; diagnostic and evaluative medical services; family training, counseling, and home visits; special instruction; speech and language pathology and audiology services; sign language and cued language services; occupational and physical therapy; psychological and social work services; vision services; nutrition services; assistive technology devices and services; health services that are necessary to enable the infant or toddler to benefit from other early intervention services; transportation and related costs that are needed to enable the infant or toddler or family to receive another early intervention service; and service coordination. 20 U.S.C. 1432(4)(E); 34 C.F.R. 303.13(b), (d); G.S. 122C-3(13c); *see* 10A N.C.A.C. 27G.0902(3).

Early intervention services are provided under public supervision at no cost, except when federal or state law allows for a system of payments by families, such as a sliding fee. The services are provided to the maximum extent appropriate in a natural environment, including the child's home and community settings where children without disabilities participate (e.g., a child care center or Head Start program). 20 U.S.C. 1432(4)(A), (B) and (G); 34 C.F.R. 303.13(a).

If funding is available, the State Board of Education and the Secretary of the NCDHHS may enter into an agreement that allows early intervention services to continue for children with disabilities who are 3 years old until they enter or are eligible to enter kindergarten. While

[13] Title 10A of the North Carolina Administrative Code, Chapter 27, subchapter G.

children are receiving continued early intervention services under Part C, they will not receive a free appropriate public education under Part B of IDEA. G.S. 115C-107.1(c); *see* 20 U.S.C. 1435(c); 34 C.F.R. 303.21(c).

4. Individualized family service plan (IFSP). An infant or toddler with a disability receives early intervention services through an IFSP. An IFSP includes (1) a multidisciplinary assessment of the infant's or toddler's unique needs and identifies the necessary services to meet those needs and (2) a family-directed assessment of resources, priorities, and concerns and the identification of family supports and services to enhance its capacity to meet the infant's and toddler's developmental needs. 20 U.S.C. 1436(a).

The IFSP must be in writing and include the contents specified at 20 U.S.C. 1436(d) and 34 C.F.R. 303.344. Some of the required components are the services that will be provided, the expected measurable outcomes for the infant or toddler and family, the natural environment where the services will be provided (or a justification for why the services will not be provided in the natural environment), and a designated service coordinator responsible for implementing the plan. *See* 10A N.C.A.C. 27G.0903(2). For toddlers about to age out of Part C, there must be transition planning from early intervention services to other appropriate services, including preschool services under Part B, and notice to the local school of the child's pending transition to Part B services. 20 U.S.C. 1436(d)(8) and 1437(a)(9); 34 C.F.R. 303.344(h).

When an infant or toddler is determined to be eligible for early intervention services, the IFSP meeting must be completed within forty-five days of the receipt of the referral, unless there are exceptional family circumstances or the parent does not consent. 34 C.F.R. 303.310 and 303.342(a); 10A N.C.A.C. 27G.0903(1)(h), (i). Before services may be provided, the parent must consent. 34 C.F.R. 303.342(e). A parent may decline any early intervention service for themselves, the infant or toddler, or other family members without jeopardizing the provision of other services. 34 C.F.R. 303.420(d); 10A N.C.A.C. 27G.0903(3)(i).

The family must be provided with a review of the plan at least every six months, and the plan must be evaluated annually. 20 U.S.C. 1436(b); 34 C.F.R. 303.342(b); 10A N.C.A.C. 27G.0903(3). The purpose of the review is to evaluate the child's progress and whether changes need to be made to the IFSP. 34 C.F.R. 303.342(b), (c).

5. The IFSP Team. The IFSP Team creates the IFSP. Members of the IFSP Team include

- the parent or parents,
- other family members as requested by the parent (if feasible),
- an advocate for the family if requested by the parent,
- the service coordinator designated by the local Children's Developmental Services Agency (CDSA),
- the person(s) directly involved in conducting the assessments, and
- persons who will be providing the early intervention services to the infant or toddler and family (as appropriate).

34 C.F.R. 303.343(a)(1); 10A N.C.A.C. 27G.0903(3)(c).

The IFSP meeting must be conducted at times and in settings that are convenient for the family and that are held in the family's language. 34 C.F.R. 303.342(d)(1); 10A N.C.A.C.

27G.0903(3)(j). Participants may participate through alternative means such as a telephone conference call, providing records to review at the meeting, or through an authorized representative. 34 C.F.R. 303.343(a)(2); 10 N.C.A.C. 27G.0903(3)(d).

6. Procedural safeguards. Required procedural protections are addressed at 20 U.S.C. 1439. *See also* 10A N.C.A.C. 27G.0905 (procedural safeguards). They include the right of parents to receive prior written notice of the proposed initiation of, change, or refusal to initiate or change the infant's or toddler's evaluation, identification, placement, or provision of early intervention services. 34 C.F.R. 303.421. Parents have the right to examine records related to screening, assessment, eligibility determinations, and the development and implementation of the IFSP and to confidentiality of personally identifying information with the right to notice of and consent to the exchange of information among agencies. 34 C.F.R. 303.401 and 303.405. Parents have the right to determine whether family members (including themselves) and/or their infant or toddler will accept or decline any early intervention services without jeopardizing other early intervention services. 34 C.F.R. 303.420(d). Parents also have the right to use the mediation procedure established under Part B of IDEA and a complaint resolution process where the parent may bring a civil action in state or federal court appealing the administrative hearing decision. 34 C.F.R. 303.430. See section 13.8.B.4, above. During the dispute resolution process, unless there is an agreement stating otherwise, the infant or toddler continues to receive the services that were being provided or that are not in dispute. 34 C.F.R. 303.430(e).

There must also be procedures to protect the infant's or toddler's rights when the parents are not known, cannot be located, or when the infant or toddler is a state ward. A surrogate parent may be appointed. 34 C.F.R. 303.422.

D. Parent: Definition, Role, and Appointment of Surrogate Parent

1. Parent's role. The role of a parent under IDEA is important. A parent who suspects their child has a disability may make a referral for special education or early intervention services and request an evaluation. 20 U.S.C. 1414(a)(1)(B); 34 C.F.R. 303.303(c)(3). A parent's consent is required for evaluations and the initial provision of services. 20 U.S.C. 1414(a)(1)(D)(i)(I) and (c)(3), 1436(e); 34 C.F.R. 300.300(a), (b)(1), 303.342(e), and 303.420(a). A parent may also revoke consent to the continued provision of special education and related services or early intervention services. 34 C.F.R. 300.300(b)(4) and 303.7(c). A parent is a member of the IEP Team and may invite other participants the parent determines has specialized knowledge to be a member of the IEP Team. 20 U.S.C. 1414(d)(1)(B). *See* G.S. 115C-109.3(a). A parent is also a member of the IFSP Team and may invite other family members and an advocate to join the IFSP team. 34 C.F.R. 303.343(a)(1). A parent may exercise procedural safeguards, including the right to request an independent educational evaluation, mediation, or a due process hearing and to file a complaint.

Note that the rights of the parent transfer to the student when the student turns 18 (unless the student has been determined to be incompetent). 20 U.S.C. 1415(m); 34 C.F.R. 300.520(a); G.S. 115C-109.2(a).

2. Parent defined. IDEA defines "parent" broadly. A "parent" is

- a biological or adoptive parent,
- a foster parent (unless state law or contractual obligations prohibit the foster parent from serving as a parent under IDEA; in North Carolina, the Department of Public Instruction policy states a therapeutic foster parent cannot act as a parent under IDEA. *See* NC 1500-2.27(a)(2) and 1504-1.20(d)(1)),
- a guardian authorized to act as the parent or make educational or early intervention decisions for the child (except for the State when the child is a "ward of the state"),
- an individual the child lives with who is acting in the place of a natural or adoptive parent (including a grandparent, stepparent, or other relative), or
- an individual who is legally responsible for the child's welfare.

20 U.S.C. 1401(23); 34 C.F.R. 300.30(a) and 303.27; G.S. 115C-106.3(14). Note that "guardian" is not defined by IDEA.

If the child does not have an IDEA parent, a surrogate parent is appointed and acts as the parent (discussed in subsection 4, below). *See* 20 U.S.C. 1415(b)(2) and 1439(a)(5); 34 C.F.R. 300.519 and 303.422; G.S. 115C-109.2(c), (d).

A child is a ward of the state when the child is in DSS custody, but the child is not in a foster home when the foster parent is a "parent" for purposes of IDEA. 20 U.S.C. 1401(36); 34 C.F.R. 300.45 and 303.37; NC 1500-2.44. Under North Carolina policy, therapeutic foster parents are not permitted to act as an IDEA parent. NC 1500-2.27(a)(2); 1504-1.20(d)(1).

Practice Note: A person who qualifies as an IDEA parent is not necessarily authorized to consent to educational services outside of the scope of IDEA (e.g., a school field trip) or other services outside of a school or early intervention program (e.g., medical services). Whether a person has the authority to consent to services or activities outside of IDEA identification and programming will depend on that person's legal relationship with the child, any court orders delegating or restricting that person's rights regarding the child, and applicable statutes for the presenting issue.

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3. Determining parent. When there is more than one person who is qualified to act as the IDEA parent (e.g., the biological parent and the foster parent), a biological or adoptive parent who is attempting to act as the IDEA parent must be presumed to be the "parent." Examples of acting as an IDEA parent may be responding to prior written notices sent by the school and attending IEP Team meetings. There is an exception to this presumption when the parent does not have the legal authority to make educational decisions for the child (e.g., a court order limiting the parent's rights, a permanency planning order of guardianship or custody that does not authorize the parent to retain educational rights for the child, or a termination of parental rights order). 34 C.F.R. 300.30(b) and 303.27(b)(1); *see* 34 C.F.R. 300.300(a)(2).

When a biological or adoptive parent either does not have the legal authority to make educational decisions or in the absence of a court order addressing educational decisions, they

are not acting as the IDEA parent, they are not the "parent" for purposes of IDEA. The foster parent or other person qualifying as an IDEA parent acts in that capacity.

The court hearing the abuse, neglect, or dependency action has the authority to decide who may make educational decisions for the child based on the child's best interests. The court may delegate the authority to make decisions for a child who is in DSS custody to a parent, foster parent, or other individual. G.S. 7B-903.1(a), (b). The court may also determine what (if any) rights and responsibilities remain with the parents when it is determining whether legal guardianship or custody to a third person should be established as the child's permanent plan. G.S. 7B-906.1(e)(2); *see In re M.B*., 253 N.C. App. 437 (2017) (holding when a child's permanent plan places the child in guardianship or custody with a non-parent, the parent's rights and responsibilities, other than visitation, are lost if the court order does not provide otherwise).

If a court order identifies a person (e.g., the biological or adoptive parent, foster parent, guardian, custodian, or person the child lives with who is acting in place of the parent) to act as the IDEA parent or make educational or early intervention decisions for the child, that person must be determined to be the parent for purposes of IDEA. 34 C.F.R. 300.30(b)(2) and 303.27(b)(2). If the court appoints someone who does not meet any of the criteria of a "parent" under IDEA, the court is appointing a "surrogate parent," which is discussed further in subsection 4, below. Note, federal law prohibits a DSS employee from acting as the child's parent under IDEA. *See* 34 C.F.R. 300.30(a)(3) and 303.27(a)(3), (b)(2). *See also* G.S. 7B-903.1(a) ("[e]xcept as prohibited by federal law" language when authorizing DSS to make decisions for the child).

Practice Notes: Absent a termination of parental rights order, a relinquishment, a court order limiting a parent's rights to make educational or early intervention services decisions for the child, or a permanency planning order that awards guardianship or custody to someone other than the parent without a provision delegating educational rights to the parent, the biological or adoptive parent has the authority to act as the "parent" for purposes of IDEA even when the child is placed in DSS custody.

A party in the abuse, neglect, or dependency case may raise the need for the court to address who has the authority to make special education or early intervention decisions for the child if the child receives or will be referred for services under IDEA. This is particularly important when a child is placed in a group home or therapeutic foster home. It may also be an issue when a child has experienced numerous placement changes that resulted in a lack of consistency by any one person (e.g., a foster parent) or where the current foster parent has insufficient information about the child to meaningfully participate as the IDEA parent in the IEP or IFSP Team meetings. The court may also consider the parent's role as the IDEA parent as part of the plan for reunification. Depending on who the court appoints and whether that person meets the criteria of "parent" as defined by IDEA, this person is considered to be either an IDEA parent or "surrogate parent."

Although the court may order someone other than one of the parents or the foster parent(s) to be the child's educational decision-maker for IDEA purposes, parents and current and former

foster parents may still be invited to be a member of the IEP or IFSP Team by either the school or IDEA parent.

4. Appointment of a surrogate parent. The school or Children's Developmental Service Agency (CDSA) designated service coordinator must determine whether a surrogate parent is needed to protect the child's rights when the child's parent cannot be identified or located, the child is a ward of the state, or the child is an unaccompanied homeless youth. 34 C.F.R. 300.519(b) and 303.422(b); G.S. 115C-109.2(c); *see* 10A N.C.A.C. 27G.0904(b). A surrogate parent is needed when the child, infant, or toddler does not have someone who meets the definition of "parent" under IDEA to act on their behalf. Children who are placed in therapeutic foster homes or group homes are most likely to require a surrogate parent. Reasonable efforts to appoint a surrogate parent should occur within thirty days of when the school or CDSA determines the child needs a surrogate parent. 20 U.S.C. 1415(b)(2)(B); 34 C.F.R. 300.519(h) and 303.422(g); G.S. 115C-109.2(c).

(a) Appointment by court or school. When a surrogate parent is needed, one may be appointed by either

- the judge hearing the child's abuse, neglect, or dependency case or
- the school or CDSA (note that when the CDSA is making the appointment for a state ward, it must consult with the county DSS that has custody of the child, 34 C.F.R. 303.422(b)(2)).

20 U.S.C. 1415(b)(2)(A)(i); 34 C.F.R. 300.519(b)(2), (c) and 303.422(b), (c), (d).

Practice Note: Although the school or service coordinator designated by the CDSA is required to determine whether a surrogate parent is needed, DSS, the child's guardian ad litem, or the parent may raise the issue with the court hearing the abuse, neglect, or dependency action so that the court can enter an order appointing a surrogate parent. This may result in a more expedient appointment of a surrogate parent and/or the appointment of someone who has a more substantial relationship with the child or understanding of the child's circumstances.

(b) Criteria for surrogate parent. A surrogate parent must not have a personal or professional conflict of interest with the child and must have adequate knowledge and skills to represent the child. 34 C.F.R. 300.519(d)(2)(ii)–(iii) and 303.422(d)(2)(ii)–(iii). The person appointed as a surrogate parent must not be an employee of the school district, the North Carolina Department of Public Instruction, the CDSA, or any other agency that is involved in the child's education, provision of early intervention services, or care. 20 U.S.C. 1415(b)(2)(A); 34 C.F.R. 300.519(d)(2)(i) and 303.422(d)(2)(i). *See* G.S. 115C-109.2(d); 10A N.C.A.C. 27G.0904(e). This means the surrogate parent cannot be the DSS social worker when DSS has custody (e.g., "care") of the child.

Practice Note: DSS is involved in the child's care. As a result, a DSS employee, including the social worker assigned to the case, cannot be the child's surrogate parent. Under North Carolina policy, the same is also true for a therapeutic foster parent and an employee of a group home where the child is placed. NC 1504-1.20(d)(1). Although such an employee is not eligible to be the child's surrogate parent, they may be a member of the child's IEP

Team as a person with knowledge or special expertise regarding the child who is invited by the surrogate parent or school district.

Resource: For more information about surrogate parents, see the "Special Education Surrogate Parents" manual under the "Policies and Procedures" tab for "Exceptional Children" on the N.C. Department of Public Instruction website.

13.9 Special Immigrant Juvenile Status and Selected Immigration Resources

A. Introduction and Selected Resources

Families involved in juvenile court proceedings may have immigration issues as a result of a parent's, potential caregiver's, or child's lack of legal status to stay in the United States. Immigration issues may impact the juvenile court proceeding (e.g., deported or detained parents), and the juvenile court proceeding may impact an individual's immigration issues. Immigration issues for these families are beyond the scope of this Manual, but resources are provided below.

One immigration issue that is directly and specifically related to a juvenile court proceeding involves undocumented noncitizen children and their potential for "special immigrant juvenile status" (SIJS). Undocumented noncitizen children who will not be reunified with their parent(s) may be eligible to achieve the lawful immigration status of SIJS if the juvenile court makes specific findings pertaining to the child, which are then included in a separate application for citizenship filed with the U.S. Citizenship and Immigration Services (USCIS). This section provides a general overview of SIJS as it relates to the juvenile court proceeding.

Practice Notes: Attorneys involved in juvenile proceedings in North Carolina should be familiar with any policies, procedures, or guidance relating to SIJS or other immigration issues. This area of the law is rapidly changing.

Local consulates may be able to provide assistance with various aspects of a juvenile case that involves a citizen of its country. It is important to determine which country the individual is from, so ask the question "what country are you a citizen of" or "where were you born."

In cases where language is a barrier, Title VI (as discussed in section 13.4, above) applies.

Resources:
The ABA Center on Children and Law maintains a "Child Welfare and Immigration Project," on its website, which includes information related to parents, children, and caregivers and Child Welfare and Immigration Quick Guides.

For general information including resources and toolkits for working with immigrant families, see

- The Center on Immigration and Child Welfare website.
- The Immigrant Legal Resource Center website.
- The Young Center for Immigrant Children's Rights website.

For information about parents and legal guardians who are detained or deported, see

- "Detention and Removal of Alien Parents and Legal Guardians of Minor Children" (July 2, 2025), a U.S. Immigration and Customs Enforcement (ICE) policy involving detained parents, legal guardians, and primary caretakers of minor children who are involved in child welfare proceedings.
- Online Detainee Locator System on the U.S. Immigration and Customs Enforcement section of the Department of Homeland Security website.

For federal policy in a Q&A format discussing Titles IV-B and IV-E requirements related to citizenship, aliens and immigration, see the CHILD WELFARE POLICY MANUAL under the "Laws and Policies" section of the Children's Bureau, U.S. Department of Health and Human Services website, specifically "7. Title IV-B" (see section 7.1) and "8. Title IV-E" (see section 8.4B).

In 2012, the U.S. Department of Homeland Security implemented the "Deferred Action for Childhood Arrivals Initiative," (DACA) under which certain people brought to this country as undocumented children may seek deferral of removal (deportation) and obtain work authorization if several criteria are met. The status of the DACA program is undetermined based on rule changes and pending litigation. For more information, see the "DACA" section on the Department of Homeland Security, U.S. Citizenship and Immigration Services website under "Humanitarian Programs and Information."

When immigration issues arise, it is advisable to seek assistance from an immigration specialist. For representation and other information, see

- The "Immigrants and Refugees" section of the North Carolina Justice Center website.
- ImmigrationLawHelp.org, where you can select a state on the map for resources.
- The "See Our Work" section of the U.S. Committee for Refugees and Immigrants website.

B. Special Immigrant Juvenile Status and Obtaining Lawful Permanent Residency

1. Introduction. With Special Immigrant Juvenile Status (SIJS), an undocumented child who will not be reunified with their parent(s) due to abuse, neglect, or abandonment may be able to become a lawful permanent resident by applying for such status and permanent residency based on a SIJS petition. This is only possible once a juvenile court has made specific findings and orders meeting the requirements of SIJS. The juvenile court is not determining the child's immigration status but is instead making findings that are necessary for SIJS eligibility, which is determined by the U.S. Citizenship and Immigration Services (USCIS).

The status of "special immigrant juvenile" was created by section 153 of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978. The federal regulations that implement the statute are contained in 8 C.F.R. 204.11. Amendments were made to the regulations, effective April 7, 2022. *See* 87 Fed. Reg. 13066 (March 8, 2022). The USCIS addresses the requirements for SIJS in its POLICY MANUAL, specifically Volume 6 (Immigrants), Part J (Special Immigrant Juveniles).

2. Eligibility for SIJS. Special immigrant juvenile is defined as

> an immigrant who is present in the United States (i) who has been declared to be dependent on a juvenile court located in the United States or whom such a court has legally committed to or placed under the custody of, an agency or department of a state, or an individual or entity appointed by a State or juvenile court located in the United States, and whose reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law; (ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence; and (iii) in whose case the Secretary of Homeland Security consents to the grant of special immigrant juvenile status….

8 U.S.C. 1101(a)(27)(J).

This definition requires specific findings by the juvenile court, which must then be included in a separate application for SIJS filed with the U.S. Citizenship and Immigration Services. *See* 8 C.F.R. 204.11(c), (d).

(a) Court findings and orders. To be classified as a special immigrant juvenile, the following requirements must be met and should be enumerated as specific findings in an order signed by a judge that will be submitted to USCIS with the SIJS petition. The order must contain both findings to support the necessary determinations and judicial relief from parental abuse, neglect, abandonment, or similar condition, such as an order of custody to a non-parent or the provision of child welfare services. 8 C.F.R. 204.11(d)(5).

- **Dependent or in custody**. The child must be declared a dependent of a juvenile court or placed in the custody of an agency or department of a state, or an individual or entity appointed by either the state or a juvenile court in the United States. 8 U.S.C. 1101(a)(27)(J)(i); 8 C.F.R. 204.11(c)(1)(i), (d)(3) and (5). As long as the court has jurisdiction under state law to make determinations about the custody and care of juveniles, it falls within the term "juvenile court." *See* 8 C.F.R. 204.11(a).
- **Reunification not viable**. A court must find that reunification with one or both of the child's parents is not viable due to abuse, neglect, abandonment, or similar basis found under state law. *See* 8 U.S.C. 1101(a)(27)(J)(i); 8 C.F.R. 204.11(c)(1), (d)(3)–(5).
- **Best interest not to return**. There must be a judicial or administrative finding that it would not be in the child's best interest to be returned to the child's or parent's country of nationality or country of last habitual residence. 8 U.S.C. 1101(a)(27)(J)(ii); 8 C.F.R. 204.11(c)(2), (d)(3) and (5).

(b) Additional requirements for eligibility. In addition to the required court findings, the following requirements must be met to be eligible for SIJS:

- **Age.** The juvenile must be under 21, and documentary proof of age must be submitted with the application. 8 C.F.R. 204.11(b)(1), (d)(2).

- **Court jurisdiction**. The juvenile court must have exercised its jurisdiction over the child when the child was a juvenile. The petitioner seeking SIJS must be subject to the juvenile court order at the time of filing the petition with USCIS and through the determination of the petition, with two exceptions. First, the petitioner was adopted or achieved another permanent plan (other than reunification with a parent). Second, juvenile court jurisdiction terminated because the juvenile aged out and the petitioner is younger than 21 years old when the petition is filed. 8 C.F.R. 204.11(c)(3).
- **Unmarried**. The juvenile must be unmarried at the time of filing and during the USCIS decision process. *See* 8 C.F.R. 204.11(b)(2).

Resources:
The U.S. Citizenship and Immigration Services section of the Department of Homeland Security website contains information about SIJS, including

- "Special Immigrant Juveniles."
- POLICY MANUAL, specifically Volume 6 (Immigrants), Part J (Special Immigrant Juveniles) and Volume 7 (Adjustment of Status), Part F (Special Immigrant-Based Adjustment), Chapter 7 (Special Immigrant Juveniles).

3. The application process. A petition for special immigrant juvenile status must be filed and completed on the I-360 form petition. 8 C.F.R. 204.11(d). The I-360 petition must include documentary evidence of the juvenile's age; a certified copy of the court order containing the required findings and relief; and if reunification was determined not to be viable because of a similar basis to abuse, neglect, or abandonment, evidence of how the basis is similar. *See* 8 C.F.R. 204.11(d). An application to become a lawful permanent resident may be filed concurrently, by filing an I-485 application. *See* 8 C.F.R. 204.11(g)(2). The SIJS petition is adjudicated within 180 days after receipt of a properly filed petition. 8 C.F.R. 204.11(g).

Practice Note: Before applying for SIJS, it is important to make a correct determination of eligibility because an ineligible child who is denied SIJS could be referred for deportation. Before proceeding, refer the child to an immigration attorney, who should carefully consider with the child client the possible consequences or risks of applying for SIJS.

USCIS Forms:

- I-360, Petition for Amerasian, Widow(er), or Special Immigrant with instructions
- I-485, Application to Register Permanent Residence or Adjust Status with instructions

4. Impact on parents. Once SIJS is granted, the parents cannot derive any immigration benefit from the child. *See* 8 U.S.C. 1101(a)(27)(J)(iii)(II); 8 C.F.R. 204.11(i). The granting of SIJS, a court finding that reunification with a child is not viable, or an order for termination of parental rights does not cause a parent to become deportable or inadmissible. However, a criminal conviction for child abuse, neglect, or abandonment is a ground of deportability.