



NICWA

National Indian Child Welfare Association

Child and Family Policy Update

November 2017

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Hot Topics

State of Texas Joins Foster Parents to Challenge ICWA and 2016 Regulations

On October 25, 2017, the State of Texas and two non-Indian foster parents filed a lawsuit in a Northern Texas Federal District Court challenging the constitutionality of the Indian Child Welfare Act (ICWA) and the 2016 federal regulations (*Texas v. Zinke*). The foster parents contend that ICWA interferes with their right to adopt an Indian child, and the State of Texas alleges that ICWA is unconstitutional and they should not have to enforce it. The lawsuit has broad implications for tribes beyond ICWA including challenges to foundational principles and law regarding the federal-tribal relationship. You can see a copy of an article on the lawsuit in the *Texas Tribune* [here](#).

The state court and state child welfare agency complied with ICWA and were working with the child's tribes to locate a permanent placement when the foster parents petitioned to adopt the child following the termination of parental rights of the birth parents. The state court concluded the foster family did not meet the placement preferences of ICWA and did not prove good cause existed to deviate from the placement preferences. The foster parents then filed an appeal in a state appellate court immediately followed by the filing of a federal lawsuit with the State of Texas before the appeal in the state appellate court was heard.

The federal lawsuit challenges ICWA on constitutional grounds and is the first lawsuit filed by a state challenging ICWA. The defendant in the lawsuit is the federal government. No tribes have been named in the lawsuit, although the Indian child is eligible for membership in both Navajo Nation and Cherokee Nation of Oklahoma and the tribes have an interest in the welfare of this child.

The State of Texas and the foster parents have both shared claims and separate claims. Their shared claims are:

- The Federal Regulations violate the Administrative Procedures Act (APA) because the placement preferences required by ICWA violate the foster parents and other Texas citizens' equal protection rights under the Fifth Amendment of the Constitution.
- The ICWA Federal Regulations violate the APA because they are arbitrary and capricious.
- ICWA and its Federal Regulations violate the Tenth Amendment because the federal government cannot regulate state adoption and foster care placements.
- ICWA and its Federal Regulations violate the anti-commandeering principle by making Texas implement a federal child-custody regulatory regime.
- The ICWA Federal Regulations violate the Constitution by allowing Indian tribes to determine the best placement for Indian children, because that provision delegates essential functions from the federal government to Indian tribes.
- ICWA is unconstitutional because the Indian Commerce Clause does not provide Congress with the authority to pass ICWA.
- ICWA is unconstitutional because it violates the equal footing doctrine and the Full Faith and Credit clause of the Constitution.

- ICWA is unconstitutional because it violates the Guarantee clause of the Constitution, which guarantees states the right to a republican form of self-government.

The foster parents have an additional claim of their own, which is:

- The ICWA Federal Regulations violate their substantive due process rights, which includes a fundamental liberty right—the intimate family relationship—between foster parents and children.

Texas has additional claims of its own, which are:

- ICWA and its Federal Regulations violate the non-delegation doctrine, because they require Texas to follow the placement preferences of tribes instead of state law.
- ICWA and its Federal Regulations violate the spending clause of the Constitution by tying certain federal funds to complying with ICWA.

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) is working with tribes and other allies to defend the Indian child's rights and ICWA in this case. If you are interested in learning more about how you can support the ICWA Defense Project's work on this case or receive additional information, please contact either David Simmons at the National Indian Child Welfare Association (desimmons@nicwa.org) or Matt Newman at the Native American Rights Fund (mnewman@narf.org).

United States Supreme Court Denies Petition to Review ICWA Case

On October 30, 2017, the United States Supreme Court denied a cert. petition to review an Arizona ICWA case. The case, *S.S. v. Stephanie H.*, involved a step-parent adoption of a Native child. The Goldwater Institute filed the cert. petition along with the legal counsel for the two children involved. This marks a series of attempts by Goldwater Institute and their allies to continue their efforts to get an ICWA case to the United States Supreme Court during the last few years since the *Baby Veronica case (Adoptive Couple v. Baby Girl)*.

The ICWA Defense Project (see member organizations above) worked with the respondents (birth parents and tribe). We encourage you to let us know if you have any ICWA cases that are under appeal or getting media attention in your area by contacting either David Simmons at the National Indian Child Welfare Association (desimmons@nicwa.org) or Matt Newman at the Native American Rights Fund (mnewman@narf.org).

Administrative Policy

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. In addition, Congress is also considering larger tax reform legislation that includes this adoption tax credit bill in H.R. 3138 and S. 1935 (Tribal Investment and Tax Reform Act of 2017).

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.

Senators Introduce Child Welfare Legislation to Improve Support for Relative Guardianships

Senators Hatch (R-UT) and Wyden (D-OR) introduced legislation, S. 1964, on October 16, 2017, to improve support to children needing out-of-home placements, particularly relative guardianship placements. The legislation, Child Welfare Oversight and Accountability Act of 2017, has several provisions that would improve supports for children and their caregivers, as well as improve accountability for the systems that serve them. The legislation has provisions that address both states and tribes that operate Title IV-E Foster Care programs. The legislation follows several child welfare bills that were approved by the House of Representatives on June 20, 2017. The Senate bill focuses on different provisions than the House bills do, so there would need to be some work done to reconcile the differences if the Senate approves their bill this year. The provisions in S. 1964 that would apply to tribes that operate the Title IV-E program include the following:

- De-link the Aid to Families of Dependent Children (AFDC) eligibility criteria (income based) for kinship guardianship payments and decrease the number of months a child needs to be in a Title IV-E foster care placement prior to being eligible for a subsidized kinship guardianship placement from six months to three months.
- Apply Title IV-E criminal background check requirements to kinship guardianship placements.
- Development of national caseload and workload standards.

- Expands the list of eligible training recipients that states and tribes can receive reimbursement for.
- Expands data requirements on child fatality issues, required reviews, and national standards definitions.
- Establishment of provider-specific data in AFCARS (assessing performance of private organizations that provide foster care services).
- Private right of action for individuals who feel aggrieved by states or tribes not meeting Title IV-E plan requirements.
- Transparency in information available regarding private contracted child welfare service providers.

For more information on this legislation, please contact NICWA Government Affairs Director, David Simmons 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, tax reform, 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.