



## California Indian Legal Services (CILS) Community Legal Education Self-Help Series

Bishop ♦ Escondido ♦ Eureka ♦ Sacramento

# Active Efforts in ICWA Cases During the Pandemic

Indian Child Welfare Act (ICWA) cases are being severely impacted by the COVID-19 pandemic: courts are delaying time sensitive hearings, tribal family's visits are being disrupted or canceled altogether, and case plan services are being put on hold. This raises concerns of whether active efforts tribal families need in order to reunite with their children can still be provided during the pandemic. As an advocate for ICWA compliance, you may be asking yourself, should I hunker down for now and deal with all efforts and services issues once the pandemic is under control? **NO!** Do ANY services even exist in a time like this, let alone active efforts or reasonable services? **YES!** What can I do to make sure active efforts continue to be provided to tribal families?

► **Here are some ideas to get your cases back on track with active efforts!**

### 1) Ensure That Your Tribal Families Have the Technology to Access to Their Children, Services, and Support Networks.

During the pandemic, while face-to-face contact is limited, tribal families *must* have access to the internet, computers, and phones in order to access their children, case plan services, and support networks. It is essential to check in with families to make sure all children, parents, foster parents, and key support persons have access to these crucial items. The county agency has a responsibility to ensure parents have access their children, case plan services, and their safe support network. It is also the county child welfare agency's responsibility to make sure foster children can maintain connections with their parents and siblings as well as other important persons to them. In order for the county agency to fulfill these responsibilities during the pandemic, the county agency must assist tribal families with technology.

#### ► **Active Efforts**

While advocating for tribal families, you may need to remind county social workers that active efforts require more than just the passive efforts of providing information to parents and children on how to obtain internet, computers, phones, and other resources. Active efforts require the county agency to take an *active role* in locating, accessing, and using appropriate resources. This includes aiding parents and children in following the necessary steps to obtain these resources, to use them, and to continue to have access to these resources.

Active efforts may require the county social worker to assist with filling out and following up on applications on behalf of the tribal family. Additionally, it may require a social worker to assist a parent or child with learning to set up and use their voice mail or computer. It may require assistance with setting up internet or phone service, determining a safe place to store the items, and coming up with a plan to pay bills.

For youth, social workers should check in with foster families and the youth around the use of communication devices in the home at this time. It is unacceptable for any foster family to entirely take away necessary means of connections as a form of punishment during the pandemic. Instead, wherever possible, appropriate boundaries and rules around communication devices should be established.

### ► Resources

Information on low or no cost phones and phone plans can be found at the following websites:

<https://www.obamaphone.com/get-obama-phone>

<https://www.whistleout.com/CellPhones/Guides/free-government-cell-phones>

Information on low cost computers or internet service can be found at:

[http://www.internetforallnow.org/get\\_affordable\\_internet\\_today](http://www.internetforallnow.org/get_affordable_internet_today) - Low cost computers and internet.

<https://www.everyoneon.org/> - National program to connect families to internet/computer resources.

<https://m.att.com/shopmobile/internet/access/> - Low cost AT&T Access for limited income households.

<https://www.human-i-t.org/request-internet> - Low cost internet and free Chromebook.

<https://www.alticeadvantageinternet.com/> - Free internet for students, low cost internet for low income seniors and veterans.

Information on free laptops, cell phones, and internet for foster youth can be found at:

<https://www.jbaforyouth.org/covid-19-resources/>

## **2) Ensure That Tribal Children and Parents Have Meaningful, Frequent Family Time.**

Visitation is legally required to occur *as frequently as possible*, consistent with the well-being of the child.<sup>1</sup> Active efforts requires in addition, that the county agency to support regular visits in the *most natural setting possible* consistent with the need to ensure the health, safety, and welfare of the child.<sup>2</sup> These standards apply even during the pandemic! At this time, while people are sheltering in place and courts are issuing blanket orders to limit family visitation, it is important to make sure visitation is continuing for tribal families. Visitation must continue to be appropriate in amount and duration, and it must occur in the least restrictive manner and natural setting that is safe and healthy for the child.

### ► Active Efforts for Meaningful Visitation

Active efforts require some creativity to ensure visitation can continue as frequently as possible and in the most natural setting possible. In your advocacy of your tribal families, consider if visitation can continue in-person, what that could safely look like, and how possible exposure to COVID-19 can be limited. Consider the use of family members or foster families to provide transportation and supervision of family time to limit multiple person contact and possible exposure to COVID-19. Can in-person visitation safely occur outdoors in nature? Can you borrow ideas from family law cases and consider what families with joint custody of children are doing during the pandemic to limit exposure from custody exchanges and can visitation in the

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<sup>1</sup> Cal. Welf. and Inst. Code § 361.2

<sup>2</sup> Cal. Welf. and Inst. Code § 224.1(f)(7)

Child Welfare matter function in a similar manner? Consider if visitation can be arranged through a window outside the parent's or child's home with the assistance of a cell phone, or if visitation can be arranged keeping a distance of six feet away if direct contact would not be appropriate or safe. Consider whether children may be reunified with their parents in an expedited manner if the child's safety would not be jeopardized. During this pandemic, it is essential to think outside the box to support tribal families.

If no other preferred alternatives are available, phone or video visitation should be arranged. Parents and children should receive assistance with ideas to make the most out of any phone or video time together and deal with the separation. This may include suggesting activities for the tribal family such as reading together, singing or dancing together, and playing games together during phone or video visitation. It may also include suggesting other methods to maintain family ties that can be used in addition to visitation such as writing letters or sending cards, looking through family pictures or albums, creating a family tree, and having discussions about family ancestry and tribal heritage.

It is also imperative to remember that while dealing with the stress and isolation of the pandemic, children may require even more visitation. Consider if visitation should be more frequent to provide for the same number of hours of visitation pre-pandemic and consider adding more visitation time if appropriate to meet the family's needs.

#### ► Resource

Guides on having successful phone or video visitation can be found at:  
<https://haralambie.com/wp-content/uploads/2016/10/When-You-Cant-Be-There-in-Person.pdf>  
<https://www.nccdglobal.org/blog/successful-video-visits-young-children>

#### ► Understanding Current Authorities for Visitation

While many courts have passed blanket orders or other mass orders restricting visitation at the request of the county agency, these orders are contrary to federal and state authority and guidance. Instead, a case-by-case assessment of visitation is required, and total visitation time should continue at the previously ordered pre-pandemic amounts.

Federal guidance from the Children's Bureau on March 27, 2020, asks courts to discourage or refrain from issuing blanket court orders to reduce or suspend family time. The California Department of Social Service issued guidance to County Child Welfare Agencies in All County Letter 20-25 dated March 21, 2020 requiring county child welfare agencies to work to maintain face-to-face visits, particularly for children under the age of three (3) years old while these young children are developing critical early bonds with their parents. Effective April 6, 2020, the Judicial Council of California issued Emergency Rule of Court, Rule 6(c)(7), giving a county child welfare agency the discretion to change the manner of how visitation will occur (i.e. move from in-person visitation to phone or video conferencing) after performing a case-by-case assessment, including a balancing of any recent health directives, the best interest of the individual child, and consideration of whether in-person visitation can take place safely for each child. The county child welfare agency is required to provide five (5) court day notice to all attorneys and parties before making any change in the manner of how visitation will be provided.

### ► Active Efforts for Modifying Visitation

While advocating for tribal families, it is important to hold the county child welfare agency to the required case-by-case assessments, the critical need to maintain face-to-face visits for children under the age of three (3) years old, and required notice prior to any modification in visitation. It is also important to reject attempts at mass blanket modifications for visitation orders. Active efforts require the county agency to conduct their efforts in a partnership with the tribe and tribal family, to notify and invite the tribe to participate in important aspects of the case, and to ensure decisions are consistent with the prevailing social and cultural conditions and way of life of the tribe.<sup>3</sup> For the sake of active efforts and a culturally appropriate assessment, insist on the tribe being included during the county agency's visitation assessment, or ask to hold a virtual family team meeting to work through the visitation assessment before any modifications are made, (or as soon as possible if you find out modifications were already made).

### ► Authorities and Guidance

Information on federal guidance for visitation during the pandemic can be found here:  
[https://cdn.ymaws.com/www.naccchildlaw.org/resource/resmgr/news\\_items/march\\_27\\_2020\\_letter\\_from\\_a.pdf](https://cdn.ymaws.com/www.naccchildlaw.org/resource/resmgr/news_items/march_27_2020_letter_from_a.pdf)  
<https://www.naccchildlaw.org/page/CoronavirusCOVID-19>

Information on state guidance for visitation during the pandemic can be found here:  
<https://www.cdss.ca.gov/Portals/9/Additional-Resources/Letters-and-Notices/ACLs/2020/ACL20-25.pdf>

Emergency Rules of the California Rules of Court can be found here:  
<https://jcc.legistar.com/View.ashx?M=F&ID=8234474&GUID=79611543-6A40-465C-8B8B-D324F5CAE349>

### **3) Assess Whether Case Plans Need to be Updated and Tailored for Your Tribal Family's Current Situation.**

Your tribal family's needs and situations have changed with the pandemic. Some services may no longer be available and other service providers may have changed the way they offer services. Families may have new or different needs at this time. Therefore, a family's case plan needs to be changed and updated, and a new case planning meeting must be set up to ensure reunification continues on track. Active efforts require the county child welfare agency to continue to actively guide families through the steps required to make progress in their case plans.<sup>4</sup> It also includes identifying appropriate and available services, helping the parents overcome any barriers, and assisting with utilizing and accessing resources.<sup>5</sup> Active efforts further requires considering alternative ways to address the needs of the family, if the optimum services do not exist or are not available.<sup>6</sup> This is crucial when services must be modified to overcome barriers caused by the pandemic. Case plans must continue to be practical and

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<sup>3</sup> Cal. Welf. and Inst. Code § 224.1(f)

<sup>4</sup> Cal. Welf. and Inst. Code § 224.1(f)

<sup>5</sup> Cal. Welf. and Inst. Code § 224.1(f)(2), (8)

<sup>6</sup> Cal. Welf. and Inst. Code § 224.1(f)(10)

possible and include services that are actually available to the family and that will result in timely reunification.

### ► Active Efforts

In advocating for your tribal families and working with the county child welfare agency to update the case plan, consider if telephone/online or other alternative services can meet each case plan component. Consider whether current local services can continue by phone or video. Consider if therapy should increase due to added stress and isolation from the pandemic or decrease due to progress. Or, does additional therapy need to be put in place to cover services such as domestic violence or substance abuse that parent previously received in-person and no longer has access? Does telemedicine need to be arranged for the family?

If substance abuse treatment programs are not available, consider if the parent attending 90 AA or NA online meetings in 90 days and working the twelve steps could be an alternative way to meet a substance abuse treatment goal. If drug testing continues to be necessary, are there mobile services or services outside of healthcare facilities that can provide those tests? Do social workers have the training to administer oral or urine testing at the parent's home or alternative settings? (It is standard practice for social workers to administer drug tests in some counties.) If not, can social workers request authorization to receive training to administer drug tests and continue offering drug tests? As suggested by the American Society of Addiction Medicine, can oral or home breathalyzer tests be offered, self-administered and monitored via telehealth or by the social worker through video conferencing?

### ► Resource

Guidelines on adjusting drug testing protocols during the pandemic can be found here: <https://www.asam.org/Quality-Science/covid-19-coronavirus/adjusting-drug-testing-protocols>

### ► Samples of Some Online Services Currently Available

Online Substance Abuse Meetings and Services:

12 Step: <https://www.12step.org/social/online-meetings/>

In the Rooms: [https://www.intherooms.com/home/?fbclid=IwAR0jah6iT17Is-QFa\\_WQbz9d9I-bXv92Qgxt0RYOqIPyXhYVsrp2ngHKm-4](https://www.intherooms.com/home/?fbclid=IwAR0jah6iT17Is-QFa_WQbz9d9I-bXv92Qgxt0RYOqIPyXhYVsrp2ngHKm-4)

Smart Recovery: [https://www.smartrecovery.org/smart-recovery-toolbox/smart-recovery-online/?fbclid=IwAR1WYJ\\_y\\_YKdYglurQ2r3L1MlaNAZ-ihdq6Lz6Mux-u8GGsTLDsdINUCWsk](https://www.smartrecovery.org/smart-recovery-toolbox/smart-recovery-online/?fbclid=IwAR1WYJ_y_YKdYglurQ2r3L1MlaNAZ-ihdq6Lz6Mux-u8GGsTLDsdINUCWsk)

AA: <http://aa-intergroup.org/directory.php>

NA: <https://virtual-na.org/>

Alanon: <https://al-anon.org/al-anon-meetings/electronic-meetings/>

Online Mental Health chat rooms, forums, online meetings and phone in support groups and meetings:

<https://namimainlinepa.org/online-and-telephone-support-groups/?fbclid=IwAR0QZnWSDebKDTYZM6I1nhPA0G7xZKkJi3AJ-YK-NiZIGkQhRFksAoo1DiADepression>

Online Therapy:

<https://www.verywellmind.com/best-online-therapy-4691206>

Online Parenting:

<https://www.parentmap.com/article/theres-an-online-parenting-class-for-that>

<https://courtoorderedclasses.com/ParentingOnline.html>

Online 52 Week Batterer Intervention Program:

<https://courtclasses.org/products/batterer-intervention-program-52wk>

<https://mentalhealth.openpathcollective.org/batterers-intervention/>

<https://s2sdvonline.com/classes/domestic-violence-52-week-class/>

<http://www.courtorderedclasses.com/battery.html>

#### **4) Evaluate if Alternative Placement is Available if Your Tribal Children Are in Congregate Care.**

Congregate care placements (such as group homes or residential treatment facilities) place tribal children at extreme risk of exposure to the COVID-19 outbreak. Congregate care facilities don't typically have the resources to provide adequate cleanliness and isolation to protect children in the facility. Additionally, crowding, close contacts with various individuals, and various staff members entering and exiting the facility, contribute to the increased exposure risk. Some congregate care facilities have closed due to the pandemic. While jails and prisons with similar risk factors are currently working to alleviate the risk by releasing inmates who meet certain criteria, similar considerations should be made regarding whether it is appropriate to move children out of congregate care facilities.

##### **► ICWA Compliant Placements**

Active efforts require an ICWA compliant placement unless there is good cause to deviate from ICWA placement preferences and this requirement is ongoing for children in non-ICWA compliant placements.<sup>7</sup> Active efforts also require a diligent search for the Indian child's extended family members and includes contacting and consulting with extended family members.<sup>8</sup>

Work with the county agency to renew family finding efforts and efforts to find tribal or other foster homes. It is more important than ever to try to get youth into family settings. Ask the child, parents family friends and relatives if they know of an alternative place for the child during the pandemic. Consider if it would be safe to reunify the family. Consider if the placement is meeting the current needs of the child and is the least restrictive placement, or if the placement is no longer necessary. However, keep standards high and make sure the county agency is looking for the right placement for the child and not just a placement for the child.

##### **► Tribal Foster Families**

Additionally, work with the county child welfare agency and your tribe to increase tribal foster parent recruiting efforts. More people are staying at home and thus have more availability to foster a child right now. Many people are looking for a way to give back to the community while sheltering in place during the pandemic. Foster parenting is a rewarding way to give back to the community while making good use of additional time spent at home. Make sure that potential

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<sup>7</sup> 25 U.S.C. Section 1915(b)

<sup>8</sup> Cal. Welf. and Inst. Code § 224.1(f)(4)

foster parent recruits are aware that foster care funds are a subsidy for the support of the child and will not be considered income to the foster family when filing tax returns and applying for most public benefits programs. Becoming a foster placement will not affect a family's ability to apply for or continue to receive unemployment or other income-related benefits.

### ► **Active Efforts for Children who Must Remain in Congregate Care**

If a child must remain in congregate care, talk to the facility about what will happen if there is an outbreak at the facility. Ask what will happen if staff members are sick and unable to work. Find out what measures have been put in place to keep the facility clean. Find out if there are ways to isolate a child if a child becomes ill at the facility and what that isolation will look like for that child. Have a specific plan in place for the child should the facility need to close, and also a plan for the care and wellbeing of the child should the child become exposed to COVID-19 while at the facility.

### ► **Resource**

Ideas for making emergency plans with youth in congregate care can be found here: <https://ylc.org/wp-content/uploads/2020/03/YLC-Toolkit-for-Emergency-Planning-with-Youth-in-Congregate-Care.pdf>

## 5) **Act Now! Do Not Wait Until the Next Review to Address Active Efforts.**

With court closures, continuances of regularly scheduled review hearings, and county court blanket orders in place, you may be frustrated with the lack of active efforts a family is receiving and confused about what legal recourse the tribe has. The pandemic is not an excuse for county child welfare agencies to stop providing active efforts or to put reunification on hold. Do not accept any responses from the county child welfare agency that families will have to wait until the pandemic is under control to complete a necessary component of their case plan. Timelines for reunification are short. Childhood is a critical time for tribal children's development and will affect whether they grow into safe, happy, and healthy adults and elders. Childhood only lasts for a short while and does not wait for the pandemic to end; the reunification of tribal children and families cannot be put on hold, even during a pandemic.

Waiting for a "no active efforts" finding at the next status review hearing is never an appropriate remedy for the family. Even if the court makes a "no active efforts" finding at the next status review hearing and extends services, a lot of damage can be done to the family in the meanwhile that might not be repairable with an extension of services. Early intervention is critical. See if things can be resolved by some informal discussions with the county agency social worker or by having virtual or telephonic Family Team Meetings. A little effort and creativity now may go a long way to getting a family back on track and getting active efforts back on track. However, if the county child welfare agency has stopped providing active efforts in a case or will not consider creative online or alternative services to meet case plan goals, contact your attorney immediately. Your attorney will help you determine if filing a motion with the juvenile court now to get compliance with active efforts is appropriate.

### ► File a Motion with the Court

Filing an objection or motion with the court can be very useful to gain court oversight of an issue and highlight the importance of the issue. The filed motion will direct the court and counsel's attention to the appropriate authorities and guidance that should be applied during the pandemic and allow legal standards to be cleared up. It will provide an opportunity for the court and parties to take corrective action. A filed motion will also preserve the record should the issue need to be appealed and reviewed by a higher court. Ultimately, a filed motion can help maintain the family's relationship and bond when visitation orders are not being followed or visitation legal standards are not being adhered to. It can get a family back on track to reunify when adequate services are not being provided.

A motion may also be necessary to prevent irreparable damage and unintentional waiver of legal rights. During this pandemic, failing to object quickly to visitation modifications may lead to irreparable damage to the family bond. Further, failing to object quickly could also be considered "consent" to the blanket visitation modifications and waive the tribe's right to object to the modification of visitation. Under Emergency Rule 6(c)(7) of the California Rules of Court, objections to modifications in visitation should be brought to the court's attention within 14 days with the party challenging the modification to bear the burden at the hearing. Get in contact with your attorney right away to discuss any visitation and active effort issues!

The pandemic calls for everyone to go above and beyond their typical work on ICWA cases. While technology is more important than ever before, services and visitation may need to be modified, and placements may need to be re-assessed, by taking quick action to work with the county agency on a case-by-case basis and using creativity, active efforts can continue to be provided.

### ► Resource

A sample "Motion to Resume Visitation" can be found at: [https://www.naccchildlaw.org/resource/resmgr/policy/motion\\_to\\_address\\_visitation.docx](https://www.naccchildlaw.org/resource/resmgr/policy/motion_to_address_visitation.docx) (This motion is based on Colorado law.) Please talk to an attorney to assist in drafting a motion based on the appropriate authorities for your case.

## 6) Links to Additional Resources for Providing Active Efforts and Reasonable Services

The website hosted by Alliance for Children's Rights contains information on food assistance, health care, housing and emergency aid, education, employment, and more: <https://kids-alliance.org/covid-19/>

The website hosted by the National Association of Counsel for Children contains many links to helpful resources such as tip sheets for dealing with various COVID-19 issues, links to federal communication and guidance for CWS cases during the pandemic, news related to how foster youth and child welfare systems are affected by COVID-19, and more: <https://www.naccchildlaw.org/page/CoronavirusCOVID-19>

The website hosted by John Burton Advocates for Youth contains many links to helpful resources such as food support, healthcare, childcare, unemployment benefits, higher education resources online, financial aid, resources by county and more:

[https://docs.google.com/document/d/1AMR6VLFrIGcFyJkzFcum1O8pwWJZzwsFdlq0\\_G7i5M/edit#](https://docs.google.com/document/d/1AMR6VLFrIGcFyJkzFcum1O8pwWJZzwsFdlq0_G7i5M/edit#)

The website hosted by John Burton Advocates for Youth contains resources for teens and Non-Minor Dependents: <https://www.jbaforyouth.org/covid-19-resources/>

The website hosted by California Department of Social Services contains state guidance to county agencies: <https://www.cdss.ca.gov/inforesources/2020-all-county-letters>