



# NICWA

National Indian Child Welfare Association

## Child and Family Policy Update

May 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](http://www.nicwa.org).

### Hot Topics

#### **Trump Administration Seeks Review of Native Children's Data Regulations**

The Department of Health and Human Services (DHHS) has announced a proposal to streamline the 2016 Adoption and Foster Care Analysis Reporting System (AFCARS) regulations that include Native children's data elements and a two-year delay in requiring states to submit data. The 2016 AFCARS regulations contained the first ever mandatory data elements for states related to how Native children are doing in state foster care and adoption. The data elements track a number of Indian Child Welfare Act (ICWA) requirements. The [announcement seeking comments on streamlining the AFCARS data elements](#), including the Native children's data elements, was posted in the *Federal Register* on March 15, 2018, on page 11449. Native children's advocates have expressed concern that this is an attempt by the administration not to just streamline a few of the Native children's data elements, but to eliminate the majority of them.

The [2016 AFCARS regulations](#) contain over 30 new data elements regarding Native children, 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. These are the first ever data requirements for states that track how Native children are doing in state foster care systems and they are critical to better understanding how to address issues like disproportionality of Native children in state foster care systems, efforts to provide preventive services to Native families (active efforts), and more efficient and effective targeting of resources to improve outcomes. Some of the data elements in the 2016 AFCARS regulations include:

- 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 notice regarding streamlining AFCARS data elements contains five questions for commenters to respond to. Questions 2–5 respond to issues related to the need for the Native children's data elements in

the 2016 AFCARS data elements. Comments provided must respond to the questions in the Advanced Notice of Public Rule Making (ANPRM) that you can find [here](#). One of the questions in the ANPRM that seeks comments specifically identifies ICWA data elements and the possibility of streamlining them. ACF does not ask questions about the value of the data elements, but instead seems focused on their burden to states. It will also be very important that states provide supportive comments on the ICWA data elements, so tribes and Indian organizations are encouraged to work with their states to provide supportive comments.

**The comment period for the notice regarding streamlining data elements requires that comments must be received by June 13, 2018.** NICWA is strongly encouraging all tribes to submit comments and work with their state child welfare agencies to provide supportive comments as well. It will be very important that a number of states provide supportive comments. NICWA will be developing resource materials to assist states and tribes develop their comments. If you would like these materials, please contact NICWA Government Affairs Director David Simmons at [desimmons@nicwa.org](mailto:desimmons@nicwa.org).

### **Congress Includes Major New Child Welfare Funding in Continuing Resolutions Bill**

On February 6, 2018, the House of Representatives passed a continuing resolution (CR), the Bipartisan Budget Act of 2018 (P.L. 115-123), 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 in the early morning on Friday, February 9.

Under Division E, Title VII of the [Bipartisan Budget Act of 2018](#), there are major new child welfare funding provisions 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 the 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.

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](mailto:desimmons@nicwa.org).

### **Administrative Policy**

See Hot Topics for AFCARS data regulations discussion above.

### **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 with 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; in the House of Representatives, it 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](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/foster-care-adoption](http://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](mailto:desimmons@nicwa.org).

### Budget

#### Congress Passes Omnibus Appropriations Bill for FY 2018

On March 23, President Trump signed into law the Consolidate Appropriations Act, 2018 (H.R. 1625). The enactment of this omnibus appropriations bill for fiscal year 2018 follows the passage of four previous short-term continuing resolutions (CRs) that were used as stopgap measures to keep the federal government operating while Congress worked on a final appropriations bill. The new omnibus appropriations bill includes increases in several human service programs that tribal governments rely on, such as Bureau of Indian Affairs (BIA) programs.

Below is a chart that details select human service programs that tribal governments often access.

Program	FY 2017 Enacted	President's FY 2018 Request	FY 2018 Enacted
BIA Social Services	\$52.3 million	\$35 million	\$52.8 million
BIA Welfare Assistance (includes Child Assistance funding)	\$74.8 million	\$70.8 million	\$76 million
Indian Child Welfare Act Grants	\$18.9 million	\$14.9 million	\$19.1 million
Resources to Fight Opioid Epidemic (tribal only funds)	\$0	\$0	\$50 million (funded under State Targeted Response to Opioids grants)

With FY 2018 appropriations completed, Congress can now focus on FY 2019 appropriations. Fiscal year 2018 funding will run out on September 30, 2018, so Congress will either need to pass appropriations bills by that date or use a short-term CR to keep the government operating. Because it is an election year and half of the legislative year is finished, it is likely that we will see Congress pass a short-term CR sometime in September.

President Trump's FY 2019 budget proposal that was sent to Congress recently proposes slashing funding for tribal social services under the Bureau of Indian Affairs similar to what he proposed for FY 2018. Fortunately, Congress did not follow the administration's FY 2018 requests and instead increased funding for BIA social services and ICWA funding. Native children's advocates are encouraged to contact their Senate and House delegation members and express their requests for funding of these critical programs. You can find a copy of NICWA's FY 2019 appropriations testimony for BIA programs [here](#) and Department of Health and Human Services programs [here](#).

## Judicial

### **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 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 four different federal lawsuits have been filed. 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.

In the *Texas v. Zinke* lawsuit, the judge has accelerated the briefing schedule and amicus briefs supporting ICWA are being developed right now. If your tribe would like to sign on to the National Congress of American Indians, Association on American Indian Affairs, and NICWA brief, please contact Dan Lewerenz at the Native American Rights Fund at (202) 785-4166 or [lewerenz@narf.org](mailto:lewerenz@narf.org). **The deadline for signing on to the amicus brief for tribes is May 23, 2018.** A draft copy of the brief will be available for review on May 18 by request.

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.

- *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](mailto:desimmons@nicwa.org)) or Erin Dougherty at the Native American Rights Fund ([dougherty@narf.org](mailto:dougherty@narf.org)). Your help and support are very much appreciated

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