



NICWA

National Indian Child Welfare Association

Child and Family Policy Update

February 2018

An electronic copy of this update, with live links, can be found on the National Indian Child Welfare Association's (NICWA) website under Latest News at www.nicwa.org.

Hot Topics

Congress Includes Major New Child Welfare Funding in Continuing Resolutions Bill

On February 6, the House of Representatives passed a continuing resolution (CR) that included several major child welfare provisions, much to the surprise of many child welfare advocates. Following the passage of the House CR, the Senate took up a similar CR that included all of the same child welfare provisions. The House followed by adopting the Senate's bill, and the legislation moved on to the President to be signed into law, which he did early morning on Friday, February 9.

The CR (H.R. 1892), the [Bipartisan Budget Act of 2018](#), contains major new child welfare funding and reauthorizations of existing federal child welfare programs. A large portion of the child welfare provisions were based upon the Family First Prevention Services Act, first introduced in 2016 by Senator Wyden (D-OR) and co-sponsored by Senator Hatch (R-UT). The legislation has several purposes, but of most interest is making prevention services, such as parent training/education, individual and family counseling, and mental health and substance abuse treatment, eligible for partial reimbursement through the Title IV-E Foster Care and Adoption Assistance program. Title IV-E is the federal government's only open-ended entitlement child welfare program and currently provides about \$6 billion in federal match to states and tribes for services related to child placement in out-of-home care. The eligible services could be supported for up to 12 months and would be available to children who are at risk of being placed into foster care or re-entering foster care after being returned to their parents or a relative. Parents and relative caregivers are also eligible for these services.

Tribes who operate the Title IV-E program directly through the federal government are eligible to seek reimbursement for the new services. Tribes that have an agreement with a state to operate the Title IV-E program may also be eligible to seek reimbursement for the new services, depending upon the terms of their agreement and the state's decision on whether they seek to utilize these new services.

An additional component of the new funding is definitions of what services would qualify as eligible beyond the categories mentioned earlier. The new law states that services must be promising practices, supported services, or well-supported services. The law says that these services must meet certain criteria, such as having written materials (manuals, books, other written materials) that specify the components of the service/practice and how to administer them. For tribes, the Secretary of DHHS is given authority to specify the requirements for services applicable to tribes and permit services that are adapted to the culture and context of the tribal community served.

There are several other important child welfare provisions in the law that tribes participate in:

- Reauthorize the Maternal, Infant, and Early Childhood Home Visiting Program through FY 2022. This program, created through the Affordable Care Act, has mandatory funding of \$400 million annually. Three percent of funds (\$12 million) are reserved for tribes, tribal organizations, and urban Indian organizations. These funds are often used to help prevent child abuse and neglect.

- Extend the Children's Health Insurance Program (CHIP) for an additional four years, through FY 2027. The previous CR (PL 115-120) had extended CHIP through FY 2023.
- Reauthorize the Stephanie Tubbs Jones Child Welfare Services Program through FY 2021. Although the statute does not specify a percentage or an amount of funds for tribes, they receive formula funds under this program, which is authorized under Title IV-B, Subpart 1 of the Social Security Act. Tribes currently receive about \$6 million under this program.
- Reauthorize the Promoting Safe and Stable Families Program through FY 2021. This program receives both discretionary and mandatory funds. The act provides for level funding for the mandatory source. Tribes receive a 3% statutory allocation of the mandatory and discretionary funds, which amounts to approximately \$12 million annually.
- Reauthorize the Court Improvement Program through FY 2021. These grants are for courts to improve their handling of child welfare cases. Tribes receive \$1 million annually, which is awarded competitively.

NICWA is developing a separate analysis of the child welfare provisions contained within the new CR and will be posting it to our website and sending it out on social media when it is ready. For more questions, please contact NICWA Government Affairs Director, David Simmons, at desimmons@nicwa.org.

Opponents of ICWA Continue to Mount Challenges to ICWA in Federal Courts

While tribes have been successful so far in defending against several lawsuits challenging the Indian Child Welfare Act (ICWA), opponents of ICWA, such as the Goldwater Institute and the American Academy of Adoption Attorneys, continue to file lawsuits in federal court. At this time six different federal lawsuits have been filed with two being cert. petitions asking the United States Supreme Court to review their complaints. One of the lawsuits was filed by Texas with the original complaint amended to include a total of three states, a first since the passage of ICWA. The three states are Texas, Louisiana, and Indiana. Only one of the lawsuits was filed by a tribe asking for relief from due process and ICWA violations in a district court in South Dakota. All of the lawsuits filed by opponents of ICWA are alleging violations of the United States Constitution, which is different than allegations related to implementation of the ICWA statute. The constitutional claims are varied, but include allegations that ICWA is a race-based law and deprives Native children of constitutional protections while in state child welfare court proceedings. A number of these constitutional claims have very serious implications for tribal sovereign authority and federal precedent with regards to acknowledgement of tribes as governments. All of the lawsuits started as state ICWA cases, so if you know of an ICWA case that is being appealed in your state, please let NICWA know.

Below are the lawsuits that have been filed that challenge ICWA. You can find [descriptions](#) and case materials regarding the cases on the Turtle Talk website under the ICWA Appellate page under Open Case Materials. A summary is available on the same Turtle Talk page as the case materials at the bottom of the page.

- *Renteria v. Tulare County District Court* (US Supreme Court cert. petition)
- *R.K.B. v. E.T.* (In re B.B.) (US Supreme Court cert. petition)
- *A.D. v. Washburn* (Goldwater Litigation) (on appeal to 9th Circuit of Appeals)
- *Americans for Tribal Court Equality v. Piper D.* (Minnesota Federal District Court)
- Texas ICWA challenge (Northern District of Texas Federal District Court)

Tribal Challenge to ICWA and due process failures in South Dakota District Court

- *Oglala Sioux Tribe v. Fleming* (Van Hunnik) (on appeal to 8th Circuit of Appeals)

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 working with tribes and other allies to defend Native children's rights and ICWA in these cases. If you are interested in learning more about how you can get involved or provide other types of support to the ICWA Defense Project, 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). Your help and support are very much appreciated.

Administrative Policy

Trump Administration Seeks Review of Native Children's Child Welfare Data Regulations

The Department of Health and Human Services (DHHS) has announced review of new data elements contained in the Adoption and Foster Care Analysis and Reporting System (AFCARS). These are part of new AFCARS [regulations](#) that were published in 2016 that contained first ever data elements for states to collect information on related to how Native children are doing in state foster care. The announcement is posted on the Office of Information and Regulatory Affairs website where they list regulations under review and proposed new regulations or actions (<https://www.reginfo.gov/public/>). There are two postings identified. One proposes to delay the implementation of the new regulations for two years until 2021 and the other proposes to solicit comments on whether the new regulations are burdensome or should be streamlined.

Included in the new regulations are over 30 new data elements, several of which track how the state is implementing Indian Child Welfare Act (ICWA) requirements and identifying Native children and their parents' and caregivers' tribal affiliation. 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 and is critical since there are 14 states where Native children are disproportionately represented in state foster care systems and current AFCARS data only collects generic data that has little value for improving outcomes for Native children.

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?

If the Trump Administration decides to move forward on the two proposed actions, there will be announcements in the *Federal Register* with a comment period for public comments included. NICWA is working closely with tribal leadership from across the country to address concerns and will be notifying tribes if DHHS decides to publish these proposed rules. Tribes are encouraged to speak with their state child welfare leaders and governors to solicit support for the 2016 regulations and state efforts to collect the data.

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 with broad bipartisan 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.

Budget

Congress Passes Continuing Resolution to Keep Government Operating in FY 2018

As with the last several years, Congress has not been able to pass the 12 appropriations bills that fund the government and instead have been relying on short-term continuing resolutions (CR) to keep the government running. The current resolution expired on February 8 with another short-term CR passed by the Senate and House that funds the government until March 23, 2018. The new CR entitled the [Bipartisan Budget Act of 2018](#) (H.R. 1892) also provides new child welfare funds and reauthorizes key child welfare programs (see article under Hot Topics). The new CR also suspends earlier budget caps for both defense and non-defense programs to make room for the over \$400 billion of new spending.

For tribes (and states) continuing business as usual is much more difficult when Congress uses the CR process. Uncertainty related to funding levels continues with each short term CR as governments that rely on federal funding try to figure out how much will be available and whether that might change in the next CR. Critical governmental services, such as child welfare, may experience disruptions as federal agencies experience uncertainty too and as a result release grant funds later than usual or in increments. The current continuing resolution provides funding at fiscal year 2017 levels for the vast majority of federal programs. A danger in using CRs, especially over a number of years, is while federal funding does not shrink in funding levels, it is a reduction in real dollar terms as costs go up to operate government services.

Between now and March 23, Congress will be working to complete their negotiations on immigration reform and trying to finalize FY 2018 appropriations. With the lateness in getting 2018 appropriations settled there are tensions created as fiscal year 2019 appropriations would normally be in process now. The lateness in dealing with FY 2018 appropriations makes it even more likely that FY 2019 appropriations will also need to happen through a series of short-term CRs. 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.