



# NICWA

National Indian Child Welfare Association

## Child and Family Policy Update

July 2017

An electronic copy of this update, with live links, can be found on the National Indian Child Welfare Association's (NICWA) website under News and Events (Latest Policy Update) at [www.nicwa.org](http://www.nicwa.org).

### Hot Topics

#### **NICWA Joins Amicus Brief in Appeal of ICWA Lawsuit Involving South Dakota Court**

In *Oglala Sioux Tribe, et al. v. Mark Vargo, et al.*, the State of South Dakota again appealed a federal court decision that ordered the state to stop due process and Indian Child Welfare Act (ICWA) violations in a state court near Rapid City. NICWA, the Cherokee Nation, Navajo Nation, ICWA Law Center, and National Congress of American Indians filed an amicus brief with the court explaining the purposes and continued importance of ICWA. The class action lawsuit was originally filed in 2013 by American Civil Liberties Union Attorney Stephen Pevar, alleging due process and ICWA violations related to child removal procedures used by state and local social workers and court judges in Pennington County. In March of 2015, a federal court judge confirmed the allegations and found that the state's practices in this case violated ICWA and the due process clause of the Fourteenth Amendment of the Constitution. In his order, the judge asked the parties to suggest remedies to the problems. In defiance of the judge's order, the defendants (state) did not provide any suggested remedies and continued to operate as they had previously. Later in 2016, the federal judge held a compliance hearing where he found that the defendants continued to defy his prior rulings. The judge ordered an immediate halt to the violations and issued a formal injunction. This ruling has now been appealed by the defendants in the case.

What was occurring in Pennington County was that state social workers were removing Native children from their parents and then initiating an emergency placement hearing within 48 hours where parents were not assigned counsel to represent them, were not given a copy of the petition accusing them of wrongdoing, and no state employee was called to testify. In addition, the parents were not permitted to testify, call witnesses, or cross-examine any state employee. The hearings typically lasted fewer than five minutes—some were done in 60 seconds—and the state won 100% percent of the time. This gross violation of ICWA and due process rights is an example of why ICWA is still needed and additional enforcement is required. If you want to learn more about this case, read this [article](#) and recent [filings](#) in the case.

#### **Federal District Court in Arizona Dismisses ICWA Lawsuit and Goldwater Institute Appeals**

On March 16, 2017, Federal District Court Judge Neil Wake ordered a federal lawsuit challenging the application of ICWA upon constitutional grounds be dismissed. Defendants in the lawsuit—the United States Department of Justice (representing the federal government), State of Arizona, Navajo Nation, and Gila River Tribe—previously filed petitions asking the court to dismiss the case. In the judge's order, he stated that the plaintiffs were not able to demonstrate any particular or concrete injury to the Native children or foster or adoptive parents named in the lawsuit based on the application of ICWA. Judge Wake also found that the plaintiffs lacked standing to bring the lawsuit in federal court stating that he felt the federal court was being asked to pre-adjudicate the claims for the state court in that he believed that the state court was the proper jurisdiction to hear the case.

As was expected, following Judge Wake's ruling, the Goldwater Institute and other plaintiffs in this case filed an appeal in the 9<sup>th</sup> Circuit Court of Appeals. Briefs are due later this summer.

The Goldwater Institute and the American Academy of Adoption Attorneys are also involved in a number of state level ICWA cases and are looking for another case that has potential to receive review by the United States Supreme Court including this one in Arizona. ICWA Defense Project partners (National Indian Child Welfare Association, Native American Rights Fund, National Congress of American Indians, and the Michigan State University Indian Law Clinic's ICWA Appellate Project) are monitoring these cases and working with different parties in the case that are trying to enforce ICWA's requirements. If you know of a case that you think has this potential, please let us know by contacting David Simmons at the National Indian Child Welfare Association ([desimmons@nicwa.org](mailto:desimmons@nicwa.org)) or Matt Newman at Native American Rights Fund ([mnewman@narf.org](mailto:mnewman@narf.org)).

To learn more about the ICWA Defense Project, lawsuits challenging ICWA, and how you can help protect ICWA, please go to the [ICWA Defense Project website](#) on Turtle Talk.

### **BIA Releases Revised ICWA Guidelines to Supplement New ICWA Regulations**

On December 12, 2016, the Bureau of Indian Affairs (BIA) released revised Indian Child Welfare Act (ICWA) [guidelines](#). Guidelines are not legally binding, but provide the agency's suggested practices for implementing ICWA. This is the same day the new 2016 ICWA regulations went into effect. The revised guidelines supersede the guidelines that were published in 2015 prior to the regulations being released. The guidelines provide further information for state courts and public and private child welfare agencies on the BIA's suggested instructions on how to implement ICWA and the regulations. This likely completes federal guidance on ICWA that was intended to address 37 years of uneven and sometimes improper implementation of the act in state courts and in public and private child welfare agencies. Several leading national Indian organizations, nationally recognized child advocacy organizations, and tribes have come out in support of the new regulations.

NICWA has developed a webinar and ICWA trainings discussing the new ICWA regulations and will soon be incorporating the new guidelines in these materials and trainings. If you are interested in obtaining a summary of the regulations or guidelines, please visit our home page at [www.nicwa.org](http://www.nicwa.org) and go to the News and Events section. If you are interested in a webinar or ICWA training for your program or organization, please contact NICWA Events and Training Director Lauren Shapiro at [lauren@nicwa.org](mailto:lauren@nicwa.org).

### **ACF Publishes New Federal Child Welfare Data Regulations that Include ICWA Data Elements**

On December 14, 2016, the Administration for Children and Families (ACF) published [regulations](#) that add new data elements reporting requirements for states and tribes to the Adoption and Foster Care Analysis and Reporting System (AFCARS). Included in the new regulations are over 30 new ICWA data elements that states will need to collect data on and report to ACF. Since ICWA requirements only apply to states, tribes will not be required to report on the new ICWA data elements. States will be required to begin collecting the data on October 1, 2019; they will submit their first data report on May 15, 2020, and twice a year thereafter.

The new AFCARS ICWA data elements include, but are not limited to, the following data elements:

- Did the state agency inquire as to whether the child in custody was an Indian child under ICWA?
- Is the Indian child's domicile on an Indian reservation or Alaska Native Village?
- Did the state court make a determination that ICWA applies?
- Is child in placement a member or eligible in a federally recognized tribe?
- Are the Indian child's parents members of a tribe?
- Was legal notice provided to the child's parents or Indian custodian, or tribe, within the required timelines specified under ICWA?
- Did the state court apply ICWA's legal requirements in ordering a removal of an Indian child from their home and placement in foster care?
- Is the placement for the Indian child (foster care, guardianship, or adoptive home) consistent with the ICWA placement preferences?
- Was a good cause determination to deviate from the placement preferences made by the court?
- Were active efforts provided and what types of active efforts were provided (follows ICWA regulations active efforts examples)?
- Did the state court apply ICWA's legal requirements in ordering a termination of parental rights?
- Did the state court approve a petition granting transfer of jurisdiction to the child's tribal court?

In addition to the new ICWA data elements, new data elements related to relative guardianship placements, the child's sexual orientation (for youth 14 years of age and older), and whether the child was a victim of sex trafficking before or while in foster care are included.

The development process for these new data elements at the state level is going to begin soon and tribes are encouraged to work with their state in this process. Care needs to be given to how data elements are incorporated within state data collection systems, procedures for state workers on how to collect ICWA data need to be clear and ensure the integrity of the data, and opportunities for sharing the data with tribes should be provided. NICWA is working to examine opportunities to provide assistance to states and tribes that want to develop the new AFCARS data elements.

## Legislation

### **NICWA Submits Testimony on Native American Children's Safety Act Field Hearing**

On April 21, 2017 Chairman Hoeven of the Senate Committee on Indian Affairs conducted an oversight hearing on implementation of the Native Children's Safety Act (P.L. 114-165). The hearing took place on the Spirit Lake Reservation in North Dakota. Chairman Hoeven stated his desire to ensure that child abuse and neglect involving Native children was reduced and the legislation that he co-sponsored was successful in helping achieve this goal. [Witnesses](#) included Acting Assistant Secretary for the Bureau of Indian Affairs, Michael Black, Regional Administrator for the Administration for Children and Families Region 8, Nikki Hatch, Spirit Lake Tribe Chairwoman, Myra Pearson, and Cankdeska Cikanna Community College President, Cynthia Lindquist. Each of the witnesses spoke to issues related to increasing protections for Native children and efforts their respective entities were making in that regard. NICWA's [testimony](#) focused on the barriers to accessing criminal background check data for tribes from the national crime databases operated by the Federal Bureau of Investigation and the need to fund child abuse and neglect grant programs, such as those contained under the Indian Child Protection and Family Violence Prevention Act (Pub. L. 101-630) that provide funding for tribes for child protection and child abuse victim treatment. The resolution of these implementation barriers are key to the law being successfully implemented along with quality training and technical assistance for tribes on the new law's requirements.

Below are descriptions of the key requirements in the new law:

- Defines who is required to receive a criminal background check (person 18 years of age or older who resides or is employed in the household where the placement is occurring), including adults who move into the home after the home is licensed.
- Describes the standards under which criminal background checks and checks of child abuse registries must occur before a foster care placement is approved or a foster care license is issued.
- Exempts tribal emergency placements from having completed criminal background checks before placement.
- Requires that the tribal social service agency meet the requirements under Title IV-E of the Social Security Act (42 U.S.C. § 671(A)(20)(a)) that describes which crimes will prohibit the licensing of a foster care home and placement of a child in that home.
- Requires that the tribal social service agency do periodic recertification of foster care homes, which includes new individuals not present in the home during the previous certification.
- Allows a tribe the flexibility to establish additional requirements that they determine necessary within its existing authority.
- Requires the Secretary of the Department of the Interior to issue guidance, after consultation with tribes, on procedures for criminal background checks, self-reporting requirements for individuals residing in a foster care home, promising practices by tribes with regard to emergency placement procedures, and procedures for certifying compliance with the legislative requirements.

### **Supporting Equity for Tribal Adoptions (H.R. 2035 and S. 876)**

Since 1997, the federal government has provided families and individuals that adopt children a tax credit to help offset the costs of adopting a child. This tax policy has been important in helping families that otherwise couldn't afford the costs of adoption to be able to adopt children into their home. Unfortunately, the tax credit was structured in such a way that only adoptions in state courts, and not Indian tribal courts, were eligible for the tax credit. Recently, Senators and House of Representatives members reintroduced a bill that has broad bi-partisan support that would amend the federal law establishing the tax credits to also include adoptions

that take place in tribal courts. The legislation in the U.S. Senate is S. 876 and in the House of Representatives is H.R. 2035. NICWA urges you to contact your Senate and House of Representatives members to support this important legislation so that all families can have the benefits of the federal adoption tax credit. You can find your congressional members and their contact information at [www.congresslookup.com](http://www.congresslookup.com). You can also find a letter of support for similar legislation in 2014 from several leading child and family advocacy groups at [www.nicwa.org](http://www.nicwa.org). If you have any questions, please contact David Simmons, NICWA Government Affairs and Advocacy Director at [desimmons@nicwa.org](mailto:desimmons@nicwa.org).

## **Budget**

### **Congress Passes FY 2017 Appropriations and Sets Course for FY 2018**

For FY 2017 Congress ended up passing a continuing resolution to keep the government functioning, rather than individual appropriations bills. On May 3 the House passed H.R. 244 the Consolidated Appropriations Act of 2017 and the following day, May 4, the Senate passed the House passed legislation and sent the bill to the President for signature into law, which he did. The funding levels for most federal programs were kept at FY 2016 levels with some notable exceptions related to Defense spending (\$ 15 billion increase), border security efforts (\$1.5 billion increase), National Institutes for Health (\$2 billion increase), and funds to combat opioid abuse (\$103 million increase).

The Republican leadership, who now control both the House of Representatives and Senate, are now moving to enact a FY 2018 budget. Normally, the House and Senate would first pass budget resolutions that provide the individual committees within the House and Senate with instructions on budget priorities and budget targets for different program areas. However, this year the Congress has modified its normal process to speed through the FY 2017 budget and begin work on the FY 2018 budget. Because the process for FY 2018 appropriations is behind schedule, many are wondering if another continuing resolution will be required for FY 2018. Republican leadership in the House and Senate already wanted to have completed repeal and replacement of the Affordable Care Act (Obama Care) by now and move on to FY 2018 appropriations (budget reconciliation process and regular appropriations) and entitlement reform for programs like Medicaid (block grant to states), but it is beginning to look like even replacement of the Affordable Care Act may not be able to get done this year. Without a budget resolution for FY 2018 and work still not done on the repeal and replacement of the Affordable Care Act, it makes a continuing resolution for FY 2018 appropriations much more likely.

On May 23, President Trump released his fiscal year 2018 budget for federal agencies. This followed an earlier release in April of his budget blueprint or “skinny budget” as it has been referred to. The budget released in May contains much more detail on both mandatory and discretionary funding programs than the earlier blueprint. For tribal governments hoping for some additional support in the President’s budget for funding to address critical needs for the children, families, and the elderly, there was great disappointment. Under the Bureau of Indian Affairs (BIA), Human Services budget category all six of the human service programs were recommended for budget cuts totaling almost a 16% decrease from FY 2017 funding levels. The programs recommended for cuts included BIA Social Services, Welfare Assistance, Indian Child Welfare Act, Housing, Human Services Tribal Design (formerly known as Tiwahe Initiative), and Human Services Program Oversight. The programs that were recommended for the biggest cuts were BIA Social Services (-22%), which supports several different programs and functions, including protective services for children, elders, and the disabled, and the BIA Housing Program, which was recommended to be eliminated completely. The BIA Indian Child Welfare Act program was recommended for a 4% reduction.

While only Congress can pass a budget into law and does not always follow the President’s budget recommendations, the President’s budget does set a tone for budget negotiations between the White House and Congress and signals the President’s budget and policy priorities. In May, NICWA submitted testimony ([www.nicwa.org](http://www.nicwa.org)) to both the House and Senate Appropriations Committees making recommendations on programs that serve American Indian and Alaska Native children and families often citing the great needs that many tribal communities and urban Indian communities have for human services, as well as the benefit for states when tribal governments are well resourced.

*For more information relating to this update, please contact NICWA Government Affairs Director David Simmons at [desimmons@nicwa.org](mailto:desimmons@nicwa.org)*