



NICWA

National Indian Child Welfare Association

Child and Family Policy Update

September 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

Implementation of Family First Prevention Services Act Moves Forward

After being signed into law on February 9, 2018, the Administration for Children and Families (ACF) is moving quickly to begin implementation of the Family First Prevention Services Act (FFPSA). FFPSA is contained within the larger [Bipartisan Budget Act of 2018](#) (under Division E, Title VII) that was enacted into law in February of 2018. The FFPSA contains prevention services funding for states and tribes that operate the Title IV-E Foster Care and Adoption Assistance program, and also has implications for American Indian and Alaska Native (AI/AN) children who are in state care and are eligible for the protections of the Indian Child Welfare Act (ICWA). Consultation with tribal governments is being held by ACF in August and September of this year.

The FFPSA's funding is available to support prevention services such as parent training/education, individual and family counseling, and mental health and substance abuse treatment. The prevention services can be supported up to 12 months and are available to children who are candidates for foster care or a foster child who is pregnant or parenting foster children. A candidate for foster care includes children who are at risk of being removed from their homes (parent or relative caregiver home) and placed in foster care. It also includes children who have been returned home after being in foster care and are at risk of re-entering foster care. Parents and relative caregivers are also eligible to receive these prevention services.

Tribes that operate the Title IV-E program directly through the federal government are eligible to seek reimbursement for the new prevention services. The services will be reimbursed at 50% until fiscal year 2026, when they will be reimbursed at the tribe's Federal Medical Assistance Percentage or FMAP, which is typically 83%. This level of reimbursement is much higher than other Title IV-E program components (administrative and training 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 choose to offer the prevention services in their state (optional).

An additional requirement of the new funding is prevention services must be evidence based and trauma informed. There are three different categories of evidence-based prevention services (promising practice, supported practice, or well-supported practice). Within each category, there are additional criteria. The criteria that apply to all evidence-based prevention services include:

- Services or programs must have written material (manuals, books, other written materials) that specify the components of the service/practice and how to administer them.
- No empirical basis suggesting that the practice, compared to its benefits, constitutes a risk of harm.
- When multiple studies have been conducted on a service or program, the overall weight of evidence supports the benefits of the practice.
- Outcome measures are reliable and valid.

- No case data suggesting a risk of harm probably caused by the service or program and that was severe or frequent.

Trauma-informed services or programs must be provided under an organizational structure and treatment framework that involves understanding, recognizing, and responding to the effects of all types of trauma and in accordance with recognized principles of trauma-informed approaches.

Specifically, for tribes, the secretary for the Department of Health and Human Services (DHHS) is given authority to specify the requirements for evidence-based prevention services and programs applicable to tribes. The secretary must develop tribal requirements that are consistent with those applicable to states as much as is practicable, but also permit services that are adapted to the culture and context of the tribal community served. Another similar provision allows the secretary the same flexibility in the development of performance measures for application with tribal services and programs.

How the DHHS secretary defines these requirements for tribes will be critical to the ability of AI/AN children and families to benefit from these prevention services and participate in the Title IV-E program in the future. ACF conducted phone consultation on the law with tribes in August and in person on September 13 at the ACF Tribal Consultation.

NICWA is developing a separate analysis of the child welfare provisions contained within the new law and will be posting it to our website and sending it out on social media when it is ready. **In the meantime, please refer to the Child Welfare League of America’s detailed summary that you can find [here](#).** For more questions, please contact NICWA Government Affairs Director David Simmons at desimmons@nicwa.org.

Administrative Policy

NICWA Submits Comments on Evidence-Based Criteria for Prevention Services

The Administration for Children and Families published a solicitation for comments regarding the specific criteria they will use to review and accept evidence-based services and programs eligible for reimbursement under the Family First Prevention Services Act (Bipartisan Budget Act of 2018, Division E, Title VII). The solicitation appeared in the [Federal Register on June 22](#) with comments due by July 22, 2018. NICWA teamed up with First Kids 1st and the Indian Country Child Trauma Center to develop comments that provide information and recommendations for developing culturally appropriate criteria for AI/AN children and families (see NICWA’s website). **You can see a copy of our comments [here](#).** Several other commenters also mentioned how critical it is to develop criteria that promote cultural services for different populations and don’t force mainstream services or programs on populations where they have not been studied or may even promote harm. NICWA’s comments also provided a list of current prevention-related services and programs that have been researched with AI/AN populations. Under the Family First Prevention Services Act, ACF will be required to publish a list of eligible evidence-based programs that tribes and states can use and seek reimbursement for with eligible children, parents, and relative caregivers (see a description of the new law above).

ACF Publishes National Foster Care Standards and Asks for Comments

On August 1, 2018, the Administration for Children and Families published a proposed set of national foster care standards for comment by states and tribes. **Comments are due October 1, 2018.** ACF is required to identify a national set of foster care standards as authorized under the Family First Prevention Services Act (Bipartisan Budget Act of 2018 under Division E, Title VII). The national standards are for licensing of both relative and non-relative foster families. The new law requires ACF to “identify reputable model licensing standards with respect to the licensing of foster family homes (as defined in section 472(c)(1) of the Social Security Act).” After the standards have been fully established, tribes and states that operate the Title IV-E Foster Care and Adoption Assistance program will be required to do the following:

- Provide information on whether the state or tribe’s foster care standards are consistent with the national standards and if not, provide reasons why they are not
- Provide information on whether the state or tribe waives non-safety licensing standards for relative foster family homes, and if so, how caseworkers are trained to use the waiver authority and whether the agency has developed a process or provided tools to assist caseworkers in waiving these non-safety standards to quickly place children with relatives.

There is no penalty for states or tribes that use different foster care standards than the national ones, but NICWA has raised concerns about how these will be used in future technical assistance and training with tribes by ACF. In addition, the national standards have not adequately taken into consideration unique cultural issues for AI/AN children and families and issues related to tribal authority to establish foster care standards.

NICWA strongly encourages tribes to review these national standards and file comments. You can find the proposed national foster care standards and information on how to file comments [here](#). NICWA will also be filing comments and will provide a sample copy of our comments in September.

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. 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 Passing a Few Appropriations Bills and Doing a Continuing Resolution For The Rest

With FY 2018 funds expiring on September 30, 2018, Congress is busy at work trying to pass as many FY 2019 appropriations bills as possible before October 1 and pass a continuing resolution (CR) for any appropriations bills that are not passed before October 1. Previously, there were threats of a government shutdown by the President if appropriations didn't contain funding levels and policy that he was interested in, but he has since backed off that threat. The Department of Health and Human Services (HHS-Labor appropriations bill) seems to be on a track for passage before October 1. This appropriations bill contains funding for health care/Indian Health Services, substance abuse, mental health, child welfare, and other social services that states and tribes utilize. Funding levels in the HHS-Labor appropriations bill are very similar to FY 2017 levels. In the CR, the Department of Interior funding for tribal social services programs is also expected to be similar to FY 2017 levels. This is a victory for tribal advocates in that Congress rejected the draconian budget cuts in many BIA programs proposed by the President in his FY 2019 budget.

You can find a copy of NICWA's FY 2019 appropriations testimony for BIA programs [here](#), Department of Health and Human Services programs [here](#), and a comparison chart by Child Welfare League of America on the FY 2019 HHS-Labor appropriations bill [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 challenging ICWA have been filed and a

fifth lawsuit was filed in an attempt to uphold ICWA's requirements. One of the lawsuits was filed by the State of Texas with the original complaint amended to include two more states (Louisiana and Indiana), which is the first time since the passage of ICWA that a state has sued the federal government challenging ICWA. Only one of the lawsuits was filed by a tribe asking for relief from due process and ICWA violations. All of the lawsuits filed by opponents of ICWA are alleging violations of the United States Constitution. 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 beyond ICWA and federal acknowledgment of tribes as governments.

On July 24, 2018, in the *Texas v. Zinke* lawsuit, the judge flatly denied the federal government's and tribal intervenor's motions to dismiss the case and has more recently heard oral arguments on the plaintiff's (states and other private parties) motion for summary judgment. A motion for summary judgment is a request for the court to find that the other parties (federal government and tribes) have no case and are unlikely to succeed in their efforts to defend the law. In this case, the plaintiffs are asking the court to declare ICWA unconstitutional and its regulations unlawful, and prohibit the federal government from enforcing ICWA and its regulations.

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.

- *Texas v. Zinke*—Northern District of Texas Federal District Court
- *A.D. v. Washburn* (Goldwater Litigation)—on appeal to Ninth Circuit Court of Appeals
- *Watso v. Piper*—on appeal to Eighth Circuit Court of Appeals
- *Americans for Tribal Court Equality v. Piper D.*—Minnesota Federal District Court (stayed pending appeal in *Watso v. Piper*)

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

- *Oglala Sioux Tribe v. Fleming* (Van Hunnik)—on appeal to Eighth Circuit Court 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 Erin Dougherty at the Native American Rights Fund (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.