



NICWA

National Indian Child Welfare Association

Child and Family Policy Update

October 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.

Hot Topics

Goldwater Institute Files Petition Asking United States Supreme Court to Hear ICWA Case

On July 17, 2017, the Goldwater Institute joined by legal counsel for two children involved in a child custody proceeding in Arizona filed a cert. petition with the United States Supreme Court requesting review of a decision by the Arizona Court of Appeals in an Indian Child Welfare Act (ICWA) case earlier this summer. The case, *S.S. v. Stephanie H.*, was also appealed to the Arizona State Supreme Court this summer, but was not granted review. The respondents are the child's tribe, birth mother, and birth father.

The case involves an Indian father and non-Indian mother who divorced shortly after the birth of their two children. The mother was initially granted custody, but later after struggles with substance abuse was ordered by a trial court to relinquish her children to the birth father. The birth father later sought to terminate the mother's parental rights, which the trial court did not approve and was later affirmed by the Arizona Court of Appeals. The appellate court agreed that the termination of parental rights legal requirements under ICWA applied in this private action, not just when a public agency was involved. This included the provision of active efforts by the birth father, which the courts found the birth father had not provided and proven were unsuccessful (mother completed treatment and other court ordered actions successfully). In their decision, the Arizona Court of Appeals also flatly rejected the Goldwater Institute's challenges to ICWA's constitutionality (equal protection challenge).

The Goldwater Institute is asking the United States Supreme Court to accept review of the case and address the following questions:

- 1) Do ICWA Sections 1912(d) and 1912(f) (active efforts, burden of proof, expert witness) apply in a private severance action (termination of parental rights) initiated by one birth parent against the other birth parent of an Indian child?
- 2) If so, does this de jure (lawful or legal) discrimination and separate-and-substandard treatment of Indian children violate the due process and equal protection guarantees of the Fifth and Fourteenth Amendments of the United States Constitution?

As they have in previous lawsuits, the Goldwater Institute is challenging the constitutionality of ICWA and comparing it to other race-based laws that were struck down by the United States Supreme Court in years past, completely denying the political basis for laws like ICWA that are based upon a child's political relationship with their tribal government. The ICWA Defense Project (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 engaged in this case and working with the respondents (birth parents and tribe). If you have any questions regarding this case, please contact David Simmons at the National Indian Child Welfare Association (desimmons@nicwa.org) or Matt Newman at the Native American Rights Fund (mnewman@narf.org).

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 in Pennington County. 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.

In Pennington County 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% 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 9th Circuit Court of Appeals.

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) or Matt Newman at the Native American Rights Fund (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*.

NICWA Providing Training on New ICWA Regulations and Guidelines

In December 2016, the Bureau of Indian Affairs (BIA) released new Indian Child Welfare Act (ICWA) regulations and revised guidelines. The ICWA regulations and guidelines provide substantive guidance on implementation of ICWA with state and private agencies and state courts.

NICWA has developed a webinar and training curriculum discussing the new ICWA regulations and revised guidelines, as well as summaries of both. If you are interested in obtaining a summary of the regulations or guidelines, please visit our home page at www.nicwa.org. 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.

New Federal Child Welfare Data Regulations that Include ICWA Data Elements Under Scrutiny

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. This is the first time that the federal government has attempted to collect data on how Native children are doing in state foster care systems where ICWA applies. 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:

- 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 for membership 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?

The AFCARS regulations are being examined by the new Administration for possible changes, and recently at a meeting of tribal leaders and Acting Assistant Secretary for ACF tribal leaders voiced their concern that the Administration might be considering any changes to the regulations. Tribal leadership expressed how important the new ICWA data elements are in helping identify implementation challenges for ICWA within the states and developing effective solutions. Acting Assistant Secretary Steven Wagner said that tribes would be consulted if changes were being pursued, but stopped short of saying they would protect the ICWA data elements in the regulations. Tribal leaders are encouraged to contact ACF Acting Assistant Secretary Steven Wagner to express their position and any concerns regarding the AFCARS ICWA data elements.

Legislation

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 members of the House of Representatives 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 Senators and House representatives 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. 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/foster-care-adoption. If you have any questions, please contact David Simmons, NICWA government affairs and advocacy director at desimmons@nicwa.org.

Congress Lets Key Federal Children's Programs Authorizations Lapse

Many important federal children's programs need to be reauthorized every few years in order for the programs to continue operating and funding to be distributed to tribal and state governments. In the current Congress three very important child and family programs were allowed to lapse without reauthorization recently. The programs are the Temporary Assistance to Needy Families (TANF), Children's Health Insurance Program (CHIP's), and the Maternal, Infant, and Early Childhood Home Visiting Program (MIECHV). Each of these federal programs was slated for reauthorization by September 30, 2017, but no reauthorization bills were passed and sent to the President for signing into law. Congressional leaders have indicated that they want to reauthorize these programs, but overall Congress has found it difficult to move legislation while focused on health care repeal and appropriations legislation. Advocates for children are pressuring Congress to get these critical programs reauthorized soon, but if this is not accomplished in the next couple months, millions of children and their families will lose important funding for health care and social services. NICWA encourages tribal leadership and other advocates for Native children to contact their congressional members to urge them to move forward on reauthorizing these critical children's programs.

Budget

Congress Passes Continuing Resolution to Keep Government Operating in FY 2018

With the end of the 2017 fiscal year (September 30), Congress needed to pass appropriations bills or a continuing resolution to keep the government running in fiscal year 2018. As House and Senate leadership struggled with attempts to repeal the Affordable Care Act and find a replacement through the summer it became apparent that appropriations bills would not be finished in time for the new 2018 fiscal year that started on October 1. As they have done previously, Congress passed a continuing resolution bill (H.R. 601) that funds the government through December 8, 2017. President Trump signed the bill into law on September 8, 2017. The continuing resolution that funds the government through December 8, 2017 was contained in a bill that also included suspension of the United States debt ceiling as well as a continuation of emergency firefighting funds for the Departments of Agriculture and Interior, and an initial package of funding to aid hurricane-impacted communities. This allows Congress to have additional time to finish work on separate appropriations bills for FY 2018 or develop another continuing resolution to cover the rest of the 2018 fiscal year. The continuing resolution in H.R. 601 provides funding at fiscal year 2017 levels for federal programs. This is similar to what happened in fiscal year 2017 when a series of continuing resolution bills were passed before a final one was completed in April of 2017.

Between now and December 8, Congress will be working to complete their fiscal year 2018 appropriations bills. So far the House has passed four of their twelve appropriations bills and is expected to group the other eight spending bills together and consider them as a group. The Senate is considering each appropriations bill individually at this point. So far the appropriations bills that have been made public are rejecting the aggressive cuts to Indian programs that were contained in the President's fiscal year 2018 budget, including large proposed cuts to Bureau of Indian Affairs Human Services programs (see NICWA statement on President's FY 2018 budget at www.nicwa.org).

For more information relating to this update, please contact NICWA Government Affairs Director David Simmons at desimmons@nicwa.org.