



New Citizen Review Board (CRB) Findings for Indian Children

Introduction

Congress passed the [Indian Child Welfare Act](#) (ICWA) in 1978 in response to concerns that a high percentage of Indian families were being broken up by the removal of their children by nontribal public and private agencies. Despite the provisions of ICWA and federal guidance for its implementation, the Oregon Department of Human Services (ODHS) data continued to show disproportionate placement of Indian children in foster care.

An audit of ODHS compliance with ICWA in 2019 found a compliance rate of less than 25% in the areas of assessment, removal and permanency. As a result, an ICWA compliance group proposed an Oregon ICWA (ORICWA) statute to strengthen and create new protections for Indian children in Oregon law. The resulting bill, [House Bill 4214](#), requires board members to make the following additional findings beginning January 1, 2021.

New Findings

1. When confirming ICWA status at the beginning of a review, ask **“Is there a reason to know the child is an Indian child?”** or **“Is there a reason to know the children are Indian children?”**

“Indian Child” is defined as 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 of an Indian tribe.

A “reason to know” is meant to be a low bar, and ODHS is expected to follow up on any information that indicates the child or family has possible tribal heritage. Only a tribe can determine whether the child is a member or citizen or eligible for membership.

CRB must treat a child as an Indian child if:

- Anyone present at the review states there is reason to know the child is an Indian child, and
- Nobody present can verbally confirm that the Court determined the child does not meet the definition of an Indian child.

The rest of the new findings are only made if there is reason to know the child is an Indian child. Please note these findings are to be made in addition to the regular findings, not in place of any of them.

2. Under Finding 1, **“Did active efforts eliminate the necessity for removal based on serious emotional or physical damage to the Indian child?”**

In order to answer this question, consider the following:

Step 1—Were active efforts made to prevent removal?

To determine what efforts were made prior to the child’s removal, review the initial assessment and any report that was submitted to the court at the shelter and jurisdictional hearings. Were active efforts made? If not, what was the reason given for failing to provide active efforts to prevent removal?

Step 2—If no active efforts were made, was ODHS justified in removing the child anyway?

If the child was at risk of “imminent physical damage or harm”, ODHS may have removed the child without providing active efforts. The law allows for this. The Shelter Order authorizing the removal should reflect a court finding to this effect. If the finding was made, the court found active efforts could not have prevented the removal. Similarly, the board could find that active efforts did not eliminate the necessity for removal based on serious emotional or physical damage to the Indian child because an emergency existed.

Step 3—If active efforts were made, was the child still at risk of serious emotional or physical damage?

If ODHS made active efforts, but there was no basis to find the child was at risk of imminent physical damage or harm, the board has to consider whether the removal was appropriate because the child was at risk of serious emotional or physical damage. The court had to consider this question as well, either at the shelter or jurisdictional hearing. The Shelter Order or Judgment of Jurisdiction should reflect the court’s finding on this issue.

Definition—*What is serious emotional or physical damage?*

Countless Indian children have been removed from their homes based on subjective assessments of home conditions that, in fact, are not likely to cause the child serious emotional or physical damage. Children can still thrive when they are kept with their parents, even in homes that may not be ideal. Board members cannot assume that the existence of community or family poverty; isolation; single parenthood; custodian age; crowded or inadequate housing; substance abuse; or nonconforming social behaviors like dressing in a manner that others perceive as strange, an unusual or disruptive manner of speech, or discomfort in or avoidance of social situations is causing the child serious emotional or physical damage. Rather, there must be a demonstrated correlation between the conditions of the home and a threat to the child's emotional or physical well-being (Bureau of Indian Affairs, [Guidelines for Implementing the ICWA](#), Dec. 2016, Pgs. 52-53).

When the court makes a finding about whether the child is at risk of serious emotional or physical damage, it is required to base the finding in part on the testimony of a qualified expert witness (QEW) who has specific knowledge of the prevailing social and cultural standards and child rearing practices of the Indian child's tribe. Unfortunately, for various reasons, QEWs are not available to attend CRB reviews. So, like all other CRB findings, the board must rely on information from the case material and parties at the review to make the finding. The perspective of the tribal representative, if present, will be especially important.

3. Under Finding 5, "Has ODHS made active efforts to place the child in a timely manner in accordance with the placement preferences for Indian children?"

Under Finding 7, if the child is placed in a home outside the Oregon ICWA placement preferences, **"Has ODHS continued to maintain the relationship of the Indian child with potential adoption preferences? If not, "Has ODHS continued to search for a permanent placement that complies with the placement preferences?"**

Under Findings 5 and 7, the board has to evaluate ODHS efforts to permanently place the child according to the placement preferences under ORICWA. What placement preferences apply will depend on the child's permanency plan, or if the plan is reunification, the designation of the concurrent plan. Here's an overview of the placement preferences that apply under state and federal law.

Oregon ICWA requires that the Indian child be placed in the least restrictive setting that:

- most closely approximates a family, taking into consideration sibling attachment;
- allows the Indian child's special needs, if any to be met;
- is in reasonable proximity to the Indian child's home, extended family or siblings; and
- is in accordance with the order of preference established by the Indian child's tribe.

Ask the parties for information regarding the tribe's placement preferences. If the tribe has not established placement preferences, the following preferences apply:

For plans of Guardianship and Adoption

- A member of the child's extended family
- Other members of the Indian child's tribe, or
- Other Indian families.

For plans of Reunification, Placement with a Fit and Willing Relative, and Another Planned Permanent Living Arrangement (APPLA)

- A member of the child's extended family;
- A foster home licensed, approved or specified by the child's tribe;
- A foster home licensed or approved by a licensing authority in this state and in which one or more of the licensed or approved foster parents is an Indian; or
- An institution for children that has a program suitable to meet the Indian child's needs and is approved by an Indian tribe or operated by an Indian organization.

4. Under Finding 10, if the case plan is reunification, "Have active efforts eliminated the necessity for continued removal based on serious emotional or physical damage to the Indian child?"

This finding is very much like the new finding under Finding 1, and similar principles apply. This finding is asking you to consider whether the remaining conditions in the home place the child at risk of serious emotional or physical damage. Ask the caseworker to articulate what safety issues remain that are preventing the child from returning home. As a board, consider whether those issues will cause serious emotional or physical damage to the child if the child were to return home today.