

Chapter 13

Federal Laws Relevant to Juvenile Proceedings

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Many federal laws affect juvenile proceedings. This chapter does not attempt to address all of them, but it seeks to:

- provide an overview of federal laws that North Carolina judges and attorneys encounter most frequently and that impose specific requirements in juvenile cases (§§ 13.3 through

- 13.7); and
- highlight some other federal laws that have influenced state laws and state agency programs and procedures (§ 13.2).

Some sections in this chapter provide links to additional resources on specific federal laws. Also, information on all of the federal laws mentioned or summarized in this chapter (including those in the timeline below that are not discussed in the chapter) is available on the Child Welfare Information Gateway website. See “[Major Federal Legislation Index and Search](#),” on the Child Welfare Information Gateway website, U.S. Department of Health and Human Services.

B. Overview of Federal Impact and Timeline of Major Federal Laws¹

States are primarily responsible for the laws and programs that address the needs of children and families, but states must abide by certain federal laws and regulations in order to be eligible for federal funding for these programs. Many requirements of relevant federal laws have been integrated into the North Carolina Juvenile Code, and some are referenced in the Code but not codified. Requirements of federal laws also are integrated into policies and procedures of state and local child welfare agencies.

The largest federally funded programs that support state and tribal child welfare programs and activities—including protective services, foster care, and adoption—are authorized under Titles IV-B and IV-E of the Social Security Act (the Act). These programs are administered by the U.S. Department of Health and Human Services and include the Title IV-B Child Welfare Services and Promoting Safe and Stable Families (formerly known as Family Preservation) programs, the Title IV-E Foster Care Program, the Title IV-E Adoption Assistance Program, and the Title IV-E Chafee Foster Care Independence Program. The Social Services Block Grant (SSBG) is authorized under Title XX of the Act and funds a wide range of programs that support social policy goals specified in the Act.

Periodically, the federal Children’s Bureau (in the Administration for Children and Families in the U.S. Department of Health and Human Services) reviews North Carolina cases to assess compliance with federal laws. Two significant audits are the Child and Family Services Review (CFSR) and the IV-E Eligibility Review.

The CFSR evaluates performance in child protection cases and is conducted at five-year or shorter intervals (depending on whether the state was in substantial conformity in the previous review). Outcomes measured by the CFSR include:

1. Some content for this section is sourced or reproduced from CHILD WELFARE INFORMATION GATEWAY, U.S. DEP’T OF HEALTH & HUMAN SERVICES, [MAJOR FEDERAL LEGISLATION CONCERNED WITH CHILD PROTECTION, CHILD WELFARE, AND ADOPTION](#) (2012). Sources for information regarding federal audits and state plans include supplementary information in the Federal Register explaining 45 C.F.R. parts 1355, 1356, and 1357, Title IV-E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews, [65 Fed. Reg. 4020](#) (Jan. 25, 2000) and CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVICES, [TITLE IV-E FOSTER CARE ELIGIBILITY REVIEW GUIDE](#) (2012). Angie Stephenson, Assistant Attorney General for the State of North Carolina, provided input for this section.

- whether children under the care of the state are protected from abuse and neglect;
- whether children are safely maintained in their own homes whenever possible and appropriate;
- whether children have permanency and stability in their living conditions;
- whether the continuity of family relationships and connections is preserved for children;
- whether families have enhanced capacity to provide for their children's needs;
- whether children receive appropriate services to meet their educational needs; and
- whether children receive adequate services to meet their physical and mental health needs.

In addition to these outcomes, the CFSR evaluates programmatic factors such as service delivery, training, and responsiveness.

The IV-E Eligibility Review is conducted every three years to assess compliance with Title IV-E of the Social Security Act. For this review, sample cases from a few counties are evaluated, and the state's "score" is based on the number of cases with errors. The numerous eligibility factors that are examined include whether court orders in the sample cases comply with federal requirements, such as those relating to:

- "reasonable efforts" and "contrary to the welfare" determinations (in North Carolina, contained in G.S. 7B-507);
- voluntary placements (in North Carolina, contained in G.S. 7B-910); and
- vesting responsibility for the child's placement and care with the state (or county) agency (in North Carolina, contained in G.S. 7B-507).

After a review, the state develops a Program Improvement Plan to identify corrective actions that need to be taken to improve compliance with federal laws. Elements of the Program Improvement Plan are integrated into the goals and objectives of a required state Child and Family Services Plan. The state plan can be found on the "[Child Welfare, Program Statistics and Review](#)" page of the North Carolina Division of Social Services website.

Resources:

- For information about the Child and Family Services Review, see "[Child and Family Services Reviews](#)" on the website for the Children's Bureau, U.S. Department of Health and Human Services.
 - For the state's protocol for these reviews, see "[Child Welfare, Program Statistics and Reviews](#)" on the N.C. Division of Social Services website.
 - For information about the IV-E Eligibility Review, see "[Title IV-E Reviews](#)" on the website for the Children's Bureau, U.S. Department of Health and Human Services.
 - For supplementary information in the Federal Register explaining 45 C.F.R. parts 1355, 1356, and 1357, Title IV-E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews, see [65 Fed. Reg. 4020](#) (Jan. 25, 2000).
 - CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVICES, CHILD WELFARE POLICY MANUAL [Ch. 7 \(Title IV-B\)](#) and [Ch. 8 \(Title IV-E\)](#).
 - CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVICES, [TITLE IV-E FOSTER CARE ELIGIBILITY REVIEW GUIDE](#) (2012).
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For a timeline of the enactment of major federal legislation, see [Timeline of Major Federal Legislation Concerned With Child Protection, Child Welfare, and Adoption](#).

13.2 Highlights of Relevant Federal Laws²

For a more detailed summary of each of the federal laws highlighted in this section, see “[Major Federal Legislation Index and Search](#),” on the Child Welfare Information Gateway website, U.S. Department of Health and Human Services.

A. Child Abuse Prevention and Treatment Act

The Child Abuse Prevention and Treatment Act (CAPTA), as rewritten and amended since its enactment in 1974 [Pub. L. No. 93-247, 88 Stat. 4], has provided the basis for many North Carolina Juvenile Code provisions. CAPTA provides funds to states to establish programs to prevent and treat child abuse and neglect. It was the federal law that linked federal funding to such requirements as mandatory child abuse and neglect reporting laws, aspects of the definitions of child abuse and neglect, immunity and confidentiality for people who report, representation for children whose cases result in judicial proceedings, and confidentiality of records. The Act also authorized government research into child abuse prevention and treatment, created the National Center on Child Abuse and Neglect (NCCAN) (now replaced by the Office on Child Abuse and Neglect) and the National Clearinghouse on Child Abuse and Neglect Information, and addressed state programs for child death reviews. CAPTA funds training programs, recruitment of volunteers, and the establishment of resource centers in fields related to abuse and neglect.

The Act is codified at 42 U.S.C. §§ 5101 *et seq.* and 42 U.S.C. §§ 5116 *et seq.* Regulations issued pursuant to the Act are at 45 C.F.R. §§ 1340. For a summary of the Act, see “[Child Abuse Prevention and Treatment Act](#)” on the website for the Children’s Bureau, U.S. Dept. of Health and Human Services. Information on some of the legislation reauthorizing and/or amending the Act in [1978](#), [1988](#), [1992](#), [1996](#), [2003](#), and [2010](#) is available at “[Major Federal Legislation Index and Search](#),” on the Child Welfare Information Gateway website, U.S. Department of Health and Human Services.

B. Adoption Assistance and Child Welfare Act

The Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500, provided federal funds for foster care and adoption assistance. It also required states, as a condition of receiving funds for foster care, to make reasonable efforts (i) to prevent the need to place children outside their homes or (ii) to reunify children with their families. It was the genesis of the reasonable efforts requirements set out in G.S. 7B-507. The Act also required periodic review of cases to consider the child’s best interest, with an emphasis on returning

2. Some content for this section is adapted or reproduced from CHILD WELFARE INFORMATION GATEWAY, U.S. DEP’T OF HEALTH & HUMAN SERVICES, [MAJOR FEDERAL LEGISLATION CONCERNED WITH CHILD PROTECTION, CHILD WELFARE, AND ADOPTION](#) (2012).

the child home as soon as possible. Some of the time requirements in the North Carolina Juvenile Code are based on the Act. The Act established standards for foster family homes and for reviewing those standards periodically, and required maintenance of a data collection and reporting system about children in care.

C. Family Preservation and Support Services Program Act

The Family Preservation and Support Services Program Act, Pub. L. No. 103-66, 107 Stat. 312, was enacted in 1993. Among its many provisions, the Act broadened the definition of “family,” strengthened family preservation and support services, and established the Court Improvement Program. For information about the North Carolina Court Improvement Program, see *supra* § 1.3.B.3.

D. Adoption and Safe Families Act

The Adoption and Safe Families Act (ASFA), Pub. L. No. 105-89, 111 Stat. 2115, was enacted in 1997. ASFA emphasized, among other things, safety for abused and neglected children, timely permanent placements for children, and increased agency accountability. Like the acts described above, ASFA itself placed no requirements directly on North Carolina courts, but many of its requirements have been integrated into the North Carolina Juvenile Code and some federal funding is dependent on compliance with ASFA provisions.

Highlights of ASFA:

Emphasized safety for abused and neglected children:

- Added consideration of “safety of the child” to every step of the case plan and review process
- Required criminal records checks for foster and adoptive parents who receive federal funds on behalf of a child, unless a state opted out of this requirement

Emphasized the need for children to have permanent placements without undue delay:

- Required states to initiate court proceedings to free a child for adoption when the child had been in foster care for at least 15 of the most recent 22 months, unless one of several exceptions applied. North Carolina’s version of this requirement refers to 12 of the most recent 22 months. (*See* G.S. 7B-906.1(f) and *supra* § 8.3.G, explaining the North Carolina requirement.)
- Required that the first permanency planning hearing be held no later than 12 months after a child entered foster care (reflected in North Carolina’s Juvenile Code in G.S. 7B-906.1)

Promoted adoptions:

- Provided incentive funds to states that increased adoptions
- Ensured health coverage for eligible adopted children with special needs
- Prohibited states from delaying or denying placements of children based on the

- geographic location of the prospective adoptive families
- Required states to document and report child-specific adoption efforts

Increased accountability:

- Required the federal Department of Health and Human Services to establish new outcome measures to monitor states' performance

Clarified “reasonable efforts” (North Carolina’s reasonable efforts provisions are in G.S. 7B-507):

- Required expansion of the reasonable efforts requirement to apply to efforts to achieve a permanent placement when reunification was no longer the plan
- Emphasized children’s health and safety
- Required states to specify situations in which reunification services are not required

The North Carolina Juvenile Code includes many references to the need for the child to have a “safe, permanent home within a reasonable amount of time.” *See, e.g.*, G.S. 7B-100(5) (stating one of the purposes of Subchapter I of the Code).

E. Foster Care Independence Act

In 1999, Congress enacted the Foster Care Independence Act, Pub. L. No. 106-169, 113 Stat. 1822. Its purpose was to provide states with more funding and greater flexibility in carrying out programs designed to help older children make the transition from foster care to self-sufficiency.

North Carolina’s foster care independence program, which seeks to carry out the goals of the Foster Care Independence Act, is called NC Links. The purpose of Links is to “build a network of relevant services with youth so that they will have ongoing connections with family, friends, mentors, the community, employers, education, financial assistance, skills training, and other resources to facilitate their transition to adulthood.” 1 DIV. OF SOC. SERVICES, N.C. DEP’T OF HEALTH & HUMAN SERVICES, [FAMILY SERVICES MANUAL ch. IV § 1201\(VII\)\(A\)](#) (Oct. 2010).

Details of the NC Links Program are contained in § 1201(VII) of the manual cited above. Provisions relating to the program are not codified.

Highlights of the Foster Care Independence Act:

- Expanded opportunities for independent living programs providing education, training, employment services, and financial support for foster youth to prepare for living on their own
- Allowed funds to be used to pay for room and board for former foster youth age 18 to 21
- Required development of outcome measures to assess state performance in operating independent living programs as well as national data collection

- Mandated that state plans for foster care and adoption assistance include certification that prospective parents will be adequately prepared to provide for the needs of the child and that such preparation will continue, as necessary, after placement of the child
- Provided states with the option to extend Medicaid coverage to 18- to 21-year-olds who have been emancipated from foster care
- Emphasized permanence by requiring that efforts to find a permanent placement continue concurrently with independent living activities
- Increased funding for adoption incentive payments

F. Intercountry Adoption Act

The Intercountry Adoption Act, Pub. L. No. 106-279, 114 Stat. 825, was enacted in 2000. This Act provided for implementation by the United States of the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption. The Act addressed programs and services related to the adoption of children between countries.

G. Keeping Children and Families Safe Act

The Keeping Children and Families Safe Act, Pub. L. No. 108-36, 117 Stat. 800, was enacted in 2003 and amended several other federal laws including CAPTA (described above). Among its many provisions, the Act addressed:

- DSS procedures in training child protective service workers;
- the duties of these workers to advise individuals of reports made involving them;
- state disclosure of confidential information to government entities who need the information; and
- requirements to benefit infants and young children who are exposed to HIV, have a life threatening illness, or are perinatally exposed to a dangerous drug.

The Act also implemented programs to increase the number of adoptions of older foster children.

H. Safe and Timely Interstate Placement of Foster Children Act

The Safe and Timely Interstate Placement of Foster Children Act, Pub. L. No. 109-239, 120 Stat. 508, was enacted in 2006. The purpose of the Act was to improve protections for children and to hold states accountable for the safe and timely placement of children across state lines. This Act, along with other measures to expedite interstate placements, set out specific timelines for completion and acceptance of home studies. The Act also provided for notification and/or a right to be heard for a relative caregiver, foster parent, or preadoptive parent in certain proceedings involving a foster child. See *supra* § 7.8 for an explanation of interstate placements and the Interstate Compact on the Placement of Children.

I. Adam Walsh Child Protection and Safety Act

The Adam Walsh Child Protection and Safety Act, Pub. L. No. 109-248, 120 Stat. 587, was enacted in 2006. The purpose of the Act was to protect children from sexual exploitation and violent crime; to prevent child abuse and child pornography, with an emphasis on comprehensive strategies across federal, state, and local communities to prevent sex offenders' access to children; to promote Internet safety; and to honor the memory of Adam Walsh and other child crime victims. The Act required more extensive background checks for prospective foster and adoptive parents and other adults living in the home and safeguards and standards for disclosure of information in a child abuse and neglect registry.

J. Child and Family Services Improvement Act

The Child and Family Services Improvement Act, Pub. L. No. 109-288, 120 Stat. 1233, was enacted in 2006. Among its many provisions, the Act addressed support for monthly caseworker visits with children in foster care and emphasized activities designed to improve caseworker retention, recruitment, training, and ability to access the benefits of technology. The Act provided support for children affected by methamphetamine or other types of substance abuse. The Act also required that children who are the subject of certain foster care proceedings be consulted in an age-appropriate manner.

K. Fostering Connections to Success and Increasing Adoptions Act

The Fostering Connections to Success and Increasing Adoptions Act, Pub. L. No. 110-351, 122 Stat. 3949, was enacted in 2008. A main purpose of the Act was to connect and support relative caregivers. Among many provisions, the Act promoted and supported funding and programs related to kinship placements, guardianship, and adoptions of foster children (focusing on a foster child's connection to relatives and siblings); extended and increased adoption incentives; required transition plans before a foster child's emancipation; and required case plans that ensure educational stability of children in foster care.

In 2009, the Division of Social Services of the N.C. Department of Health and Human Services issued an administrative letter explaining the Act and its connection to existing social services policies and procedures. See [DSS Administrative Letter CWS-02-09](#) (Mar. 17, 2009) in the "Family Support and Child Welfare Administrative Letters" section of the website for the NC Department of Health and Human Services. Since the Act became law, the Division of Social Services has implemented a number of policies and procedures to carry out its provisions.

Resources: For an explanation of the Act and tools and resources related to its provisions, see "[Fostering Connections](#)" on the website for the National Resource Center for Permanency and Family Connections.

For an explanation of the Act and federal guidance to the states on its provisions, see CHILDREN'S BUREAU, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, [PROGRAM INSTRUCTION ACYF-CB-PI-08-05](#) (Oct. 23, 2008).

L. Preventing Sex Trafficking and Strengthening Families Act³

On September 29, 2014, the Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, was signed into law. It has a significant impact on child welfare proceedings. Highlights of the Act include:

- Requiring state agencies to develop policies and procedures to identify and provide appropriate services to children who are victims or at risk of being victims of sex trafficking;
- Requiring states to develop and implement plans to locate children missing from foster care, to identify factors that contributed to their absence, to address the needs of those children, and to report to the federal government on those children;
- Requiring states to implement a “reasonable and prudent parent standard” for decisions made by foster parents and child care institutions that allow a foster child to engage in age or developmentally appropriate activities;
- Adding case plan and review requirements for older youth and eliminating Another Planned Permanent Living Arrangement (APPLA) as a permanency goal for children under 16;
- Providing foster care youth ages 14 and older the opportunity to participate in developing and revising their own case plans;
- Requiring states to insure that youth exiting the foster care system receive official documents such as birth certificate, social security card, etc.;
- Improving adoption incentives and extending family connection grants;
- Collecting data on adoption and legal guardianship disruption and dissolution;
- Encouraging foster care placement with siblings; and
- Improving international child support recovery.

3. Source for some content in this section: [online fact sheet for Preventing Sex Trafficking and Strengthening Families Act from the Children’s Defense Fund](#), dated October, 2014, accessed May, 2015.

13.3 Special Immigrant Juvenile Status and Deferred Action for Childhood Arrivals⁴

A. The Connection between Juvenile Court and Immigration Law

Children who come into juvenile court may have immigration issues that could be affected by juvenile court proceedings. Undocumented children who will not be reunified with their parents may be eligible to achieve the lawful immigration status of Special Immigrant Juvenile Status (SIJS), if the juvenile court (or another state court) makes specific findings pertaining to the child that are provided to the Citizenship and Immigration Services (CIS).

In 2012, the U.S. Department of Homeland Security implemented the “Deferred Action for Childhood Arrivals Initiative,” 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.

Note: This section provides only a general overview of SIJS and the Deferred Action for Childhood Arrivals process. In some cases it is advisable to seek assistance from an immigration specialist, especially where the child has a delinquency or criminal history. Resources for consultation and/or representation include:

- The “[Immigrant and Refugee Rights Project](#)” section of the North Carolina Justice Center website.
- The “[Immigrant Children](#)” section of the U.S. Committee for Refugees and Immigrants website.

Attorneys dealing with juvenile proceedings in North Carolina should be familiar with any policies, procedures, or guidance relating to SIJS or other immigration issues promulgated by their respective agencies (Division of Social Services in DHHS, Guardian ad Litem Program, and the Parent Representation Division of the Office of Indigent Defense Services).

B. Special Immigrant Juvenile Status and Obtaining Lawful Permanent Residency

1. Introduction. With SIJS, an undocumented child who will not be reunified with his or her parents due to abuse, neglect, or abandonment may be able to become a lawful permanent

4. Sources for this section include: SALLY KINOSHITA & KATHERINE BRADY, IMMIGRANT LEGAL RESOURCE CENTER, IMMIGRATION BENCHBOOK FOR JUVENILE AND FAMILY COURT JUDGES (2005); ANGIE JUNCK, SALLY KINOSHITA & KATHERINE BRADY, IMMIGRANT LEGAL RESOURCE CENTER, [IMMIGRATION BENCHBOOK FOR JUVENILE AND FAMILY COURT JUDGES](#) (2010); training materials from [Special Immigrant Juvenile Status \(SIJS\): Highlighting Changes Implemented by the Trafficking Victims Protection and Reauthorization Act](#), a webinar sponsored by the Immigrant Legal Resource Center, March 2009; [Memorandum from Donald Neufeld](#), Acting Assoc. Dir., Domestic Operations, and Pearl Chang, Acting Chief, Office of Policy & Strategy, U.S. Citizenship & Immigration Services, to Field Leadership (Mar. 24, 2009); LISA MENDEL-HIRSA, EMPIRE JUSTICE CTR., [UNDERSTANDING SPECIAL IMMIGRANT JUVENILE STATUS: AN ADVOCATES CALL TO ACTION](#) (2010); “[Consideration of Deferred Action for Childhood Arrivals Process](#)” page on the U.S. Citizenship and Immigration Services website. Sejal Zota, formerly with the UNC School of Government, provided input on this section.

resident by applying for special immigrant juvenile status and permanent residency based on the SIJS petition. This is only possible once a court has made specific findings and orders meeting the requirements of SIJS.

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, attorneys should carefully consider with their clients the possible consequences or risks of applying for SIJS.

The status of “special immigrant juvenile” (defined in the Immigration and Nationality Act (INA) § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J)) was created by § 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. In 2008, the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA), Pub. L. No. 110-457, 122 Stat. 5044, changed some of the requirements and process for obtaining SIJS, and also changed grounds of inadmissibility (discussed below) that are waived for SIJS.

Note regarding change in law: Although federal regulations have not yet been amended to put the new TVPRA amendments into effect, new regulations were proposed and the comment period ended in November 2011. *See* Special Juvenile Immigrant Petitions, [76 Fed. Reg. 54, 978-01](#) (proposed Sept. 6, 2011). Because there has not been a timely enactment of federal regulations there is a lack of awareness and some confusion among attorneys and government officers about the SIJS requirements. In a USCIS memorandum dated March 24, 2009, to its field leadership, the USCIS explains the TVPRA changes and provides guidance to immigration service officers working with Special Immigrant Juvenile petitions regarding implementation of those changes. The memo directs officers to proceed under the new TVPRA laws, and provides a useful explanation of the changes in the law and SIJS requirements in general. *See* [Memorandum from Donald Neufeld](#), Acting Assoc. Dir., Domestic Operations, and Pearl Chang, Acting Chief, Office of Policy & Strategy, U.S. Citizenship & Immigration Services, to Field Leadership (Mar. 24, 2009), available in the SIJ section of the [U.S. Citizenship and Immigration Services website](#), labeled as the “Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions Memo.” A settlement in a class action lawsuit, *Perez-Olano v. Holder*, Case No. CV 05-3604 (C.D. Cal. 2005), addressed some of the issues also addressed by the TVPRA, such as protection for children who “age out” of the system while awaiting a response to their applications. Information about this lawsuit is also available on the USCIS website noted above.

There is no guarantee that the federal regulations will be changed to reflect the new laws or that CIS will continue to proceed the same way. Therefore, it is important to be aware of both the old and new requirements for SIJS and proceed with caution.

Tools and Resources:

- Form I-360 and I-485 along with additional information can be obtained on the [CIS website](#).

- ANGIE JUNCK, SALLY KINOSHITA & KATHERINE BRADY, IMMIGRANT LEGAL RESOURCE CENTER, [IMMIGRATION BENCHMARK FOR JUVENILE AND FAMILY COURT JUDGES](#) (2010), available on the [SIJS pages](#) of the U.S. Committee for Refugees and Immigrants website along with other information and resources on SIJS and immigration.
 - For news, research, and legal assistance on immigrant issues, see “[Immigrants and Refugees](#)” on the North Carolina Justice Center website.
 - For materials on SIJS, see [Remedies for Immigrant Children and Youth](#) on the Immigrant Legal Resource Center website.
 - For (redacted) examples of North Carolina court orders and motions related to SIJS (that preceded changes in the law), see “[Special Immigrant Juvenile Status, Samples by State or Region](#)” on the U.S. Committee for Refugees and Immigrants website.
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2. Eligibility for Special Immigrant Juvenile Status

(a) **Court findings and orders.** In order 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 CIS with the SIJS petition:

- **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. (The law prior to the TVPRA and current regulations do not include the language in italics regarding an entity or individual.) As long as the court has jurisdiction to make determinations about the custody and care of juveniles it falls within the term “juvenile court.”
- **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*. (The language in italics was added by the TVPRA and is not contained in current regulations.) Finding that reunification is not viable does not require termination of parental rights or a finding that reunification will never be possible in the future. However, the court’s order should include clear findings relating to the basis for the child’s placement and the reasons that reunification is not a viable option, to make it clear that entry of the order is not a sham for the sole purpose of obtaining special immigrant juvenile status.
- **Best interest not to return.** There must be a judicial or administrative finding that it would not be in the best interest of the child to be returned to the child’s or parent’s country of nationality or country of last habitual residence.

(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 child must be under 21 at the time of filing for SIJS. Prior to the TVPRA (and still according to regulations), applicants needed to complete the entire immigration adjudication process prior to turning 21.
- **Court jurisdiction.** The juvenile court must have jurisdiction over the child. Prior to the TVPRA (and still according to regulations), the person applying for SIJS had to

remain under juvenile court jurisdiction throughout the immigration process. The CIS has stated that for now it will approve petitions as long as the juvenile court had jurisdiction *when the SIJ petition was filed*; however, changed regulations may alter this policy. If jurisdiction does terminate due to the child aging out, an order that explicitly states that age is the reason for terminating jurisdiction could be beneficial in dealing with the tension between the regulations and the TVPRA.

- **Unmarried.** The applicant must be unmarried not only at the time of application but throughout the entire immigration process.

3. The application process. Application for SIJS requires two steps:

- the child must apply for special immigrant juvenile status (the I-360 petition), and
- the child must apply for permanent residency (the I-485 petition), called “applying for adjustment of status,” based on the SIJS petition.

Practice Note: There are fees for an I-485 petition, but not for an I-360 petition filed on behalf of a Special Immigrant Juvenile. The I-485 fee is \$985, and although an application for a fee waiver may be made, this could result in delays.

It is best to file the SIJS and adjustment of status applications at the same time because, once approved for SIJS, the petitioner is immediately eligible to adjust his or her status to lawful permanent resident. An applicant for SIJS is eligible to receive work authorization while the SIJS and adjustment of status applications are pending.

Once SIJS eligibility has been established, eligibility for lawful permanent residency must be established through form I-485. This involves showing that the child does not come within any of the applicable “grounds of inadmissibility,” or that the child qualifies for a waiver of grounds. If a child comes within the “grounds of inadmissibility” and applies for SIJS, he or she will be barred from becoming a permanent resident and might be referred for deportation proceedings, absent the grant of a waiver.

Grounds of inadmissibility and waivable grounds for SIJS are contained in INA § 212(a), 8 U.S.C. § 1182(a) (but amended by the TVPRA). Most grounds of inadmissibility relate to criminal activity. For example, SIJS applicants might not be able to obtain permanent residency if they have a record of involvement with drugs or prostitution; an adult criminal record; a classification as suicidal, mentally ill, or a sexual predator; or previous deportation.

The CIS is required to adjudicate SIJS petitions within 180 days of the filing of the petition. Prior to the TVPRA changes in the law, there was no time limit and the processing of an application could take as long as three years.

(Note that the process differs for children already involved in removal (deportation) proceedings.)

In addition to completing the I-360 petition for SIJS and the I-485 application for adjustment of status, the process may include but is not limited to the following steps, some of which relate to

determining whether the child comes within grounds of inadmissibility:

- completing additional CIS forms;
- providing proof of age and identity;
- obtaining a special medical exam (related to discovering illegal drug use, HIV, other designated diseases, or mental illness);
- providing photographs;
- being fingerprinted;
- submitting to an interview with the CIS;
- paying CIS fees or obtaining a fee waiver.

Note, however, that CIS officers may waive interviews for children under the age of 14 or when it is determined that an interview is unnecessary. Interviews are to focus on eligibility for the status and not on matters pertaining to abuse, neglect, or abandonment, as those matters were handled by the juvenile court according to state law.

4. Impact on parents. Once SIJS is granted, the parents cannot derive any immigration benefit from the child. 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 (related to grounds of inadmissibility discussed above). However, a criminal conviction for child abuse, neglect, or abandonment is a ground of deportability.

C. Deferred Action for Childhood Arrivals

On June 15, 2012, the U.S. Department of Homeland Security announced the implementation of a policy that would allow some undocumented persons to obtain temporary work authorization and deferral of removal (deportation) action. Under the “Deferred Action for Childhood Arrivals Initiative” (DACA), certain persons who were brought to the U.S. as children and who meet several key requirements may request deferral of a removal action, which creates eligibility for work authorization but does not confer legal status.

A person may request consideration of deferred action if he or she meets all of the following requirements:

- was under the age of 31 as of June 15, 2012;
- came to the U.S. before reaching his or her 16th birthday;
- has continuously resided in the U.S. since June 15, 2007, up to the present time;
- was physically present in the U.S. on June 15, 2012, and at the time of making the request for consideration of deferred action;
- entered the country without inspection before June 15, 2012, or had a lawful immigration status that expired as of June 15, 2012;
- is currently in school, has graduated or obtained a certificate of completion from high school, has obtained a GED, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the U.S.; and
- has not been convicted of a felony, significant misdemeanor, three or more other misdemeanors, and does not otherwise pose a threat to national security or public safety.

To request deferred action, a person must be at least 15 years of age. However, if a person is currently in removal proceedings or has a final removal or voluntary departure order, and is not in immigration detention, the person may be younger than 15 years old at the time the request is submitted.

For details on how to meet requirements for deferred action, including forms and process instructions, see “Guidelines” on the “[Consideration of Deferred Action for Childhood Arrivals](#)” page on the USCIS website.

Note: On November 20, 2014, President Obama announced an expansion of DACA, but this expansion is on hold pursuant to a federal district court decision. Additional information on DACA and the pending expansion can be found on the website for the [National Immigration Law Center](#).

13.4 Medical, Mental Health, and Substance Abuse Records Protection (HIPAA and 42 C.F.R. Part 2)

Note: Content for this section is an adaptation of an outline written by Mark Botts of the University of North Carolina School of Government, with the author’s permission.

A. Connection between Federal Law Records Protection and Juvenile Proceedings

Medical, mental health, and substance abuse records of parents, children, or caregivers are often relevant to the child protective assessment process as well as decisions made throughout juvenile proceedings. Although state laws give certain individuals and agencies access to confidential information for the purpose of child protection and juvenile proceedings, access to and disclosure of the records addressed in this section are also subject to federal law restrictions. See *supra* § 5.8.C for an explanation of access to and disclosure of information in juvenile proceedings under state law.

B. HIPAA⁵ Privacy Rule—45 C.F.R. Parts 160, 164⁶

The federal “privacy rule”⁷ (HIPAA) governs the privacy of health information.

1. Covered health care providers. This includes any “health care provider” that transmits any health information in electronic form in connection with a HIPAA transaction.⁸ “Health care

5. “HIPAA” stands for The Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191, 110 Stat. 1936, codified in part at 42 U.S.C. §§ 1320d to 1320d-8. This act directed the U.S. Department of Health and Human Services to develop regulations governing the privacy of health information.

6. Jill Moore of the University of North Carolina School of Government also provided input for this subsection.

7. The term “privacy rule” in this [chapter] refers to the final rule published in 67 Fed. Reg. 53,181 (Aug. 14, 2002), with modifications published in 78 Fed. Reg. 5566 (Jan. 25, 2013).

8. 45 C.F.R. §§ 160.103, 164.500. “Transaction” means the transmission of information between two parties to carry out financial or administrative activities related to health care. Examples of HIPAA transactions include transmitting claims information to a health plan to obtain payment and transmitting an inquiry to a health plan to

provider” is defined broadly to include any person or organization that, in the normal course of business, furnishes, bills, or is paid for care, services, or supplies related to the health of the individual.⁹

2. Protected health information. This includes health information that is maintained in any form or medium (e.g., electronic, paper, or oral) that

- is created or received by a health care provider, health plan, employer, or health care clearing house;
- identifies an individual (or with respect to which there is a reasonable basis to believe the information can be used to identify an individual); and
- relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.¹⁰

3. Duty to comply with HIPAA. A covered entity, including a covered health care provider, may use and disclose protected health information only as permitted or required by the privacy rule. Failure to comply with HIPAA may result in civil monetary penalties. *See* 45 C.F.R. § 160.402. Any person or organization may file a complaint regarding HIPAA violations.

4. Impact on abuse and neglect laws.

(a) Permissible disclosure. The HIPAA privacy rule permits a covered provider or other covered entity to disclose protected health information to a government authority authorized by law to receive reports of child abuse or neglect. *See* 45 C.F.R. § 164.512(b). Thus, the privacy rule permits a covered provider to disclose protected health information when making a report required by the state reporting law, G.S. 7B-301. The privacy rule also permits a covered provider to disclose protected health information to the extent the disclosure is required by law. *See* 45 C.F.R. § 164.512(a). Thus, the privacy rule permits a covered provider to disclose protected health information to DSS when that department demands the information pursuant to G.S. 7B-302 or to the guardian ad litem as necessary to comply with G.S. 7B-601.

(b) Disclosure pursuant to subpoena and court order. The privacy rule permits a covered entity to disclose protected health information in response to a subpoena if certain circumstances apply. *See* 45 C.F.R. § 164.512(e)(1)(ii). However, because HIPAA does

determine if an enrollee is covered by the health plan.

9. 45 C.F.R. § 160.103. This includes (1) preventive, diagnostic, therapeutic, rehabilitative, maintenance, or palliative care, and counseling, service, assessment, or procedure with respect to the physical or mental condition, or functional status, of an individual or that affects the structure or function of the body; and (2) sale or dispensing of a drug, device equipment, or other item in accordance with a prescription. For definitions of “health care provider” and “health care,” see 45 C.F.R. § 160.103.

10. See the definitions of “protected health information” and “individually identifiable health information” at 45 CFR § 160.103. The privacy rule excludes from the definition of “protected health information” certain records, including education records covered by the Federal Educational Rights and Privacy Act and employment records held by a covered entity in its role as employer.

not preempt more stringent state and federal confidentiality laws, and because the state mental health confidentiality law and federal substance abuse records law do not permit disclosure in response to a subpoena alone, information governed by the state mental health law or federal substance abuse records law cannot be disclosed pursuant to a subpoena alone. Information that is subject to the state communicable disease confidentiality law may be disclosed pursuant to a subpoena, but the subject of the information may request that the information be reviewed in camera before it is disclosed.¹¹ A covered provider may disclose protected health information in response to an order of a court or administrative tribunal, provided that the covered entity discloses only the information expressly authorized by the order. 45 C.F.R. § 164.512(e)(1)(i). The GAL's appointment order from the court specifically provides for the release of confidential information, including information subject to HIPAA, to the GAL. *See* AOC Form AOC-J-207, "Order to Appoint or Release Guardian ad Litem and Attorney Advocate" (June 2014).

Resource and Tool: For a detailed guide to HIPAA, see OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF HEALTH & HUMAN SERVICES, [SUMMARY OF THE HIPAA PRIVACY RULE](#) (2003).

C. Federal Substance Abuse Records Law—42 C.F.R. Part 2

Federal substance abuse records laws restrict the use and disclosure of patient information received or acquired by a federally assisted alcohol or drug abuse program. (42 U.S.C. § 290dd-2; 42 C.F.R. pt. 2).

1. Covered programs: To be covered by 42 C.F.R. part 2, a provider must meet the definition of "program" and must be "federally assisted."¹² "Program" means an individual or entity, other than a general medical care facility, that holds itself out as providing, and does provide, alcohol or drug abuse diagnosis,¹³ treatment,¹⁴ or referral for treatment. Patient records maintained by a general medical facility, such as a hospital, are not covered unless the patient receives treatment, diagnosis, or referral for treatment from

11. G.S. 130A-143. The communicable disease confidentiality law applies to information identifying an individual with a reportable communicable disease, including HIV and sexually transmitted diseases. The complete list of diseases covered by the law is at 10A N.C.A.C. 41A.0101.

12. See 42 C.F.R. 2.12(b) for definition of "federal assistance."

13. "Diagnosis" means any reference to an individual's alcohol or drug abuse, or to a condition identified as having been caused by that abuse, which is made for the purpose of treatment or referral for treatment. "Diagnosis" is not limited to the work of medical personnel. A substance abuse evaluation or assessment carried out by a drug counselor or drug court coordinator that identifies alcohol or drug abuse and is made for the purpose of treatment or referral for treatment is a "diagnosis." Thus, the term "program" covers not only treatment programs, but also individuals or entities that diagnose and refer a person to treatment at another program. On the other hand, a "screen" or "prescreen" procedure to identify persons who *may* have alcohol or drug problems for the purpose of referring them to an alcohol or drug specialist for evaluation or assessment is not a "diagnosis." In this instance, the information gathered in the screening process does not constitute a diagnosis and the screening agency is referring individuals for an assessment, not treatment. Therefore, the screening agency is not a program covered by 42 C.F.R. part 2.

14. "Treatment" is not limited to care provided by medical personnel under a medical model and can include individual or group counseling.

- a. a specialized drug or alcohol abuse unit of the hospital or medical center, or
- b. medical personnel or other staff whose primary function is to provide services for alcohol or drug abuse.

Practice Note: If a hospital emergency room treating a trauma patient performs a blood test that identifies cocaine or other drugs in the patient’s blood, the hospital emergency room is not a “program” covered by the regulations and, therefore, the drug test results are not protected by 42 C.F.R. Part 2. If, however, a substance abuse counselor evaluates the same patient for drug abuse after he or she is admitted to a medical floor of the hospital, then the substance abuse counselor would be considered a “program” under b., above, and any information acquired by the counselor that falls within the scope of 2., below, would be governed by 42 C.F.R Part 2. If the hospital emergency room provides detoxification services, then the detox unit of the hospital emergency room would be considered a “program” under a., above.

2. Confidential information. The federal prohibition against disclosure¹⁵ applies to any information, whether recorded or not, that:

- would identify a “patient”—one who has applied for or been given substance abuse treatment, diagnosis, or referral for treatment—as an alcohol or drug abuser;
- is alcohol or drug abuse information obtained by a federally assisted alcohol or drug abuse program; and
- is for the purpose of treating alcohol or drug abuse, making a diagnosis for that treatment, or making a referral for that treatment.

“Identify” means a communication, either written or oral, of information that identifies someone as a substance abuser, the affirmative verification of another person’s communication of patient identifying information, or the communication of any information from the record of a patient who has been identified.

Practice Note: Suppose a child protective services worker investigating a report of child neglect requests access to a child’s mental health record. The family/social history section of the child’s record states that the mother, during an interview with the child’s mental health counselor, disclosed that she abuses cocaine. This information is not covered by 42 C.F.R Part 2, because it was not obtained for the purpose of treating or diagnosing the mother or referring her for treatment. The information also would not identify the mother as a person who applied for or received substance abuse treatment.

3. Duty imposed by federal substance abuse records law. The regulations prohibit the disclosure and use of patient records except as permitted by the regulations themselves.

15. In addition to restricting disclosure, the federal regulations restrict the “use” of information to initiate or substantiate any criminal charges against a patient or to conduct any criminal investigation of a patient. This restriction on use applies to any information whether or not recorded that is substance abuse information obtained by a federally assisted substance abuse program for the purpose of treating alcohol or drug abuse, making a diagnosis for the treatment, or making a referral for the treatment.

Anyone who violates the law is subject to a criminal penalty in the form of a fine (up to \$500 for first offense, up to \$5,000 for each subsequent offense).¹⁶

4. Impact of 42 C.F.R. part 2 on abuse and neglect laws.

(a) Disclosure permissible only for reporting or by consent or court order. The restrictions on disclosure and use in the federal regulations do not apply to the reporting under state law of incidents of suspected child abuse and neglect to appropriate state or local authorities. 42 C.F.R. § 2.12(c)(6). Therefore, the federal law does not bar complying with the reporting law in G.S. 7B-301, even if it means disclosing patient identifying information.

Although substance abuse programs (or third party payers who have received information from substance abuse programs) must make a report of suspected abuse, neglect, or dependency mandated by G.S. 7B-301, they are not authorized to provide information beyond the initial report when DSS requests further information pursuant to G.S. 7B-302 or when the GAL requests information pursuant to G.S. 7B-601. The federal rules permit disclosure of patient-identifying information for follow-up investigations or for court proceedings that may arise from the report only with the patient's written *consent* or a *court order* issued pursuant to Subpart E of the federal regulations. 42 C.F.R. § 2.12(c)(6) "[N]o State law may either authorize or compel any disclosure prohibited by these regulations." 42 C.F.R. § 2.20.

(b) Court order requirements. A person holding records may not disclose the records in response to a subpoena unless a court of competent jurisdiction enters an authorizing order under Subpart E of 42 CFR part 2 (or the regulations explicitly make an exception to confidentiality under the circumstances). Under Subpart E, a federal, state, or local court may authorize a substance abuse program to make a disclosure that would otherwise be prohibited under the regulations, but only in certain circumstances. *See* 42 C.F.R. § 2.64. A permissible circumstance for court orders arising in the context of juvenile proceedings is when the order for disclosure is necessary to protect against an existing threat to life or serious bodily injury, including circumstances that constitute suspected child abuse and neglect and verbal threats against third parties.

When the information is sought for non-criminal purposes, the patient and program must be notified and given an opportunity to file a written response or appear in person to address the request for court ordered disclosure. The judge may examine the records before making a decision. This inspection must be *in camera*. To order disclosure, the court must find "good cause" for the disclosure. This means that the court must determine that there is no other effective way to obtain the information and that the public interest and need for disclosure outweigh the potential injury to the patient, the patient's relationship to the program, and the program's ongoing treatment services. Any order authorizing disclosure must (i) limit disclosure to parts of the record essential to fulfill the

16. A substance abuse program must maintain records in a secure room, locked file cabinet, safe or other similar container when not in use; the program must adopt written policies and procedures to regulate and control access to records. *See* 42 C.F.R. § 2.16.

purpose of the order, (ii) limit disclosure to persons who need the information, and (iii) protect the information from disclosure to others by sealing portions of the public record in the case.

(c) Consent requirements (42 C.F.R. § 2.31). A written consent to a disclosure under these regulations must include:

- (1) The specific name or general designation of the program or person permitted to make the disclosure.
- (2) The name or title of the individual or the name of the organization to which disclosure is to be made.
- (3) The name of the patient.
- (4) The purpose of the disclosure.
- (5) How much and what kind of information is to be disclosed.
- (6) The signature of the patient and, when required for a patient who is a minor, the signature of a person authorized to give consent under 42 C.F.R. § 2.14; or, when required for a patient who is incompetent or deceased, the signature of a person authorized to sign under 42 C.F.R. § 2.15 in lieu of the patient.
- (7) The date on which the consent is signed.
- (8) A statement that the consent is subject to revocation at any time except to the extent that the program or person which is to make the disclosure has already acted in reliance on it. Acting in reliance includes the provision of treatment services in reliance on a valid consent to disclose information to a third party payer.
- (9) The date, event, or condition upon which the consent will expire if not revoked before. This date, event, or condition must insure that the consent will last no longer than reasonably necessary to serve the purpose for which it is given.

5. Relationship of federal substance abuse law to state law. No state law may authorize or compel any disclosure that is prohibited by the federal drug and alcohol confidentiality law. Where state law authorizes or compels disclosure that 42 C.F.R. pt. 2 prohibits, 42 C.F.R. pt. 2 must be followed. 42 C.F.R. § 2.20. The federal drug and alcohol confidentiality law does not require disclosure under any circumstances. If the federal law permits a particular disclosure, but state law prohibits it, the state law controls. 42 C.F.R. § 2.20.

13.5 Education Records and FERPA¹⁷

A. Introduction

The Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, was enacted in 1974; the corresponding regulations are found at 34 C.F.R. part 99. FERPA is a complex federal law that provides for access to education records by parents and eligible students and governs the disclosure of education records by all educational institutions that receive federal

17. Source for this section: [Website for the Family Policy Compliance Office of the U.S. Department of Education](#). Laurie Mesibov of the UNC School of Government provided input on this section.

funds. Although state laws give certain individuals and agencies access to confidential information for the purpose of child protection and juvenile proceedings, access to and disclosure of education records in some circumstances are subject to FERPA requirements. See *supra* § 5.8 for an explanation of access to and disclosure of information in juvenile proceedings under state law.

FERPA gives parents and “eligible students” (a student who is 18 or attending a postsecondary institution) certain rights with respect to inspecting, requesting changes to, and preventing disclosure of education records. For the purposes of this manual, this section will focus on consent to disclose information and certain exceptions to the need for consent. This section is an introductory overview of FERPA requirements most relevant to juvenile proceedings and does not comprehensively address FERPA (see resources below).

Resources and Tools: For more detailed information about FERPA, including regulations, explanations, and model forms, see “[Family Policy Compliance Office](#)” on the U.S. Department of Education website. In 2011, the U.S. Department of Education announced a series of initiatives related to FERPA and formed a Privacy Technical Assistance Center (PTAC) resulting in a series of technical briefs and assistance tools accessible via a “[PTAC Toolkit](#)” website.

B. Consent Required for Disclosure

1. Consent required. Under FERPA, an educational agency or institution may not provide *personally identifiable information* from a student’s *education records* without obtaining specific written consent from the parent or eligible student, unless an exception to the consent requirement applies.

2. Personally identifiable information. “Personally identifiable information” includes but is not limited to:

- the student’s name;
- the name of the student’s parent or other family members;
- the address of the student or student’s family;
- a personal identifier, such as the student’s social security number, student number, or biometric record;
- other indirect identifiers, such as the student’s date of birth, place of birth, and mother’s maiden name;
- other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or
- information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

34 C.F.R. § 99.3

3. Education records. The term “education records” used in FERPA generally includes all records, files, documents, and other materials that are maintained by the agency or institution (or by a party acting for the agency or institution) and contain information directly related to a student. 34 C.F.R. § 99.3. (This means the records themselves and the information in them, wherever they are stored.)

There are a number of exceptions in the definition of “education records.” One narrow exception excludes personal notes kept in the *sole possession* of the maker as a memory aid and not shared with anyone except a temporary substitute. Thus, personal notes that are not shared and personal knowledge and observations of educators and administrators that do not rely on the contents of an education record are likely not subject to FERPA requirements. Another exception involves “records of a law enforcement unit.” This applies to records created and maintained by a law enforcement officer, department, commissioned police officer, or non-commissioned security guard who is officially authorized by the educational institution to enforce laws or maintain the physical security and safety of the school. This means records of a School Resource Officer (SRO) are not education records, unless the records are created and maintained exclusively for a non-law enforcement purpose, such as school discipline. For more information, see 34 C.F.R. 99.8.

4. Content of consent. A consent to release records protected by FERPA must: (1) specify the records that may be disclosed; (2) state the purpose of the disclosure; and (3) identify the party or class of parties to whom the disclosure may be made. 34 C.F.R. § 99.30.

C. Exceptions to Consent Requirement

1. Overview. There are a number of exceptions to the requirement of written consent to allow disclosure to certain parties under certain conditions. Those most relevant to juvenile proceedings and explained in more detail below are disclosures:

- to an agency caseworker or tribal organization authorized to access a student’s case plan when legally responsible for the care and protection of the student;
- to comply with a judicial order or lawfully issued subpoena;
- to appropriate officials in cases of health and safety emergencies;
- of information that is “directory” information such as name, address, phone number, dates of attendance, etc.

See 34 C.F.R. §§ 99.31, 99.36, 99.37, 99.38 and the Uninterrupted Scholars Act, Pub. L. No. 112-278, 2013, 126 Stat. 2480.

2. Disclosure to child welfare agency responsible for child. The Uninterrupted Scholars Act of 2013 addresses obtaining timely access to school records. See Pub. L. No. 112-278, 2013, 126 Stat. 2480; 20 U.S.C. §1232g(b)(1)(L). It allows schools to release records without first obtaining consent from a parent to a caseworker or other representative of a state or local child welfare agency or tribal organization authorized to access a student’s case plan when the agency or organization is legally responsible for the care and protection of the student. It is important to note, however, that this provision is permissive and not mandatory. The child

welfare agency may only disclose (or re-disclose) the records to an individual or entity engaged in addressing the student's education needs. That individual or entity must be authorized to receive the records, and the disclosure (or re-disclosure) must be consistent with state confidentiality laws. Federal regulations have not yet been amended to put the new Uninterrupted Scholars Act amendments into effect.

See also Dear County Directors of Social Services letter, dated June 1, 2013, from Kevin Kelley, Section Chief, Child Welfare Services, DHHS Division of Social Services (Subject: Family Educational Rights and Privacy Act) (available from the manual authors).

3. Disclosure to comply with judicial order or subpoena. An educational agency or institution may disclose information in order to comply with a judicial order or lawfully issued subpoena. Thus, a juvenile court may order that the information be disclosed. However, the educational agency or institution must make a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance so the parent or eligible student may seek legal recourse. Notification to the parent is not required if:

- the parent has been a party to a court proceeding involving child abuse, neglect, or dependency and the order is issued in the context of that proceeding;
- the disclosure is in compliance with a federal grand jury subpoena or a subpoena issued for law enforcement purposes for which a court has ordered that the existence or contents of the subpoena or information furnished in response to the subpoena not be disclosed; or
- the disclosure is in compliance with an ex parte court order obtained by the U.S. Attorney General or that person's designee concerning certain investigations or prosecutions.

34 C.F.R. § 99.31(a)(9) and the Uninterrupted Scholars Act, Pub. L. No. 112-278, 2013, 126 Stat. 2480; 20 U.S.C. § 1232g(b)(2)(B). Note, the regulations have not been amended since the enactment of the Uninterrupted Scholars Act.

4. Disclosure for health or safety emergency. An educational agency or institution may disclose personally identifiable information from an education record to appropriate parties, including parents of an eligible student, in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals. In making a determination as to whether this exception applies, an educational agency or institution may take into account the totality of the circumstances pertaining to a threat to the health or safety of a student or other individuals. If the determination is made that there is an articulable and significant threat to the health or safety of a student or other individual, disclosure may be made to any person whose knowledge of the information is necessary to protect the health or safety of the student or others. 34 C.F.R. §§ 99.31(a)(10), 99.36. Although FERPA does not include a specific exception for reporting child abuse or neglect, the health or safety exception may apply in the few cases in which it is necessary to consult school records to determine whether a report should be made. The exception also may apply when a social services director acting pursuant to G.S. 7B-302(e) makes a written demand for information or reports the director believes are relevant to an assessment or to the provision of protective services.

5. Disclosure of directory information. Schools may disclose, without consent, “directory” information such as a student’s name, address, telephone number, email address, photograph, date and place of birth, major field of study, grade level, enrollment status, honors and awards, dates of attendance (“dates of attendance” does not mean specific daily records of attendance), participation in sports, etc. Directory information does not include a student’s social security number or a student identification number that is used to gain access to education records (when not used in conjunction with other authenticating factors such as a PIN or password). However, parents and eligible students must be informed about directory information and their right to ask the school not to disclose it. 34 C.F.R. §§ 99.3, 99.31(a)(11), 99.37. Schools are required to notify parents and eligible students annually of their rights under FERPA. 34 C.F.R. § 99.7.

D. Redislosure and Use of Information

When an educational agency or institution is permitted to disclose personally identifiable information from an education record, it may do so only on the condition that the party to whom the information is disclosed will not disclose the information to any other party without the prior consent of the parent or eligible student. The disclosed information may be used only for the purposes for which the disclosure was made. 34 C.F.R. § 99.33(a). This restriction on redislosure does not include disclosure that is required by a court order or subpoena or for directory information. 34 C.F.R. 99.33(c). Redislosure by child welfare agencies is also governed by G.S. 7B-302 and -2901(b), which require information received by the department of social services to be maintained confidentially except for one of the enumerated statutory conditions.

E. Complaints and Enforcement

A parent or eligible student may file a written complaint with the Family Policy Compliance Office of the U.S. Department of Education regarding an alleged violation of FERPA. 34 C.F.R. § 99.63. The complaint contents, investigation procedures, and enforcement actions are explained in 34 C.F.R. §§ 99.64 through 99.67.

The United States Supreme Court has held that FERPA’s nondisclosure provisions create no personal rights that are enforceable under 42 U.S.C. § 1983. *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002).

13.6 Indian Child Welfare Act

Some of the content in this section was reproduced or adapted from a summary written by Jane Thompson and Kirk Randleman, Assistant Attorneys General for the State of North Carolina, April 2008, with permission. This section is an overview and not intended to be a comprehensive guide to the Indian Child Welfare Act (ICWA). Additional resources and tools related to ICWA can be found at the end of this section.

A. Introduction and Applicability

The Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901–1963, was enacted in 1978 to establish uniform, nationwide procedures for the handling of Indian child placements in recognition of the importance of the child/tribe relationship and the history of removal of Indian children from their homes with little, if any, deference to Indian culture. The Code of Federal Regulations contains detailed guidance on the Act at 25 C.F.R. 23. However, proposed federal regulations (at 80 Fed. Reg. 54 (Mar. 20, 2015) pp. 1488094) will significantly impact 25 C.F.R. 23. The comment period for those regulations ended in May 2015, and readers are cautioned to monitor the finalization of the regulations since revised regulations will significantly alter the law as presented in this subsection of the manual. The proposed regulations are based upon February 2015 revisions to the Bureau of Indian Affairs Guidelines to ICWA, found at 80 Fed. Reg. 31 (Feb. 25, 2015) pp. 1014659. However, the Guidelines do not have the binding effect of law. Links to the new guidelines, the proposed federal regulations, and a presentation on the changes can be found in the [Indian Child Welfare Act](#) section of the Bureau of Indian Affairs website.

1. State recognized tribes not covered by ICWA. ICWA applies only to federally recognized Indian tribes, of which there are over 500. It does not apply to Canadian tribes or to tribes that have only state recognition. The only federally recognized tribe in North Carolina is the Eastern Band of the Cherokee Nation. Other state recognized tribes, to which the Act does not apply, are:

- Coharie Tribe
- Haliwa Saponi Indian Tribe
- Lumbee Tribe of North Carolina
- Meherrin Indian Tribe
- Occaneechi Band of the Saponi Nation
- Sappony
- Waccamaw Siouan Tribe

See “[Commission of Indian Affairs](#)” on the N.C. Department of Administration website. *See also* G.S. Chapter 71A, Indians.

Even though ICWA is inapplicable to tribes with only state recognition, the Juvenile Code provides for special placement consideration and notice in the pre-adjudication phase for children who are members of a state recognized tribe. Under G.S. 7B-505(c) and 7B-506(h)(2a), “nonrelative kin” is a placement option for the court to consider when making a nonsecure custody placement if the court determines it is not going to place the juvenile with a relative. For child members of state-recognized tribes, nonrelative kin includes any member of a state-recognized tribe or any member of a federally recognized tribe, even if there is no substantial relationship between the child and the adult tribal member. Under these statutes, the court may order the department to notify the juvenile’s state-recognized tribe of the need for the juvenile’s placement in nonsecure custody.

In addition, G.S. 143B-139.5A requires the state Division of Social Services to collaborate with the N.C. Association of County Directors of Social Services, the Department of Administration, and the Commission of Indian Affairs to develop effective processes to accomplish a number of goals such as:

- enabling state-recognized tribes to receive notice when Indian children are involved in the child protective services system, and to be consulted on matters related to the placement of Indian children in foster care or for adoption;
- identifying and recruiting N.C. Indians to become foster care and adoptive parents;
- teaching cultural, social, and historical perspectives associated with Indian life to appropriate child welfare workers and foster and adoptive parents.

2. Proceedings covered by ICWA. ICWA applies to child custody proceedings, which include (1) foster care placements (other than voluntary placements), (2) TPR proceedings, (3) preadoptive and adoptive placements, and (4) juvenile court provisions for custody or guardianship of the juvenile. ICWA does not apply to placements arising out of delinquency cases or to custody cases arising out of divorce actions.

3. Children and parents covered by ICWA. ICWA states that it applies only to an “Indian child,” as defined in ICWA. However, the U.S. Supreme Court has interpreted ICWA’s application to also depend on the relationship an Indian child has with his or her Indian parent.

An Indian child is defined in 25 U.S.C. § 1903(4) as a child who is either (i) a member of a federally recognized tribe or (ii) eligible for membership and the biological child of an enrolled member. Each federally recognized tribe decides membership issues, and the tribe’s determination is conclusive. Although the only federally recognized tribe based in North Carolina is the Eastern Band of the Cherokee Nation, children from other federally recognized tribes may reside in North Carolina. Since only the tribe can determine its membership (explained in 4. below) and failure to follow ICWA can invalidate a juvenile proceeding because of a lack of subject-matter jurisdiction, early notification of the tribe is critical when a juvenile case involves a child who may be covered by ICWA. A Notice of Inquiry can be sent to determine the child’s membership in a particular tribe. The Bureau of Indian Affairs maintains a [Tribal Leaders Directory](#) with contact information for tribes.

In 2013, the U.S. Supreme Court decided *Adoptive Couple v. Baby Girl*, __ U.S. __, 133 S.Ct. 2552 (2013), and addressed when ICWA applies to a proceeding involving an Indian child who was never in the physical or legal custody of an Indian parent or who did not have a relationship with an Indian parent. By focusing on the purpose of ICWA to prevent the inappropriate removal of Indian children from their homes, and by citing the phrases “prevent the breakup of the Indian family” and “continued custody of the child by the parent or Indian custodian” (found at 25 U.S.C. 1912(d) and (f)), the Court held that ICWA does not apply when an Indian parent never had physical or legal custody of the Indian child or a relationship with the child. [Note that the revised BIA Guidelines and the 2015 proposed federal regulations are not consistent with this opinion.]

4. Who must assert or establish that ICWA applies. Anyone may raise the question of whether ICWA applies in a particular case. The North Carolina Court of Appeals has held that the burden is on a party who seeks to invoke the protections of ICWA to demonstrate that it applies, and mere allegations of “Indian heritage” will not suffice. *In re C.P.*, 181 N.C. App. 698 (2007) (holding that ICWA did not apply because the only evidence offered by the parent that she and the children were tribe members was her testimony, even though the tribe was given notice and the case was continued twice to permit a response from the tribe); *In re Williams*, 149 N.C. App. 951 (2002) (rejecting respondent’s claim that the trial court failed to follow ICWA where respondent merely made a mention of his Indian heritage but provided no supporting evidence that ICWA was applicable).

In the case *In re A.R.*, respondent parents contended that the trial court failed to comply with the notice requirements of ICWA. The parents had reported to social services an affiliation with a Native American group and the trial court found as a fact that social services should investigate this affiliation, but the court never addressed the result of that investigation. The court of appeals remanded the case for the trial court to determine the results of the investigation and, if applicable, comply with ICWA notification requirements. *In re A.R.* ___ N.C. App. ___, 742 S.E.2d 629 (2013).

5. The Eastern Band of the Cherokee. The Eastern Band of the Cherokee, the only federally recognized tribe in North Carolina, is headquartered on the Qualla Boundary, a 56,688 acre tract that lies in Jackson and Swain counties. There are also some small tracts of tribal lands in Clay County and Cherokee County.

The Eastern Band of the Cherokee is a sovereign nation governed by a Constitution that was first enacted in 1827. The Tribe has its own court system and body of laws. See “Jurisdiction” in Section B below regarding tribal versus state court actions.

Practice Notes: Cherokee Family Services is the agency of the Eastern Band of the Cherokee that handles cases that involve the Indian Child Welfare Act. If you think you are dealing with a Cherokee Indian child, you should contact Cherokee Family Services at P.O. Box 507, Cherokee, North Carolina 28719, (828) 497-6092. That office can assist you in checking with the enrollment office to determine whether the child is an “Indian child.” Enrollment in the Eastern Band of the Cherokee, as with enrollment in any other tribe, may open and close at any time set by the tribe, and the standards for enrollment can change. The tribe has sole discretion in determining its membership.

If the child is subject to ICWA, Cherokee Family Services will be involved in the case as the Tribe’s representative. In some cases, you might experience a delay in getting a response from the Tribe because Cherokee Family Services coordinates their activities with the Tribal Attorney’s Office, which provides legal services for the Tribe in any ICWA case.

In addition to determining Tribal membership, the Tribe designates who qualifies as “extended family” for the child. These persons may or may not be related by blood or marriage to the child. The Tribe bases kinship determinations on significant involvement in the child’s life. Anyone on the Qualla Boundary could be designated as “extended family” for

ICWA purposes. The Tribe has the right to approve all placements and adoptions of the child, even if it does not remove the case to tribal court.

B. Jurisdiction

1. Exclusive tribal court jurisdiction. Exclusive tribal court jurisdiction exists where an Indian child resides on a reservation (even if visiting elsewhere) or is the ward of the tribal court, even if the child does not reside on the reservation. If exclusive tribal court jurisdiction exists, a state court still may act in an emergency situation to prevent imminent physical danger or harm to the child, but must then “expeditiously” initiate proceedings under ICWA to transfer the child to tribal court jurisdiction. An exception to exclusive jurisdiction of the tribe is that states and tribes may enter into agreements related to the care and custody of Indian children and jurisdiction over child custody proceedings, including agreements allowing for transfer of jurisdiction on a case-by-case basis and agreements providing for concurrent jurisdiction between the state and the tribe. 25 § U.S.C. 1919. The Eastern Band of Cherokee Indians entered into a memorandum of agreement with the NC DHHS Division of Social Services and four county departments of social services located within Judicial District 30 (Cherokee, Swain, Jackson, and Graham) that defers jurisdiction of child protective cases from the tribal court to state court. However, the North Carolina Court of Appeals has held that it will not take judicial notice of this memorandum of agreement because it is a “legislative fact” that is not subject to judicial notice. *In re E.G.M.* __ N.C. App. __, 750 S.E.2d 857 (2013) (remanding the case for a determination of subject matter jurisdiction where the trial court made no findings related to the agreement between the state and the Tribe and the court of appeals refused to take judicial notice of the existence of such an agreement). As a result, the memorandum of agreement must be admitted as evidence in each state court case where the Cherokee tribal court would have jurisdiction.

2. Concurrent jurisdiction and intervention. In all other cases state and tribal courts have *concurrent* jurisdiction, but the Tribe has the right to intervene in a state court proceeding at any time, and the only bar to that intervention is that the child is not an Indian child or the Tribe is not the child’s Tribe.

C. Transfer of ICWA Case to Tribal Court

The parent, the Indian custodian, or the Tribe can petition the state court to *transfer* jurisdiction to the tribal court. See 25 U.S.C. § 1911. An Indian custodian is an Indian person with legal custody of an Indian child under tribal law or custom or state law or by agreement of the child’s parent. 25 U.S.C. § 1903.

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,” such as:

- The proceeding was at an advanced stage when the transfer petition was received, and it was not filed promptly after receiving notice of the hearing.
- An Indian child over 12 years old objects to the transfer.

- Evidence necessary to the case could not be adequately presented in tribal court without undue hardship to the parties or witnesses.
- The parents of a child over 5 years of age are not available and the child has had little or no contact with the child's Tribe or members of the Tribe.

Note that these regulations on transfer differ from the 2015 proposed regulations and the 2015 revised guidelines. *See* "Procedures for transfer to tribal court," in the newly revised "Bureau of Indian Affairs Guidelines for State Courts; Indian Child Custody Proceedings," published in the Federal Register at 80 Fed. Reg. 31 (Feb. 25, 2015) pp. 1014659.

Practice Note: Even if the Tribe, parent, or custodian does not request transfer to tribal court or the Tribe does not intervene in the juvenile case, ICWA still applies because the child is an Indian child.

D. Notice to the Tribe, Parent, Indian Custodian, and Others

In any proceeding to which ICWA applies, notice must be given by registered mail, return receipt requested, to the parent, custodian, *and* Tribe, along with a copy of the petition. 25 U.S.C. § 1912(a). Under ICWA, a "parent" does not include the unwed father where paternity has not been acknowledged or established. 25 U.S.C. § 1903(9).

In North Carolina, the relevant tribe will often be the Eastern Band of the Cherokee. This Tribe has designated Barbara Jones as the tribal agent to receive the required ICWA notice at: Eastern Band of Cherokee, Barbara Jones, Program Manager, 134 Boys Club Loop, P.O. Box 507, Cherokee, NC 28719. *See* Designated Tribal Agents for Service of Notice, [79 Fed. Reg. 12, 3225](#), 3232 (Jan. 17, 2014). Her contact information also includes: Telephone: (828) 497-6092; Fax: (828) 497-3322; Email: barbjone@nc-cherokee.com.

To determine a tribal agent for another tribe, see the annual Designated Tribal Agents for Service of Notice in the Federal Register. (The most recent version as of this writing is: 79 Fed. Reg. 12, 3225 (Jan. 17, 2014)).

Copies of the notice must be sent by registered mail, return receipt requested, to the Secretary of the Department of Interior as well as the Regional Director for the Bureau of Indian Affairs. 25 C.F.R. 23.11. For proceedings in North Carolina, the Regional Director may be reached at: BIA Eastern Regional Office, 545 Marriott Drive, Suite 700, Nashville, TN 37214, (615) 564-6500. 79 Fed. Reg. 92, 27189 (May 13, 2014)(to be codified at 25 C.F.R. 23. (Note: this address was recently updated in the Federal Register, and future changes could occur.) If the proceedings involve a tribe located outside the Eastern Region, notice should also be sent to the other relevant regional office. A [map](#) and [contact information](#) for the other regions may be found at "Regional Offices" on the Bureau of Indian Affairs, Department of the Interior website.

If the identity or location of the Indian parent, Indian custodian, or Tribe cannot be determined, written notice by registered mail must be sent to the Secretary of the Department of the Interior. 25 U.S.C. § 1912(a). Notice should also be sent by registered mail to the

Regional Director (25 C.F.R. 23.11(b)) (see above for contact information). The purpose of this notice is to seek assistance establishing the tribal identity.

There is no provision for service by publication.

The federal regulations (at 25 C.F.R. 23.11), and the new “[Bureau of Indian Affairs Guidelines for State Courts: Indian Child Custody Proceedings](#),” (at 10146 Fed. Reg. Volume 80, No. 37 (Feb. 25, 2015)) contain detailed descriptions of the required contents of the notice, but the two are not identical. Although the regulations are binding as compared to the guidelines, the best practice would be to include all of what is required by both.

Resource: For practical guidance, see the “[Notice](#)” section of the online resource: *A Practical Guide to the Indian Child Welfare Act* cited in the resource section below.

E. Timing of Court Proceedings

No foster care placement or TPR proceeding may be held sooner than 10 days following receipt of the notice by the parent or Indian custodian and the Tribe. The parent, Indian custodian, or Tribe *must*, upon request, be granted up to 20 additional days to prepare. 25 U.S.C. § 1912(a). [Thus, DSS may have to ask the court to continue a hearing to comply with ICWA.] If ICWA requirements are not met, the Tribe and the Indian custodian or parent can move to vacate the proceeding and begin again. See U.S.C. § 1914.

F. “Active Efforts” Required

[Note that the 2015 proposed federal regulations differ from the following requirements related to active efforts.]

When a state court is seeking to place an Indian child in foster care or terminate parental rights to an Indian child, the court must find that “active efforts” have been made to provide remedial services to prevent the breakup of the Indian family and that these efforts proved unsuccessful. 25 U.S.C § 1912(d). [These efforts must take into account the social and cultural conditions of the Tribe and use the resources of the extended family, the Tribe, and Indian social service agencies.]

The U.S. Supreme Court held that this requirement of a finding of active efforts did not apply where the Indian parent had abandoned the child prior to birth and the child had never been in the parent’s legal or physical custody. The court reasoned that the term “breakup” refers to discontinuing a relationship, and in this case there was no existing relationship. The “breakup of the Indian family” had long since occurred since the Indian father had never supported or lived with his daughter. *Adoptive Couple v. Baby Girl*, ___ U.S. ___, 133 S.Ct. 2552 (2013), discussed in 13.6.A.3 above.

In the case *In re E.G.M.*, ___ N.C. App. ___, 750 S.E.2d 857 (2013), the North Carolina Court of Appeals addressed the difference between ICWA’s “active efforts” requirement and the N.C. Juvenile Code’s “reasonable efforts” requirement, in relation to the cessation of

reunification efforts. Although “active efforts” differ from “reasonable efforts, the court held that ICWA does not prohibit a trial court from ordering the cessation of reunification efforts if it finds that such efforts clearly would be futile. The court further held that ICWA does not require reunification efforts to persist if those efforts are clearly inconsistent with the child’s need for health, safety, and a safe, permanent home within a reasonable period of time. Finally, the court held that ICWA requires a 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.”

G. Finding of Serious Emotional or Physical Damage

No Indian child may be placed in foster care or be the subject of a termination of parental rights unless the court finds that continued custody by the parent or Indian custodian is likely to result in *serious emotional or physical* damage to the child. 25 U.S.C. § 1912(e), (f). For foster care placements, this finding must be supported by clear and convincing evidence; for TPR, the evidence must be beyond a reasonable doubt. The finding must be based on testimony from a “qualified expert witness.” ICWA does not define qualified expert, but the Bureau of Indian Affairs’ (BIA) non-binding Guidelines for State Courts states that the expert should be, in priority order, (1) a member of the child’s Tribe recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing, (2) any expert witness with substantial experience in the delivery of family services to Indians and extensive knowledge of tribal child rearing practices, or (3) a professional person having substantial education and experience in his or her specialty. The BIA can assist in identifying a qualified expert witness, if requested to do so by a party or the court. The North Carolina Court of Appeals has held that the required expert testimony must occur at the hearing that results in the foster care placement and cannot be based on expert testimony heard at an earlier hearing. *In re E.G.M.*, __ N.C. App. __, 750 S.E.2d 857 (2013) (holding that the requirement of expert testimony was not met where the expert testimony had been at the disposition hearing and not at the permanency planning hearing in which the court gave DSS custody).

The U.S. Supreme Court held that this requirement did not apply where the Indian parent never had legal or physical custody of the child. The court reasoned that the term “continued custody” refers to custody that a parent already has or had at some point in the past and does not apply when an Indian parent never had custody of the child. *Adoptive Couple v. Baby Girl*, __ U.S. __, 133 S.Ct. 2552 (2013), discussed in 13.6.A.3 above.

For a case in which a state court terminated the parental rights of an Indian child’s parents following both North Carolina and ICWA requirements, see *In re Bluebird*, 105 N.C. App. 42 (1992).

H. Placement Preferences

An Indian child placed in foster care must be in the least restrictive setting that approximates a family and is within reasonable proximity to his home, taking into account any special needs. Preference must be given, in the absence of good cause to the contrary, to (1) a

member of the child's extended family, (2) a foster home licensed or approved by the child's Tribe, (3) an Indian foster home approved by a non-Indian authority, and (4) an institution approved by the Tribe and suitable for the child. 25 U.S.C. § 1915(b).

For adoptive placement, ICWA requires that absent good cause to the contrary, the child must be placed with: (1) a member of the child's extended family, (2) other members of the child's Tribe, or (3) another Indian family. 25 U.S.C. § 1915(a). In a private adoption, this preference for an Indian family is not applicable if an alternative adoptive party has not formally sought to adopt the child. *Adoptive Couple v. Baby Girl*, ___ U.S. ___, 133 S.Ct. 2552 (2013).

Note that the Tribe can change these preferences through its governing body at any time. 25 U.S.C. § 1915(c)

I. Consent to Foster Placement, Relinquishment, and Consent to Adoption

A parent or Indian custodian's voluntary consent to a foster care placement or voluntary relinquishment for or consent to adoption must be in writing and recorded before a family court judge who certifies in writing that the parent or Indian custodian understood the consent or relinquishment. See 25 U.S. Code § 1913. [Note that in North Carolina, relinquishment for adoption refers only to placement of a child by a parent or guardian with a DSS or licensed child-placing agency for purposes of adoption. See G.S. 48-3-701 through 48-3-707 for requirements related to relinquishment for adoption. A parent's signed consent to a private adoption is pursuant to G.S. 48-3-606 and 48-3-607.]

There are several important differences between ICWA adoption procedures and procedures for other adoptions in North Carolina law. When ICWA applies, its stricter provisions supersede the procedures under state law. The following list is not all-inclusive:

- Under ICWA, adoption consents may *not* be given prior to or within 10 days after birth of the child. 25 U.S. Code § 1913(a). (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. Code § 1913(b). (North Carolina law provides for a 7-day revocation period. G.S. 48-3-608; G.S. 48-3-706(a).)
- The adoption of an Indian child can be challenged for up to two years for fraud or duress. 25 U.S. Code § 1913(d). (North Carolina law allows voiding consent for fraud or duress only before entry of the adoption decree. G.S. 48-3-609; G.S. 48-3-707(a).)
- When an Indian adoptee reaches age 18, the court entering the final decree will inform the adoptee of his or her tribal affiliation and any other information needed to protect rights flowing from tribal membership. 25 U.S. Code § 1917. (This issue is not addressed in North Carolina law.)

There is no explicit requirement to notify the Tribe of *voluntary* surrenders or foster care placements, if it is already known that the child is an Indian child. The state court must provide a copy of a final adoption decree involving an Indian child to the Secretary of BIA,

along with information that shows the name and tribal affiliation of the child, name and address of biological parents (unless they have signed a court affidavit for anonymity), names and addresses of adoptive parents, and agency information relating to the adoptive placement.

Resources and Tools:

- For links to ICWA provisions, amendments affecting ICWA, and related laws, see “[Existing Law](#)” on the National Indian Child Welfare Association website.
 - For additional information related to the Indian Child Welfare Act and to child welfare issues involving American Indian children, see the [National Indian Child Welfare Association website](#).
 - [Guidelines for State Courts; Indian Child Custody Proceedings](#), 44 Fed. Reg. 67,584 (Nov. 26, 1979).
 - NATIVE AMERICAN RIGHTS FUND, [A PRACTICAL GUIDE TO THE INDIAN CHILD WELFARE ACT](#) (2009).
 - The NC Department of Social Services provides information and policy on ICWA at 1 DIV. OF SOC. SERVICES, N.C. DEP’T OF HEALTH & HUMAN SERVICES, FAMILY SERVICES MANUAL ch. IV § [1201\(IV\)\(E\)\(2\)](#) (Dec. 2009). The DSS manual also contains an “[Indian Child Welfare Act Compliance Checklist](#).” Note, however, that this checklist was last updated in April, 2008 and will not reflect changes in the law since then.
 - For issues related to American Indian child welfare court reform, see NAT’L COUNCIL OF JUVENILE & FAMILY COURT JUDGES AND NAT’L INDIAN CHILD WELFARE ASS’N, TECHNICAL ASSISTANCE BRIEF, [COURT REFORM AND AMERICAN INDIAN AND ALASKAN NATIVE CHILDREN: INCREASING PROTECTIONS AND IMPROVING OUTCOMES](#) (2009).
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13.7 Multiethnic Placement Act¹⁸

The Howard M. Metzenbaum Multiethnic Placement Act (MEPA), Pub. L. No. 103-382, §§ 551–554, 108 Stat. 3518, 4056, was enacted in 1994 and was amended by the Removal of Barriers to Interethnic Adoption provisions (IEP), Pub. L. No. 104-188, § 1808, 110 Stat. 1755, 1903, in the Small Business Job Protection Act of 1996 (collectively referred to here as “MEPA-IEP”).

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 foster and

18. Sources of information for content in this section include: 1 DIV. OF SOCIAL SERVICES, N.C. DEP’T OF HEALTH & HUMAN SERVICES, [FAMILY SERVICES MANUAL ch. IV § 1201\(IV\)\(E\)](#) (2009); JOAN HEIFETZ HOLLINGER & THE ABA CENTER ON CHILDREN AND THE LAW, NATIONAL RESOURCE CENTER ON LEGAL AND COURT ISSUES, [A GUIDE TO THE MULTIETHNIC PLACEMENT ACT OF 1994 AS AMENDED BY THE INTERETHNIC ADOPTION PROVISIONS OF 1996](#) (1998); CHILD WELFARE INFORMATION GATEWAY, U.S. DEP’T OF HEALTH & HUMAN SERVICES, [MAJOR FEDERAL LEGISLATION CONCERNED WITH CHILD PROTECTION, CHILD WELFARE, AND ADOPTION](#) (2012)).

adoptive parents. All child placements by agencies receiving federal funds must comply with MEPA-IEP, and two provisions in the North Carolina Juvenile Code specifically require compliance with MEPA. *See* G.S. 7B-505(d) and 7B-506(h)(2).

MEPA-IEP does not operate to alter the requirements of ICWA in cases of Indian children who are subject to ICWA. MEPA specifically provides that it has no effect on ICWA, which stresses the placement of Indian children with Indian families. However, placement of a child who is a member of a non-federally recognized Indian tribe is subject to MEPA-IEP.

Compliance with MEPA-IEP is a civil rights issue, and noncompliance is deemed a violation of Title VI of the Civil Rights Act. For more information about Title VI, see 42 U.S.C. §2000d *et seq.*, 28 C.F.R. 42.101 *et. seq.*; 28 C.F.R. 50.3; 45 C.F.R. Part 80.

Under MEPA-IEP, states and other entities involved in foster care or adoption placement 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;
- 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.

MEPA 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. The N.C. DHHS manual addresses recruitment plans pursuant to MEPA in section 1201. *See* 1 DIV. OF SOC. SERVICES, N.C. DEP’T OF HEALTH & HUMAN SERVICES, [FAMILY SERVICES MANUAL ch. IV § 1201\(IV\)\(E\)](#) (Dec. 2009).

Race and ethnicity may be considerations in placement decisions only in the context of a child’s individualized needs, with the rationale specifically documented in the placement record. 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.

Resources and Tools: For a comprehensive guide to MEPA, as well as common questions and checklists for implementation, see JOAN HEIFETZ HOLLINGER & THE ABA CENTER ON CHILDREN AND THE LAW, NATIONAL RESOURCE CENTER ON LEGAL AND COURT ISSUES, A GUIDE TO THE MULTIETHNIC PLACEMENT ACT OF 1994 AS AMENDED BY THE INTERETHNIC ADOPTION PROVISIONS OF 1996 (1998), available on the [American Bar Association website](#).

For additional guidance, see OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF HEALTH & HUMAN SERVICES, [ENSURING THE BEST INTERESTS OF CHILDREN THROUGH COMPLIANCE WITH THE MULTIETHNIC PLACEMENT ACT OF 1994, AS AMENDED, AND TITLE VI OF THE CIVIL RIGHTS ACT OF 1964](#).

For other resources related to MEPA, including training materials, articles, reports, and information on transracial adoption, see “[MEPA/IEP: Multiethnic Placement Act/Interethnic](#)

[Placement Provisions](#)” on the website for the National Resource Center for Permanency and Family Connections at the Hunter College School of Social Work.
