

# ICWA QUESTIONS ANSWERED

This paper provides information in response to questions raised during the State-Tribal Relations Committee (STRC) meeting on November 11, 2019, in Billings.

## WHEN DOES ICWA APPLY?

The Indian Child Welfare Act (ICWA) applies when the state has jurisdiction over a case of abuse, neglect, or certain acts of juvenile delinquency<sup>1</sup> involving an Indian child because the incident occurred outside the boundaries of a reservation.<sup>2</sup> Federal law defines Indian children as:

- unmarried and under 18 years of age;
- either a member of an Indian tribe or eligible to be a member; and
- the biological child of a member of an Indian tribe.<sup>3</sup>

If it's known or there is reason to believe a child is an Indian child, federal regulations require Child Protection Specialists (CPS) and courts to handle the case as an ICWA case until proven otherwise.<sup>4</sup>

## CAN AN ICWA CASE BE TRANSFERRED TO TRIBAL COURT?

Yes. ICWA allows a case to be transferred from state court to tribal court at the request of a child's parent, Indian custodian<sup>5</sup>, or tribe. If the request is made by a tribe, the child's parent(s) or Indian custodian may object.<sup>6</sup>

The state must transfer a case to tribal court unless the tribal court declines jurisdiction, either parent objects, or the state determines there is good cause to deny the request. Reasons for the denial must be documented and other parties given the opportunity to respond. Reasons may include the objection of a child who is over 12 years of age and difficulty in presenting necessary evidence and witnesses in tribal court.<sup>7</sup>

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<sup>1</sup> The acts of juvenile delinquency include offenses that would not be a crime if committed by an adult, e.g., drinking, running away, and truancy.

<sup>2</sup> A Guide to Compliance with the Indian Child Welfare Act, National Indian Child Welfare Association, page 1.

<sup>3</sup> 25 USC 1903.

<sup>4</sup> 25 CFR 23.107(b).

<sup>5</sup> 25 USC 1903 defines Indian custodian as an Indian person who has legal custody of an Indian child under tribal law or custom or state law or to whom temporary physical care, custody, and control has been transferred by the child's parent.

<sup>6</sup> A Guide to Compliance with the Indian Child Welfare Act, National Indian Child Welfare Association, page 4.

<sup>7</sup> Ibid, pages 4-5.

## WHAT ARE "ACTIVE EFFORTS"?

ICWA requires that the state make "active efforts" to provide remedial services and rehabilitative programs designed to prevent the breakup of a family before a child is removed or parental rights are terminated.<sup>8</sup>

25 CFR 23.2 defines active efforts as affirmative, active, thorough, and timely efforts to maintain or reunite an Indian child with his or her family, including assisting the parent(s) or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan. Active efforts should be consistent with the prevailing social and cultural conditions and way of life of the child's tribe and conducted in partnership with the child, the parent(s), extended family members, Indian custodians, and tribe.

The state must tailor active efforts to the facts and circumstances of the case and may include:

- conducting a diligent search for and consulting with extended family members;
- keeping siblings together whenever possible; and
- considering alternative ways to address the needs of the parent(s) and family if the optimum services don't exist or aren't available.

## WHAT ARE THE JUDICIAL STANDARDS?

For foster care placement, a state court must receive "clear and convincing evidence" that the continued custody of the Indian child by a parent or Indian custodian is likely to result in serious emotional or physical damage to the child.<sup>9</sup> This is a higher level of proof than what's usually required and means that the side favoring placement must present evidence that is not just slightly more persuasive than the evidence against it, but clearly more persuasive.<sup>10</sup>

For termination of parental rights, the standard of evidence is "beyond a reasonable doubt". Again, this is a higher standard than what's usually required and means that the side favoring termination must present a more convincing case than the opposition and eliminate all reasonable doubt in the mind of the person deciding the case that the child will be at risk of serious physical or emotional damage if the parent maintains custody.<sup>11</sup>

A qualified expert witness (QEW) must testify in both situations as to whether continued custody by a parent or Indian custodian is likely to result in serious emotional or physical damage. The QEW may not be the social worker regularly assigned to the child and must know the prevailing social and cultural standards of the child's tribe.<sup>12</sup>

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<sup>8</sup> 25 USC 1912.

<sup>9</sup> 25 USC 1912.

<sup>10</sup> A Guide to Compliance with the Indian Child Welfare Act, National Indian Child Welfare Association, page 6.

<sup>11</sup> Ibid, page 8.

<sup>12</sup> 25 CFR 23.122.

## WHERE MAY AN INDIAN CHILD BE PLACED?

ICWA prioritizes the placement of Indian children as follows:<sup>13</sup>

For foster care or preadoptive placement:

- 1) with a member of the child's extended family;
- 2) in a foster home licensed, approved, or specified by the child's tribe;
- 3) in an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
- 4) in an institution approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the child's needs.

For adoptive placement:

- 1) with a member of the child's extended family;
- 2) with other members of the child's tribe;
- 3) with other Indian families.

Exceptions may be made for good cause or a different preference established by a child's tribe.

For foster care or preadoptive placement, ICWA requires that the child be placed in the least restrictive setting which most approximates a family, takes into consideration sibling attachment, and meets any special needs of the child. The child must also be within reasonable proximity to his or her home, extended family, and siblings, again considering any special needs of the child.<sup>14</sup>

When appropriate, ICWA also allows for the preference of the child or parent to be considered.

The state must maintain a record of each placement and its efforts to comply with the order of preference.

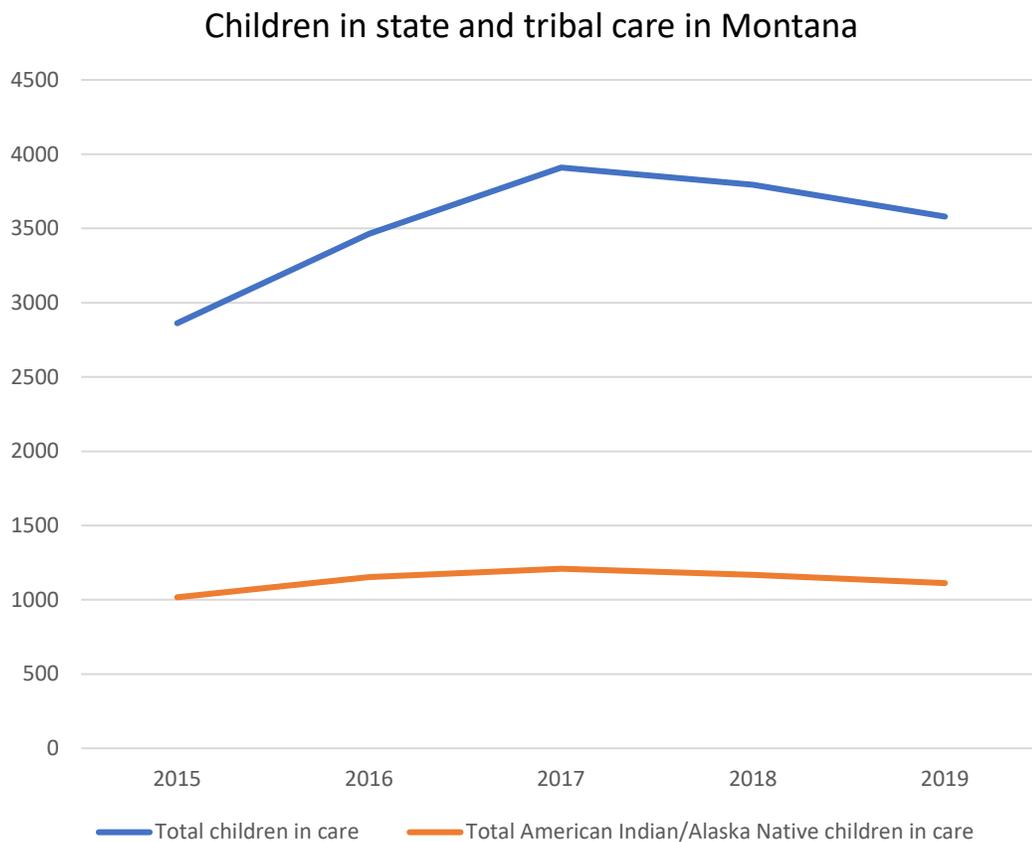
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<sup>13</sup> 25 USC 1915.

<sup>14</sup> Ibid and 25 CFR 23.131.

**HOW MANY INDIAN CHILDREN ARE IN CARE?**

For children in state *and* tribal care, 35.5 percent identified as American Indian or Alaska Native in 2015. In 2019, it was 31 percent.



Data provided by the Department of Public Health and Human Services

When looking at state care alone, American Indian and Alaska Native children comprised an average of 22 percent of the total number of children in care per year between 2015 and 2019.

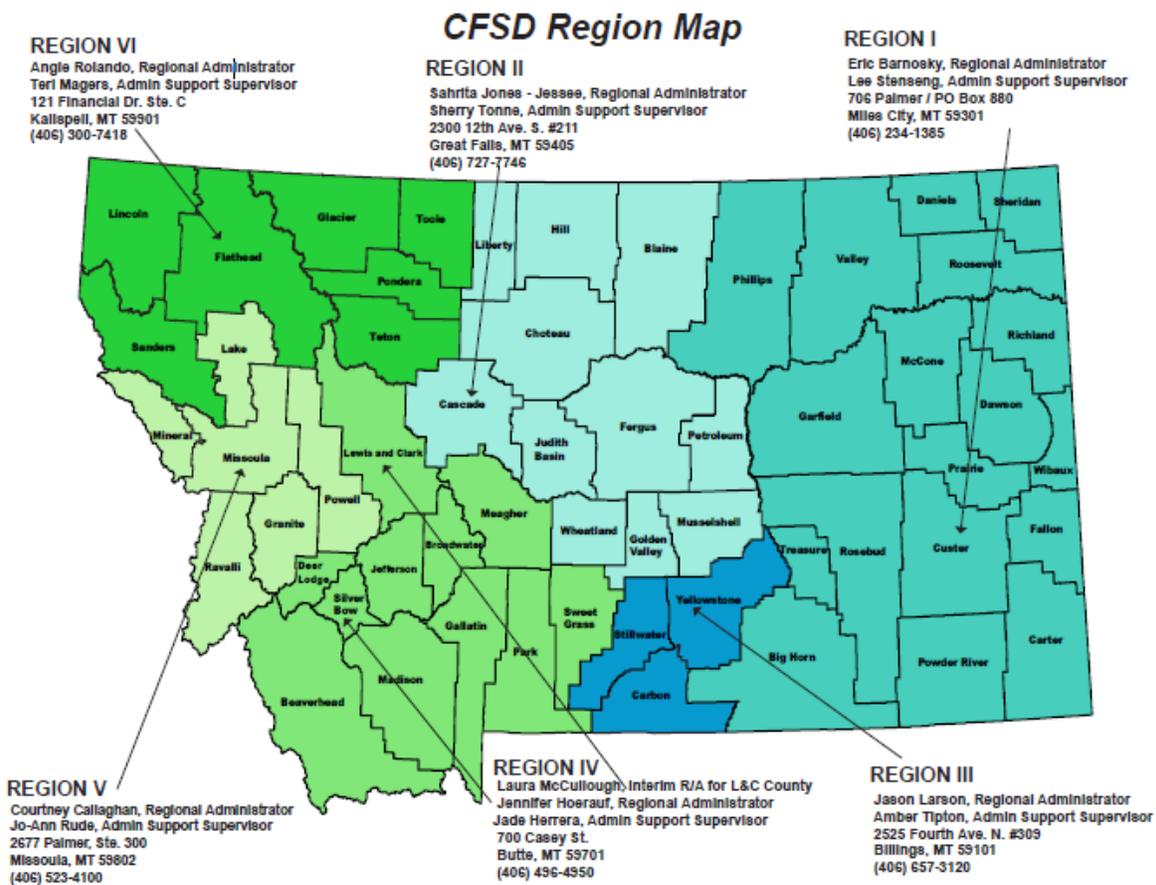
Either way, American Indian and Alaska Native children are overrepresented since they comprise 12.3 percent of all children in Montana according to the July 2018 Census Bureau population estimate.

The data for children in state and tribal care show that while the overall number of children in care in Montana increased 25 percent between 2015 and 2019, the number who identified as American Indian or Alaska Native increased at a slower rate of 9 percent.

**WHERE ARE THE MOST ICWA CASES LOCATED?**

A one-time review of all CPS cases completed by the Child and Family Services Division (CFSD) on February 4, 2020, found 676 ICWA cases in Montana. About a quarter of those cases are actually tribal cases at Fort Peck that the state handles in tribal court through an agreement with the tribal government. Of the remaining cases, most are located in the CFSD regions that include Great Falls, Havre, and Billings.

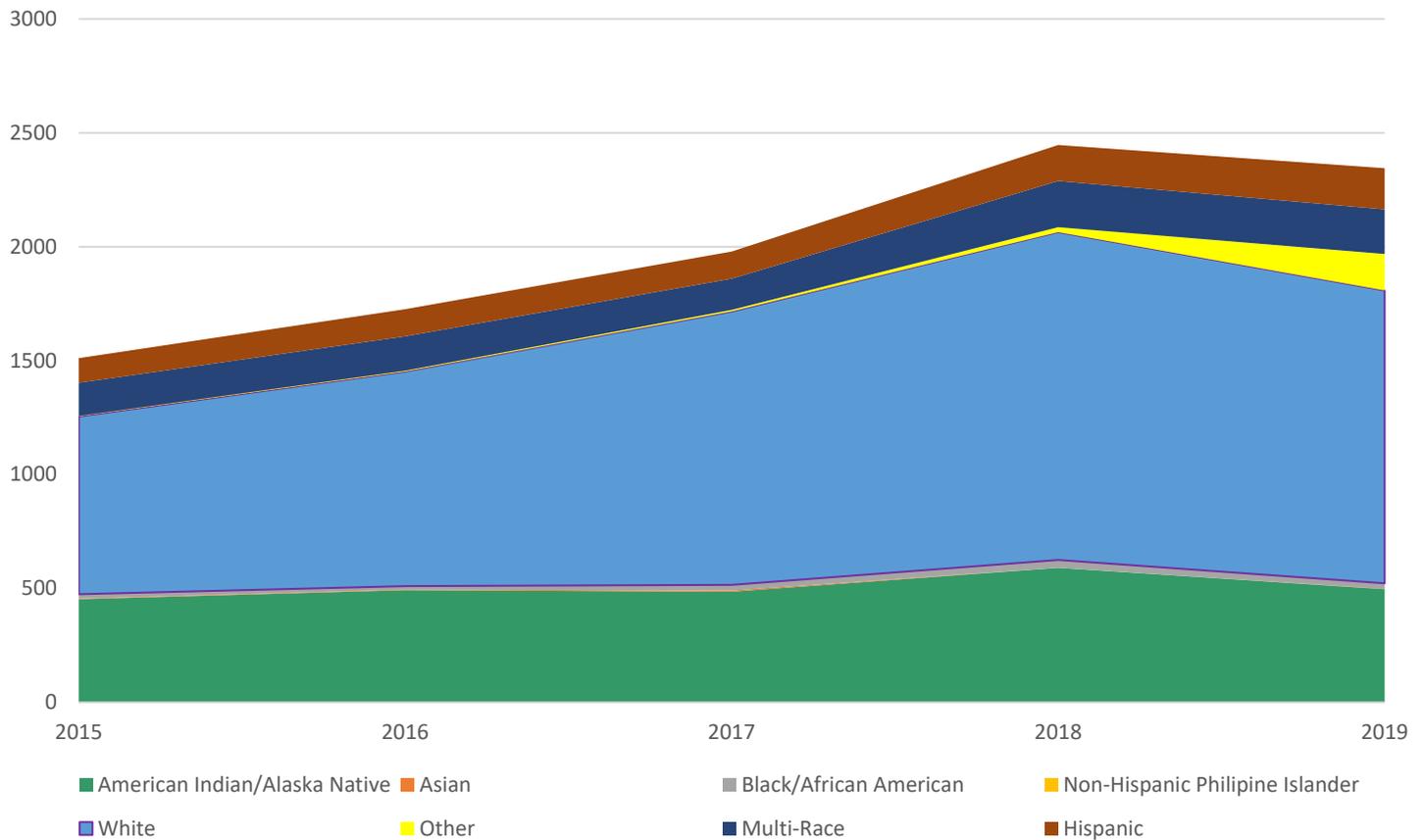
Region	Number of ICWA cases
I	178
II	211
III	221
IV	13
V	22
VI	31
Total	676



## HOW LONG DO INDIAN CHILDREN STAY IN THE SYSTEM?

CFSD provided data that shows not how long the average child stays in care, but the percentage of children exiting care by race. When comparing data over a 5-year period, the rate of American Indian and Alaska Native children exiting state and tribal care decreased from 30 percent of all children in 2015 to 21 percent in 2019. When looking at children solely in state care, 21 percent exiting care in 2015 identified as American Indian or Alaska Native compared to 16 percent in 2019.

Number of children exiting state and tribal care by race



Data provided by the Department of Public Health and Human Services

Please note, some Indian children may be included in the "multi-race" or "other" categories of the table above.

## WHAT TRAINING DO CPS RECEIVE?

Information specific to the Indian Child Welfare Act is included in child protection specialists' overall training, which builds off the CFSD safety model field guide and the immediate danger and family functioning assessments.

As explained in the field guide, case work begins with the immediate danger assessment. A CPS looks for safety threats that are actively occurring or in the process of occurring and would likely result in actual or substantial risk of physical or psychological harm to a child. If an immediate danger is identified, the CPS develops a same-day, short-term protection plan that protects the child from the identified safety threat(s).

If a child is removed from a home, the next step is the family functioning assessment (FFA), which begins the process of direct involvement with a family. CFSD says in its field guide that the FFA process is often adversarial. The field guide includes an information collection protocol for interviewing families that encourages child protection specialists to create an atmosphere that is not interrogational or punitive in which families can talk. The protocol includes identifying parents' feelings, seeing the situation from their point of view, empowering them with information, and the CPS's exercise of self-control of the worker's emotions, focus, and concentration.

The results of the FFA are used to develop a safety plan, which is a written arrangement between caregivers and the CPS to establish how impending danger threats will be managed. The safety plan is in place as long as impending danger threats exist and the caregiver's ability to ensure a child is protected is insufficient. Safety plans must be reviewed at least once a month.

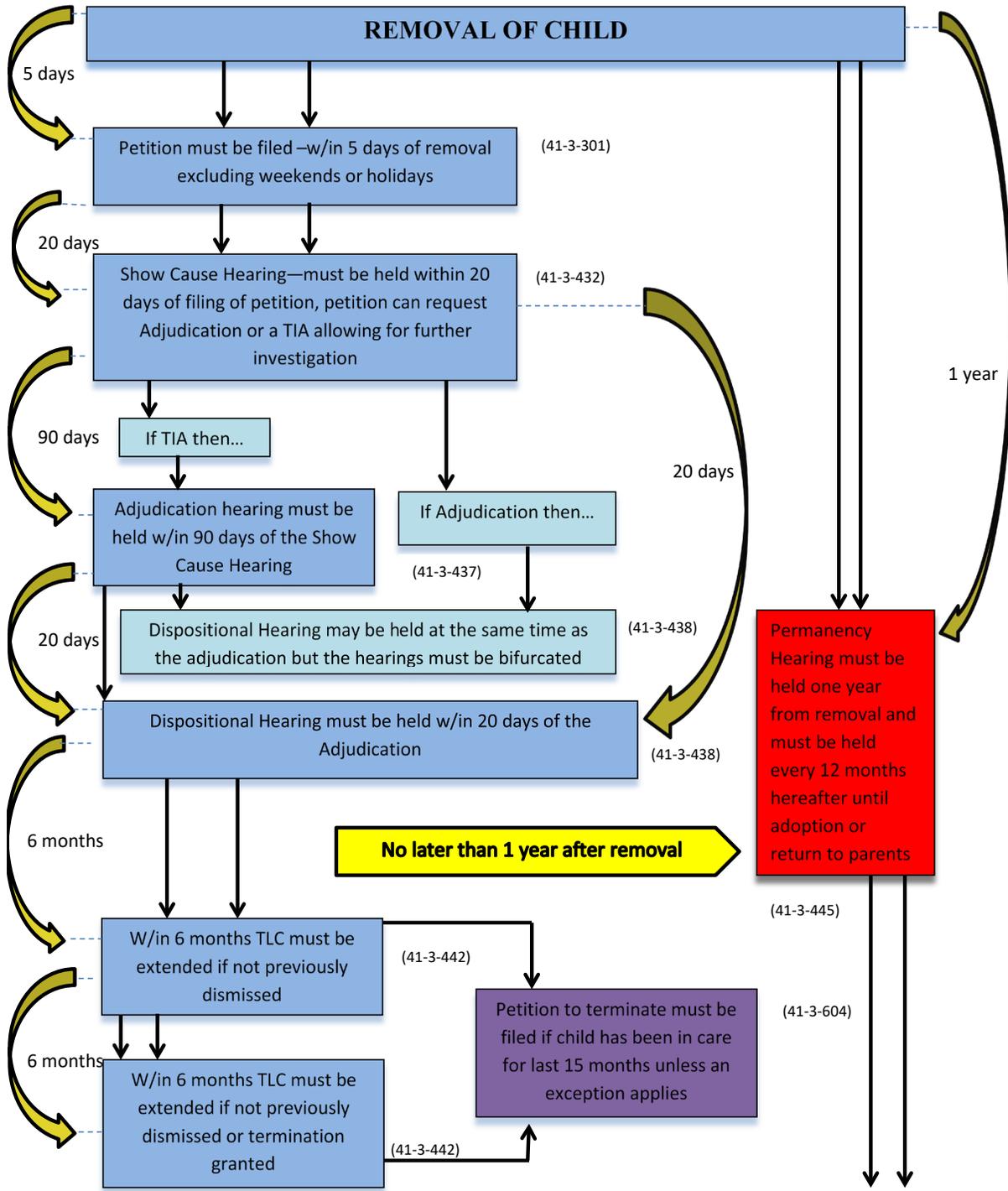
CPS are trained to use four in-home safety questions to create a list of conditions, which if met allow a child placed outside of the home to return home. The four questions are:

- Is there a home-like setting where the parents/children live?
- Is the home calm enough to allow for safety providers in the home and safety activities to occur?
- Is at least one parent willing to cooperate with the safety plan?
- Are the necessary safety activities and resources available to implement the plan?

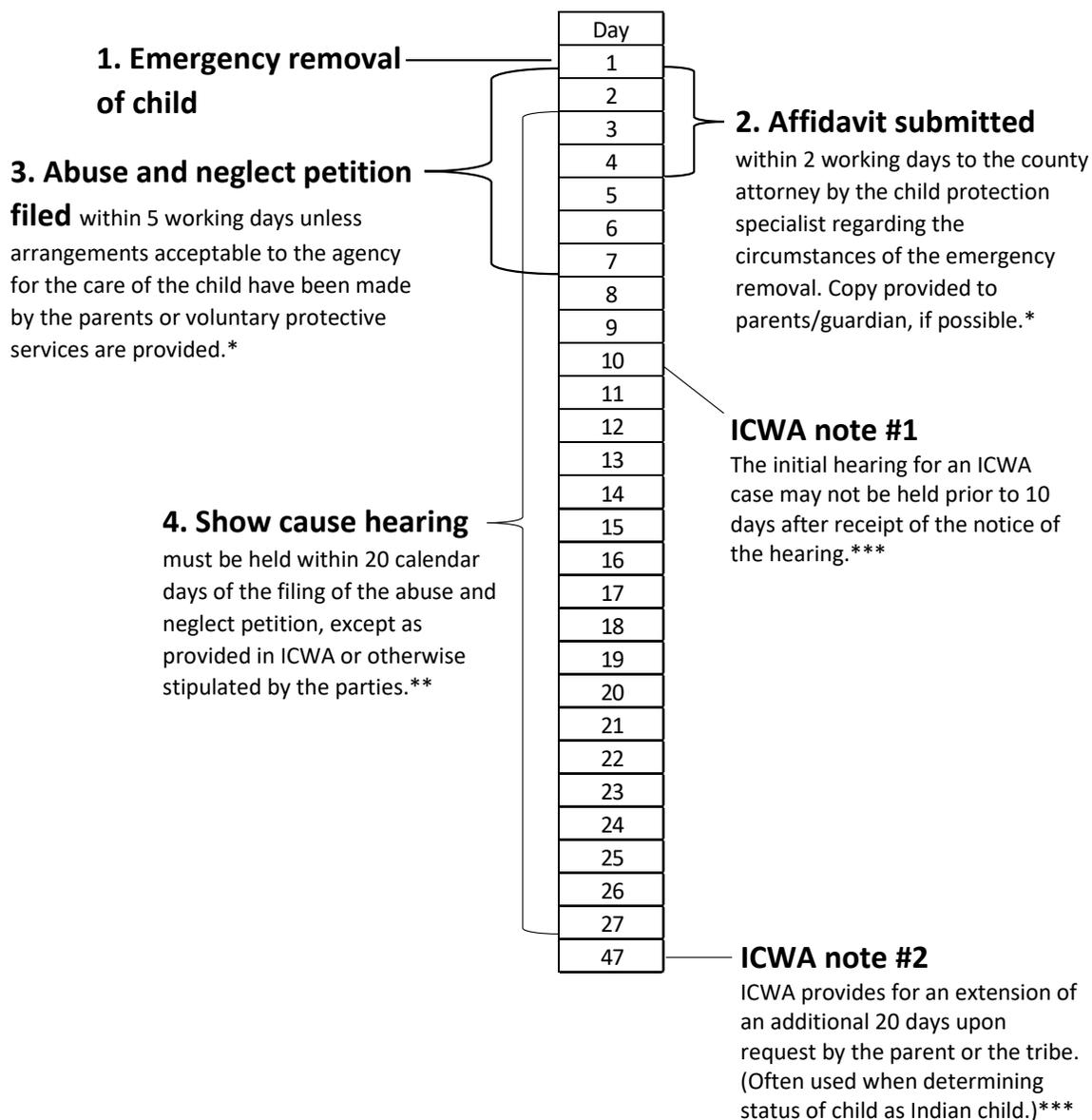
CPS also receive cultural training from Department of Public Health and Human Services (DPHHS) Tribal Relations Manager Lesa Evers. The training includes information about each tribe in Montana, the department's partnership approach to working with tribes, the historical context surrounding passage of ICWA, the continuing impact of historical trauma, and the deep meaning of "home" in an Indian value system.

**CASE TIMELINES**

**Simplified MCA Abuse and Neglect Timeline for Judicial Hearings**  
 (this flowchart assumes that reasonable efforts are required and is pursuant to MCA 2019)



## Detailed Show Cause Hearing Timeline



\*41-3-301(6), MCA.

\*\*41-3-432, MCA.

\*\*\*Child and Family Services Policy Manual: Legal Procedure, Required Judicial Hearings 301-2, page 10.

Source: Legislative Services Division

## WHAT IS THE LEGISLATIVE HISTORY OF THE SHOW CAUSE HEARING?

The legislature enacted the 20-day show cause hearing timeline in 1985 (House Bill 686), but how the 20 days was chosen is not apparent. John Madsen of the then-named Department of Social and Rehabilitation Services said the bill was a protection for parents to fully understand allegations made and what the court required them to do.<sup>15</sup>

The 2001 Legislature cut the timeline to 10 days, excluding weekends and holidays (Senate Bill 170), at the request of the Law, Justice, and Indian Affairs Interim Committee. Sponsoring Senator Mike Halligan said the bill responded to accelerated timelines in the federal Safe Families Act. He called decreasing the show cause hearing timeline "the most important provision", saying the bill adds parents' rights for the first time. Halligan said telecommunications could be used in rural areas where a judge may not be available within the 10-day timeframe.<sup>16</sup>

In 2003, the legislature changed the timeline back to 20 days (Senate Bill 95) at the request of DPHHS. Then CFSD Division Administrator Shirley Brown provided testimony that many county attorneys and district court judges indicated the 10-day timeline was unworkable.<sup>17</sup>

## WHAT ARE THE HEARING TIMELINES IN OTHER STATES?

As summarized in the table below, a review conducted by legislative staff for the Children, Families, Health, and Human Services Interim Committee found nearby states have significantly shorter timelines for initial hearings when a child is removed from a home.<sup>18</sup>

Colorado	within 72 hours, excluding weekends and holidays, or within 48 hours if a child is removed by law enforcement and placed in a facility not operated by the state.
Idaho	within 48 hours of the removal of a child or within 24 hours of the removal of an offender, excluding weekends and holidays. May be continued for a reasonable time at the request of a child's parent, custodian, or attorney.
North Dakota	within 96 hours.
South Dakota	within 48 hours, excluding weekends and holidays, unless extended by court order.
Wyoming	within 48 hours, excluding weekends and holidays. If a judge is unavailable, a district court commissioner may hold the hearing. The court must review the commissioner's report, orders, and actions as soon as reasonably possible and confirm/modify as appropriate.

<sup>15</sup> Minutes, House Judiciary Committee, February 22, 1985, page 1.

<sup>16</sup> Minutes, Senate Committee on Judiciary, January 10, 2001, page 6, and House Committee on Judiciary, March 5, 2001, page 4.

<sup>17</sup> Minutes, Senate Committee on Public Health, Welfare and Safety, January 22, 2003, Exhibit 2, page 3.

<sup>18</sup> Sandru, Alexis, HJR 48/49: Child Protective Services, Initial Hearing Timeframes, January 2, 2020.

## WHAT PAYMENTS DO TRIBES RECEIVE?

The following table provides information about payments made to tribes and directly to providers on behalf of tribal children by CFSD in Fiscal Year 2019. Except for general fund money, the funding sources are federal. General fund money is used as the state's required match. Tribes also provide matching funds, but those amounts are not included in table below.

	Blackfeet	Chippewa Cree	Crow	CSKT	Fort Belknap	Fort Peck	Northern Cheyenne	Total
<u>By Fund</u>								
01100 General Fund	\$ 314,672	\$ 60,852	\$ 119,332	\$ 421,737	\$ 167,101	\$ 14,196	\$ 197,261	\$ 1,295,150
03529 IV-E Guardianship	\$ 93,747		\$ 41,244	\$ 490,383			\$ 32,030	\$ 657,404
03530 Foster Care	\$ 720,959	\$ 181,439	\$ 161,964	\$ 1,527,289	\$ 564,854	\$ 44,271	\$ 625,694	\$ 3,826,470
03531 Subsidized Adoption	\$ 220,352		\$ 42,067	\$ 112,444	\$ 9,810	\$ 48,841		\$ 433,514
<b>Total</b>	<b>\$ 1,349,730</b>	<b>\$ 242,290</b>	<b>\$ 364,607</b>	<b>\$ 2,551,854</b>	<b>\$ 741,764</b>	<b>\$ 107,307</b>	<b>\$ 854,985</b>	<b>\$ 6,212,538</b>
<u>By Service</u>								
Foster Care	\$ 686,182	\$ 59,478	\$ 122,760	\$ 777,941	\$ 412,799		\$ 475,880	\$ 2,535,041
Subsidized Adoption	\$ 265,481		\$ 50,684	\$ 135,474	\$ 11,819	\$ 58,844		\$ 522,302
Guardianship Caseload*	\$ 49,927		\$ 20,791	\$ 239,087			\$ 15,532	\$ 325,337
Subsidized Guardianship	\$ 62,515		\$ 28,904	\$ 351,850			\$ 23,059	\$ 466,328
Tribal Contracts	\$ 285,625	\$ 182,812	\$ 141,468	\$ 1,047,502	\$ 317,146	\$ 48,463	\$ 340,514	\$ 2,363,530
<b>Total</b>	<b>\$ 1,349,730</b>	<b>\$ 242,290</b>	<b>\$ 364,607</b>	<b>\$ 2,551,854</b>	<b>\$ 741,764</b>	<b>\$ 107,307</b>	<b>\$ 854,985</b>	<b>\$ 6,212,538</b>

Data provided by the Legislative Fiscal Division.

## WHAT IS TITLE IV-E FUNDING?

Title IV-E of the Social Security Act is a primary source of funding for child welfare activities, allowing states and tribes to claim partial federal reimbursement for the cost of providing foster care, adoption assistance, kinship guardianship assistance, and transitional independent living programs for children from low-income households.<sup>19</sup> Funds may also be used for related case management activities, training, data collection, and other costs of program administration.

Recent changes at the federal level allow certain legal costs and activities to prevent children from entering foster care to be reimbursed without any income eligibility requirements.<sup>20</sup> Montana hopes to begin receiving these types

<sup>19</sup> Child Welfare: A Detailed Overview of Program Eligibility and Funding for Foster Care, Adoption Assistance and Kinship Guardianship Assistance under Title IV-E of the Social Security Act, October 26, 2012, Congressional Research Service, [R42792](#), page 2.

<sup>20</sup> Information from Susan Robison, State Relations Director at Casey Family Programs, February 10, 2020.

of reimbursements in October 2021, but must first develop a statewide plan outlining which prevention services will be used. CFSD says it will consult with tribes as it develops the plan.

Tribes can receive IV-E payments directly or via pass through agreements with the state.<sup>21</sup> Currently in Montana, the Confederated Salish and Kootenai Tribes and the Chippewa Cree have completed the requirements to receive direct payments from the federal government, but still opt to receive their payments as a pass through from the state.

## WHY CAN IV-E PAYMENTS BE DELAYED?

To receive IV-E payments, a foster home must be licensed. This means kinship providers are ineligible until or unless they become licensed. Kinship providers may receive other types of financial assistance from the Office of Public Assistance in the meantime or if the kinship provider does not want to become licensed. Typically, this a lower level of payment than what IV-E will reimburse.

Other technical issues, such as a delay in requisite background checks, omissions in record keeping, or expiration of necessary court orders can cause IV-E payments to be delayed or stopped until the delinquencies are corrected.

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<sup>21</sup> [Pathways to Tribal Title IV-E, Tribal Title IV-E Options](#), Capacity Building Center for Tribes, October 2017, pages 2-3.