



Oregon Department of Human Services (ODHS) Adoption and Guardianship Mediation Program

ICWA/ORICWA

December 15, 2021



Contents

Section 1: History of Indian Child Welfare Practices and Policy.....	3
Section 2: Oregon Indian Child Welfare Act (ORICWA)	6
Section 3: Mediation When ICWA Applies.....	8
Further Readings and Resources on ICWA	14
Glossary.....	15
References	16

© 2021



Funded through the Department of Health and Human Services, Administration for Children and Families, Children's Bureau, Grant #90CO1122-01-00. The contents of these materials do not necessarily reflect the views or policies of the funders, nor does mention of trade names, commercial products or organizations imply endorsement by the U.S. Department of Health and Human Services. This information is in the public domain. Readers should credit Oregon Department of Human Services.

Section 1: History of Indian Child Welfare Practices and Policy

Learning Objectives

When you complete this section, you will be able to do the following:

- Describe the basic history of child welfare practice with tribes
- State the intent of the Indian Child Welfare Act (ICWA)

This section focuses on the history of **Indian child** welfare practices and the creation of the **Indian Child Welfare Act (ICWA)**. Throughout this module, we have tried to use consistent terminology. The Oregon Department of Human Services (ODHS) uses the following definition of **Indian tribe** or **tribe**:

“Indian tribe” or “tribe” means any Indian tribe, band, nation, or other organized group or community of Indians federally recognized as eligible for services provided to Indians by the Secretary of the Interior because of their status as Indians, including Alaska Native village as defined in 43 U.S. Code (U.S.C.) § 1602(c).

However, there are times you will see different terminology used in this manual when content is from an outside source or data source.

Brief History of Child Welfare Practice With Tribes

The Child Welfare Information Gateway has published fact sheets about ICWA) that includes the following description of the history of child welfare practice with tribes.

The child welfare system has had a particularly poignant impact on Tribal communities over the past century. From the 1870s through the 1930s, thousands of Indian children were removed from their homes, families, and tribes and placed in boarding schools, often at a great distance from their home. In these schools, there was a policy of assimilation that left them without access to family and unable to speak their native language or participate in their native culture. The Indian children were frequently taken from their homes without any investigation of maltreatment or well-being and without notice being provided to their families or tribes (Capacity Building Center [CBC] for States, 2017). As a result, native customs and practices were destroyed, families were separated, and generations of American

Words that are **black and bold** are glossary terms, and their definitions can be found in the Glossary.

SECTION 1: HISTORY OF INDIAN CHILD WELFARE PRACTICES AND POLICY

Indian and Alaska Native (AI/AN) children grew to adulthood without the benefit of parenting or support from their families or tribes.

Compounding the trauma associated with early child welfare practices was the overall treatment of native peoples by the U.S. Government, particularly from the 1820s through the 1960s. From the 1820s to the 1880s, the U.S. Government established practices of forced migration and placement of native peoples on reservations (CBC for States, 2017). From that point onward, U.S. Government approaches to tribal populations included seeking to assimilate tribal members into mainstream American life; distributing reservation land to settlers, often without compensation to tribes; and other policies that had serious and long-lasting negative consequences for tribes.

Although the U.S. Government's approach to working with tribes has improved in recent decades, this distressing history has contributed to a great level of distrust, historical trauma, and unresolved grief that continues to affect AI/AN families and the ways in which Federal, State, and local governments and Tribes interact.¹

ICWA

In 1974, congressional hearings began regarding concerns about the unwarranted removal and separation of Indian children from their families by state child welfare and private adoption agencies. Research at that time found that “25%–35% of all Native children were being removed; of these, 85% were placed outside of their families and communities—even when fit and willing relatives were available.”²

The passage of ICWA in 1978 (25 U.S.C. §§1901-1963) stemmed from the congressional hearings and was, in part, a response to more than 150 years of continued social and political policies to remove Indian children from their families and communities. An excerpt from ICWA follows.

Refer to “A Practical Guide to the Indian Child Welfare Act” at Native American Rights Fund (NARF), www.narf.org, for a complete guide to the Indian Child Welfare Act.

25 U.S.C.. § 1902 - Congressional declaration of policy

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.³

ICWA establishes the following:

- Minimum federal standards for the removal of Indian children from their families
- The placement of these children in foster or adoptive homes that reflect the unique values of Indian culture
- Confirmation of tribal jurisdiction over child-custody proceedings involving Indian children⁴

In 2016, the Bureau of Indian Affairs (BIA) revisited ICWA and provided additional federal guidance. The BIA added a subpart to the regulations to improve ICWA implementation.

Refer to the Department of the Interior,
<https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf>, to find the 2016 ICWA Guidelines for Implementing the Indian Child Welfare Act.

Section 2: Oregon Indian Child Welfare Act (ORICWA)

Learning Objectives

When you complete this section, you will be able to do the following:

- Identify conditions around which the Oregon Indian Child Welfare Act (ORICWA) was enacted
- Describe the policy of ORICWA
- List and describe the key safeguards of the Act

Formation of ORICWA

In 2018, ODHS data still showed a disproportionate placement of AI/AN children in foster care. AI/AN children made up 1.6% of Oregon's child population, but 4.5% of the children in foster care in Oregon.⁵

To address the disproportionate placement of AI/AN children in foster care and the inconsistent application of ICWA and at the request of Oregon tribes, the ODHS Tribal Affairs Unit formed an ICWA compliance committee. The committee, consisting of tribal partners, key state agencies, other relevant stakeholders/partners, national experts, and ODHS, drafted the **Oregon Indian Child Welfare Act (ORICWA)**. Oregon State Legislature passed ORICWA during the special session in 2020, and it was amended in 2021.

ORICWA Policy

ORICWA policy regarding Indian children is as follows:

- It is the policy of the State of Oregon to protect the health and safety of Indian children and the stability and security of Indian tribes and families by promoting practices designed to prevent the removal of Indian children from their families and, if removal is necessary and lawful, to prioritize the placement of an Indian child with the Indian child's extended family and tribal community.
- The state recognizes the inherent jurisdiction of Indian tribes to make decisions regarding the custody of Indian children.
- The state also recognizes the importance of ensuring that Indian children and Indian families receive appropriate services to obviate the need to

SECTION 2: OREGON INDIAN CHILD WELFARE ACT (ORICWA)

remove an Indian child from the Indian child's home and, if removal is necessary and lawful, to effect the child's safe return home.”⁶

The Safeguards of ORICWA

ORICWA "create[s] additional safeguards for Indian children to address disproportionate rates of removal, to improve the treatment of and services provided to Indian children and Indian families in the child welfare system, and to ensure that Indian children who must be removed are placed with Indian families, communities, and cultures.”⁷

Key safeguards include the following:

- **Cultural Continuity Agreement (CCA):** ODHS must provide the child’s tribe and the prospective guardian or adoptive parent the opportunity to create a **Cultural Continuity Agreement (CCA)**, which is covered in more detail in the next section. The CCA can be developed through the ODHS mediation process or through the tribe’s own process. The purpose of the CCA is to ensure “ongoing cultural connections between the Indian child and the Indian child’s tribe and describes how the Indian child’s cultural needs, including the value to the Indian child of establishing, developing, or maintaining a political, cultural, social, and spiritual relationship with the Indian child’s tribe, tribal community, and extended family, will be met on an ongoing basis.”⁸
- **Post Guardianship or Post Adoption Communication Agreement (PGCA or PACA):** ODHS must provide the Indian child’s birth parent(s) or Indian custodian(s) and the prospective guardian or adoptive parent an opportunity to mediate a **Post Guardianship or Adoption Communication Agreement (PGCA or PACA)**.

Expand Your Knowledge

The term “Indian custodian” means any Indian, other than the Indian child's parent, who has custody of an Indian child under applicable tribal law or custom or under applicable state law, or to whom temporary physical care, custody, and control has been transferred by the Indian child's parent.

The next section covers the CCA in more detail and different situations that might require a mediator to create a CCA, PGCA, and/or PACA.

Section 3: Mediation When ICWA Applies

Learning Objectives

When you complete this section, you will be able to do the following:

- List and describe types of agreements a mediator may need to develop if ICWA applies, and the conditions upon which each may be required
- Describe CCAs and how they are developed and formalized
- Describe what mediators need to know when ICWA applies to a referral for mediation.

This section covers what mediators need to know when receiving a referral for mediation when ICWA/ORICWA applies, including details about (1) the types of agreements a mediator may need to develop depending upon the mediation participants and specific situations and (2) the development of CCAs.

Types of Agreements That Might Be Requested

When ICWA applies to a particular case, the ODHS caseworker may request (through a mediation referral) that the contracted mediator develop the following:

- 1) a CCA **only**
- 2) a CCA **and** a PGCA or PACA
OR
- 3) a PGCA or PACA **only**

The ODHS caseworker will determine which of these are needed based on whether the following factors apply:

- The birth parent and/or other family members and the prospective guardian or adoptive parent wish to participate in mediation to develop a PGCA or PACA.
- The tribe developed or plans to develop their own CCA.
- The tribe doesn't wish to have a formal written CCA developed.
- A CCA was or will be developed at a separate time as a PGCA or PACA.

Remember:

CCA = Cultural Continuity Agreement

PGCA = Post Guardianship Communication Agreement

PACA = Post Adoption Communication Agreement

SECTION 3: MEDIATION WHEN ICWA APPLIES

- A CCA will be the only agreement developed as some or all of the proposed guardian/adoptive and birth family members do not wish to participate in mediation or potential participants are not available for mediation.

For Your Information

The child's tribe may decide that a formal written CCA is not necessary as they may be satisfied that the proposed guardian or adoptive parent is already keeping the child culturally connected. Examples may include when the proposed guardian or adoptive parent is a member of the child's tribe, the child had cultural connections prior to being placed in foster care and those connections have continued, or cultural connections were developed informally after the child was placed in foster care.

Next, we will cover each of these types of referrals.

Referral for CCA only

If there is a referral for CCA only, the mediation referral form will include the names and contact information for the mediation participants. The mediation participants for the CCA will be the tribal representative for the child's tribe and either the prospective guardian or adoptive parent.

The mediator will also be provided with the Authorization for Disclosure form, commonly known as a release of information (ROI), for the prospective guardian or adoptive parent. The child's tribe does not need to sign an ROI.

Referral for a CCA and PGCA or PACA

If there is a mediation referral to develop a CCA, the referral may also include mediation between the prospective guardian or adoptive parent and participants such as the birth parent(s), siblings, and other extended family. Therefore, this situation would require a PGCA or PACA in addition to a CCA. The mediation referral will include contact information for the tribe.

These two types of mediation (CCA + PGCA or CCA + PACA) may be included in one referral or as separate referrals. In this instance, also refer to the prior section on the CCA referral process.

Refer to Section 2: Launching a Mediation in the Program Manual for more information.

Referral for PGCA or PACA Only

If the referral is only for mediation between the proposed guardian or adoptive parent and birth parent and/or other participants and intended to produce a PGCA or PACA only, the mediation referral form will include contact information for the tribe. Even though the tribe will not be a direct participant in this type of mediation, they can still be a good source of information and recommendations.

Refer to Section 2: Launching a Mediation in the Program manual for more information on the referral process.

Important Note

The mediation referral form should indicate whether the mediation will be to develop a CCA only, a CCA and PGCA or PACA, or a PGCA or PACA only. It is always good practice to double check with the caseworker to ensure the intent of the mediation and the list of those who need to participate are clear.

If the referral does not indicate the need for a CCA to be developed, it's good practice to ask the caseworker whether the tribe has or will develop a CCA through their own process rather than through ODHS.

Developing a CCA

ICWA and ORICWA have requirements to ensure that when an Indian child is placed for guardianship or adoption that the tribe does not lose contact with the child and the child does not lose connection to their tribal identity, culture, and community. The CCA is a tool to help ensure that this connection continues.

A CCA builds a foundation for children to stay connected to their tribe, so they know who they are and where they come from. The agreement can be a way to help build a bridge between the child's tribe and the prospective guardian or adoptive parent. The mediation process is an avenue for the child's tribe and the prospective guardian or adoptive parent to talk about and develop a CCA.

Mediators should ask the ODHS caseworker for some background about the child's tribe. Questions might include:

- Is the tribe familiar with ORICWA and CCAs?
- What, if any, connection does the prospective guardian or adoptive parent have to the tribe?

Gathering this information will help reveal what type of questions the mediator may want to ask the mediation participants. When the mediator speaks with the child's tribal representative, the mediator will have an opportunity to find out more about what the child's tribe wants and what

SECTION 3: MEDIATION WHEN ICWA APPLIES

details are needed in the CCA to ensure that the child stays connected to their tribe and community. Details the mediator might explore include the following:

- What information, services, or activities would the tribe like the prospective guardian or adoptive parent to know about and access?
- What type of cultural or tribal events are available?
- Are there tribal families available to connect with the prospective guardian or adoptive parent (especially when the child may not have tribal birth family available)? This can help create a bridge for the family with the tribe.
- What other ways may the tribe be the point of contact and support for the child?
- What ways can the tribe help the prospective guardian or adoptive parent create connection for the child with their tribe and culture, now and as the child grows?
- Are there specific programs for youth and creative ways to get them connected?
- Are there tribal benefits available for the child and prospective guardian or adoptive parent?

Mediation may be a new process for the child's tribe so let the representative know you are there to listen and learn from them as much as you will help them learn about the mediation process.

Formalizing the CCA

Once the child's tribe and the prospective guardian or adoptive parent have created a plan for cultural continuity, the mediator will put the terms into a written CCA for the tribe and prospective guardian or adoptive parent to review. The final agreement, signed by the child's tribe, prospective guardian or adoptive parent, and ODHS will be provided by ODHS to the court so the court can incorporate the CCA into the final judgment of guardianship or adoption. It must also be provided by ODHS to the court prior to an entry of judgment for termination of parental rights when the birth parents aren't voluntarily relinquishing parental rights in order for an adoption to occur.

Developing PGCAs or PACAs When ICWA/ORICWA Applies

ORICWA contains a requirement that when an Indian child is placed for guardianship or adoption, the Indian child's birth parent(s) or Indian custodian(s) and the prospective guardian or adoptive parent are offered

SECTION 3: MEDIATION WHEN ICWA APPLIES

an opportunity to mediate a PGCA or PACA. Even when mediation to develop a CCA is not requested, it is important to remember that the intent of ICWA and ORICWA is to ensure the Indian child being placed for guardianship or adoption does not lose connection with their family, culture, and community. The PGCA or PACA is another tool to help ensure that those important connections are supported and nurtured.

Details the mediator might explore with the tribe include the following:

- What does the tribe want their role to be once the guardianship or adoption is finalized, and how does the tribe believe the prospective guardian or adoptive parent can support that role?
- What other ways may the tribe be the point of contact and support for the child?
- Even if a CCA is not developed, what ways can the tribe help the prospective guardian or adoptive parent create connection for the child with their tribe, culture, and family members? Are there cultural or tribal activities, events, or programs in which the child, birth family members, and/or prospective guardian or adoptive parent can participate? Are there tribal benefits that can be accessed?

Details the mediator might explore with the birth family and prospective guardian or adoptive parent include the following:

- What about the birth family's culture and heritage is important for the child to know? How will that information be shared with the child? How can the child's cultural connection and identity be supported and nurtured?
- What cultural/tribal and family activities, events, and programs are available for the child and how will the prospective guardian or adoptive parent ensure the child can participate?
- What can the prospective guardian or adoptive parent do to learn more about the child's culture, heritage, and birth family? How can they use that information to help support those connections for the child?

Tip: The contact information for the tribe is included in the Mediation Referral Form.

Note

There may be parts of the plan for openness developed that are not directly connected to the Indian child's heritage. The mediation to develop those parts of the plan for communication/contact between the direct mediation participants will follow a typical process for post guardianship or adoption mediation that would be used when ICWA does not apply.

Formalizing the PGCA or PACA

Once the child's birth family member and the prospective guardian or adoptive parent have created a plan for openness, the mediator will put the terms into a written PGCA or PACA for the birth family member and prospective guardian or adoptive parent to review. The final agreement, signed by the child's birth family member, prospective guardian or adoptive parent, and ODHS will be provided by ODHS to the court so that the court can incorporate the PGCA or PACA into the final judgment of guardianship or adoption.

Further Readings and Resources on ICWA

- National Indian Child Welfare Association (www.NICWA.org)
- Heart of ICWA videos on You Tube
- Dawnland: A film produced by PBS Independent Lens about the Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission.
- A Practical Guide to the Indian Child Welfare Act (www.narf.org)
- ORICWA Legislative Session (fast forward to about 1 hour 10 minutes to find the relevant section:
<https://olis.oregonlegislature.gov/liz/mediaplayer/?clientID=4879615486&eventID=2019091048>)

Glossary

Cultural Continuity Agreement (CCA)	A written agreement developed between the Indian child's tribe and prospective guardian or adoptive parent that ensures ongoing cultural connections between the Indian child and the Indian child's tribe and describes how the Indian child's cultural needs, including the value to the Indian child of establishing, developing, or maintaining a political, cultural, social, and spiritual relationship with the Indian child's tribe, tribal community, and extended family, will be met on an ongoing basis.
Indian child	Any unmarried person who has not attained 18 years of age and: (a) Is a member or citizen of an Indian tribe; or (b) is eligible for membership or citizenship in an Indian tribe and is the biological child of a member or citizen of an Indian tribe.
Indian Tribe or Tribe	"Indian tribe" or "tribe" means any Indian tribe, band, nation, or other organized group or community of Indians federally recognized as eligible for the services provided to Indians by the Secretary of the Interior because of their status as Indians, including any Alaskan Native village as defined in 43 U.S.C. 1602(c).
Indian Child Welfare Act (ICWA)	"ICWA" or "the Act" means the Indian Child Welfare Act of 1978, 25 U.S.C. §§1901-63
Oregon Indian Child Welfare Act (ORICWA)	A 2020 Oregon law that promotes the safety of Indian children, preserves tribal families and communities, recognizes tribal sovereignty, and supports compliance with federal ICWA standards in courts and Oregon Department of Human Services (ODHS) offices throughout the state.
Post Adoption Communication Agreement (PACA)	A written agreement for post adoptive communication, signed by the child's birth parents or other birth family members and the child's adoptive parents, based on an informed decision-making process by the mediation participants. The content of the agreement is based on the best interest of the child.
Post Guardianship Communication Agreement (PGCA)	A written agreement for post guardianship communication, signed by a child's birth parents or other birth family members and the child's guardian, based on an informed decision-making process by the mediation participants. The content of the agreement is based on the best interest of the child.

References

- ¹ *The Indian Child Welfare Act: A Primer for Child Welfare Professionals*. (2021, April). Child Welfare Information Gateway. <https://www.childwelfare.gov/pubs/factsheets/ICWA/p2>.
- ² National Indian Child Welfare Association (NICWA). www.nicwa.org
- ³ Indian Child Welfare Act of 1978, P.L. 95–608, § 3, 92 Stat. 3069 (November 8, 1978). https://www.ssa.gov/OP_Home/comp2/F095-608.html
- ⁴ Congressional Declaration of Policy, 25 U.S.C. 1902 (2009). <https://www.govinfo.gov/content/pkg/USCODE-2009-title25/pdf/USCODE-2009-title25-chap21-sec1902.pdf>
- ⁵ Oregon Department of Human Services, 2019 Child Welfare Data Book. (2020, June). <https://www.oregon.gov/dhs/CHILDREN/CHILD-ABUSE/Documents/2019%20Child%20Welfare%20Data%20Book.pdf>
- ⁶ Oregon Indian Child Welfare Act, Oregon Laws HB 4214, Chapter 14 § 1 (2020). https://www.oregonlegislature.gov/bills_laws/lawsstatutes/2020S1OrLaws0014.pdf
- ⁷ Oregon Indian Child Welfare Act, Oregon Laws HB 4214, Chapter 14 § 1 (2020). https://www.oregonlegislature.gov/bills_laws/lawsstatutes/2020S1OrLaws0014.pdf
- ⁸ Oregon Administrative Rules 413-115-0000, (29) <https://regulations.justia.com/states/oregon/chapter-413/division-115/413-115-0000/>