

# 2016 Child Welfare Legislative Update for Fall District Court Judges Conference

By Sara  
DePasquale,  
UNC School  
of  
Government

## Extended Foster Care to Age 21: Effective January 1, 2017

**S.L. 2015-241 (H97): Appropriations Act of 2015.** Subpart XII Part C addresses the Department of Health and Human Services Division of Social Services. Effective January 1, 2017, Sections 12.C.9.(a), (c), (d), (e), (f), (g), & (h), found at pages 153-156 of the pdf version of the S.L., amend various statutes to extend foster care for a youth up to age 21 (from 18).

- Eligibility:
  - G.S. 108A-48 is amended to authorize foster care services and benefits to continue for a youth up to age 21 if the young adult meets one of five designated criteria:
    1. completing high school or its equivalent,
    2. enrolled in a postsecondary or vocational program,
    3. participating in a program or activity designed to promote employment,
    4. works at least 80 hours a month, or
    5. has a medical condition or disability that prevents him or her from completing the educational or employment requirements.
  - G.S. 131D-10.2B(a) allows a youth who ages out of foster care at 18 years old to opt in for foster care services until age 21, even if the youth initially opted out of extended foster care services.
  
- Court Reviews
  - G.S. 7B-910.1 requires the court to review the voluntary placement agreement entered into by the young adult and county department **within 90 days** of the execution of the agreement. Additional hearings may be requested by the young adult or county department. There must be 15 days written notice of the review hearing. There are two parties: the county department and the young adult. The young adult will not be represented by a GAL. G.S. 7B-401.1(i) identifies a young adult in foster care in the list of parties to an abuse, neglect, and dependency proceeding.
  - The must make **findings** that address
    - Whether the placement is in the young adult's best interests, and
    - The services that have been or should be provided to
      - improve the placement, and
      - if relevant, further the young adult's educational or vocational ambitions.
  
- Benefits
  - Foster care assistance payments [G.S. 108A-49.1]
  - Adoption assistance payments up to age 21 if the teen was adopted at 16 or 17 years old [G.S. 108A-49(e)].
    - Note, these payments are currently \$634/month and are intended to pay for "food, and shelter, clothing, personal incidentals, and ordinary and necessary

# 2016 Child Welfare Legislative Update for Fall District Court Judges Conference

By Sara  
DePasquale,  
UNC School  
of  
Government

---

school and transportation expenses.” G.S. 108A-49.1(a)(3), (b)(3); 10A  
NCAC 70B .0103.

- Placement in a home approved by the county department, which may include a department approved dorm or semi-supervised housing arrangement when monthly supervision and oversight by a county department or supervising agency is provided to the young adult [GS 108A-48(d); *see* 108A-49(a)]

# 2016 Child Welfare Legislative Update for Fall District Court Judges Conference

By Sara  
DePasquale,  
UNC School  
of  
Government

## Every Student Succeeds Act (ESSA): Effective December 10, 2016

### School Stability for Children in Foster Care

NC's Department of Public Instruction (DPI) and DHHS Division of Social Services must collaborate to ensure that children in foster care

- **remain in their school of origin** (the school the child was last enrolled) unless remaining in the school of origin is not in the child's best interests. 20 U.S.C. § 6311(g)(1)(E)(i); *see also* 42 U.S.C. § 675(1)(G).
- When it is not in a child's best interests to remain in his or her school of origin, the child must be **immediately enrolled** in the new school, even if the child's educational records are not available at the time of the child's enrollment. The new school must immediately contact the child's former school to obtain relevant educational records. 20 U.S.C. § 6311(g)(1)(E)(ii)-(iii).

*Note:* School Attendance Every child of compulsory school age receiving IV-E funds (foster care, adoption assistance or subsidized guardianship payments) must be a full-time elementary or secondary student, unless the child has completed secondary school. [42 U.S.C.A. § 671(a)(30)]

### *Additional Note:* NC Compulsory Attendance, G.S. 115C-378

- Excessive absences = more than three unexcused absences in a school year
- More than six unexcused absences in a school year may be a violation of compulsory attendance laws, resulting in notice to the parent, guardian or custodian of the possible violation and initiates the involvement of a school's attendance counselor.
- After 10 unexcused absences in a school year, the principal (or designee) shall discuss the absences with the student and the parent, guardian, custodian. If the principal believes the parent, guardian, or custodian made a good faith effort to have the child attend school, the principal can file a complaint for an undisciplined juvenile with a juvenile court counselor. If the principal does not believe the parent, guardian, or custodian acted in good faith, the principal may notify the district attorney or county DSS. If the principal makes a report to DSS, the director must determine if it warrants an assessment under G.S. 7B-302.

The **best interest of the child determination** is made by the child welfare agency. In making its determination, the county department must consider

- all related factors including
- the appropriateness of the current educational setting and
- the proximity of the school of origin to the placement. 20 U.S.C. § 6311(g)(1)(E)(i); *see also* 42 U.S.C. § 675(1)(G)(i).

# 2016 Child Welfare Legislative Update for Fall District Court Judges Conference

By Sara  
DePasquale,  
UNC School  
of  
Government

Additional best interest of the child factors identified in Non-Regulatory Guidance issued jointly by the US DHHS and US DOE on June 23, 2016 include the

- child's preference and the parent's or educational decision maker's preference,
- placement of siblings,
- child's attachment to the school (including meaningful relationships there),
- child's history of school transfers and how they impacted the child,
- influence of school climate on the child, including safety,
- length of commute and impact on the child based on the child's developmental stage, and
- the availability and quality of services (including special education, related, and language services) in the school that will meet the child's educational and socioemotional needs.

## **Transportation costs are not a factor.**

20 U.S.C. § 6312(c)(5)(B)

- The state must develop and implement clear written procedures addressing transportation issues, including who bears the cost (the school, the county department, or both), for children in foster care who are continuing to attend their school of origin while they are in foster care.
  - The plan must also ensure that children in foster care who need transportation to their school of origin will promptly receive that transportation.
  - The plan must ensure that if there are additional transportation costs to transport the child to the school or origin, the local school unit will provide the transportation if
    - the county department agrees to reimburse the school,
    - the school agrees to pay, or
    - the school and county department agree to share the costs.

*Note: Foster Care Maintenance Payments include school supplies and reasonable travel for the child to remain in the school he or she was enrolled in at the time of placement [42 U.S.C.A. § 675(4)(A)].*

*Note: Child's Case Plan* The case plan is developed jointly with the child's parent or guardian and is written within 60 days of a child coming into care. 45 C.F.R. § 1356.21(g). The plan must address ensuring the *educational stability* of the child while in foster care, including--

- assurances that each placement of the child in foster care takes into account the appropriateness of the current educational setting and the proximity to the school in which the child is enrolled at the time of placement; and
- an assurance that the State agency has coordinated with appropriate local educational agencies to ensure that the child remains in the school in which the child is enrolled at the time of each placement, or if remaining in such school is not in the best interests of the child, assurances by the State agency and the local educational agencies to provide immediate and appropriate enrollment in a new school, with all of the educational records of the child provided to the school.

# 2016 Child Welfare Legislative Update for Fall District Court Judges Conference

By Sara  
DePasquale,  
UNC School  
of  
Government

## Indian Child Welfare Act (ICWA)

### Binding Federal Regulations Effective December 12, 2016

25 C.F.R. Part 23

#### Definitions (25 CFR 23.2)

- Active Efforts
- Child custody proceeding (any action, other than an emergency proceeding that may culminate in one of the following outcomes: foster care placement, TPR, preadoptive placement, adoptive placement (this includes a status offense proceeding))
- Continued custody
- Custody
- Domicile
- Emergency proceeding
- Extended family member
- Hearing
- Indian child (also defined at 25 U.S.C. 1903(4))
- Indian Tribe
- Indian Foster Home
- Involuntary Proceeding
- Parent
- Reservation
- Status Offense
- Tribal Court
- Upon demand
- Voluntary Proceeding

#### Additional Definitions (25 CFR 23.102)

- Agency
- Indian organization

#### Applicability of ICWA

- 25 CFR 23.103: any child-custody proceeding and emergency proceeding involving an Indian child. The court cannot consider the relationship between the Indian child and his/her parents [e.g. the existing Indian family (EIF) doctrine], the parent's or child's participation in the Tribe's activities, or an Indian child's blood quantum.
- 25 CFR 23.107 & 23.124: At the start of the proceeding, the court must ask each participant whether he/she knows or has reason to know the child is an Indian child. Responses should be on the record. Court must instruct parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian

# 2016 Child Welfare Legislative Update for Fall District Court Judges Conference

By Sara  
DePasquale,  
UNC School  
of  
Government

child. If there is reason to know the child is an Indian child, court must treat child as if an Indian child until and unless the court determines the child is not an Indian child.

- Reason to Know: informed by participant, tribe, or agency that
  - the child is an Indian child,
  - it has discovered information indicating child is an Indian child,
  - child gives the court reason to know,
  - domicile or residence of child, parent, or Indian custodian is on a reservation or Alaska Native village
  - child is or has been a ward of a Tribal court
  - a parent or the child has an identification card indicating membership in a Tribe
- 25 CFR 23.108: Tribe determines eligibility for membership to Tribe, which may not be substituted by the court or others

## Required Notices

- 25 CFR 23.11 & 23.111: provisions when there is an involuntary proceeding and the court knows or has “has reason to know” the child is an Indian child. The regulations address the content, method of delivery, and time requirements for the notice to the parents, Indian custodians, and Tribe.

## Timing of Foster Care Placement and TPR Hearings

- 25 CFR 23.112: at least 10 days after parent, Indian custodian, and Tribe receive notice. A request for an additional 20 days may be made.

## Emergency Proceedings

- 25 CFR 23.113: Risk of Imminent Physical Damage or Harm to the Child is a requirement. It must be alleged in the petition and there must be a court finding. The determination of whether removal is necessary to prevent imminent physical damage or harm is continuing and placement must terminate when it is no longer necessary. Additional required contents of the petition are identified in this regulation.

## Improper Removal

- 25 CFR 23.114: court must make an expeditious determination when there is an assertion by a party or the court has reason to believe that the child may have been improperly removed or retained from the parent or Indian custodian. May result in action being dismissed

## State Court Jurisdiction

- 25 CFR 23.110: Dismissal when Indian child’s residence or domicile is on reservation where the tribe has exclusive jurisdiction over child-custody proceedings or when the Indian child is a ward of the Tribal court.

# 2016 Child Welfare Legislative Update for Fall District Court Judges Conference

By Sara  
DePasquale,  
UNC School  
of  
Government

- Transfer to the Tribe a foster care or TPR proceeding,
  - Upon request: 25 CFR 23.115
  - Notification and transfer to Tribe: 25 CFR 23.116 & 23.119
  - Criteria for transfer: 25 CFR 23.117
    - Good cause to deny: 25 CFR 23.118

## Active Efforts

- 25 CFR 23.120 & 23.121: Court must conclude by clear and convincing evidence in foster care placement and beyond a reasonable doubt in TPR that active efforts to prevent the breakup of the Indian family have been made and are unsuccessful and that there is a causal relationship between conditions in home and damage to the child. Poverty, age, inadequate housing, substance abuse, and nonconforming social behavior is not by itself clear and convincing or beyond a reasonable doubt evidence.
- 25 CFR 23.121 & 23.122 Expert testimony is required that continued custody by parent or Indian custodian is likely to result in serious emotional or physical damage to the child. Qualifications of experts are identified.

Consent to a voluntary termination of parental rights, foster-care, preadoptive, or adoptive placement: 25 CFR 23.125, 23.126

- Withdrawal of consent: 25 CFR 23.127 & 23.128

## Placement Preferences

- 25 CFR 23.219: applies to any preadoptive, adoptive, or foster care placement of an Indian child
- 25 CFR 23.130: Adoptive placement preferences
- 25 CFR 23.131: Foster care or preadoptive placement preferences include least restrictive setting and descending order of preferences
- 25 CFR 23.132: Good cause for not following placement preferences proved by clear and convincing evidence by party seeking departure from preferences; factors to be considered are included here. Socioeconomic status and bonding with non-preferred attachment are not good cause.

## Access to Proceeding

- 25 CFR 23.136: Alternative participation (phone, video, etc)

## Information Provided to Bureau of Indian Affairs

- 25 CFR 23.140: state court must send final adoption decree, contents and where to send notice are included in this regulation.

## Notice of Change in Adoption to biological parent, prior Indian custodian, and Tribe

- 25 CFR 23.139: when adoption is vacated, the adoptive parent has consented to a TPR; contents of the notice and the right to waive the notices are included in this regulation

# 2016 Child Welfare Legislative Update for Fall District Court Judges Conference

By Sara  
DePasquale,  
UNC School  
of  
Government

---

## Vacating Adoption because of Fraud or Duress

- 25 CFR 23.136: within 2 years

## Invalidate Foster Care Placement or TPR

- 25 CFR 23.137: standing, petition, violation of 25 USC 1911, 1912, or 1913