



NICWA

National Indian Child Welfare Association

Child and Family Policy Update

October 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

Federal District Court in Texas Rules ICWA and Regulations Unconstitutional

On October 4, 2018, Judge Reed O'Connor in the Northern District of Texas Federal Court issued his decision in *Brackeen (Texas) v. Zinke*, a lawsuit challenging the constitutionality of the Indian Child Welfare Act (ICWA) and the 2016 ICWA regulations. In the court's decision on the plaintiff's motion for summary judgement, the court granted all but one of the plaintiff's claims finding the ICWA statute and 2016 regulations unconstitutional. To reach this decision, the court had to ignore decades of federal court precedent that affirmed inherent tribal sovereignty and the government-to-government relationship between tribal nations and the United States as enshrined in the U.S. Constitution, countless federal laws, and treaties between tribal nations and the U.S. government. You can find a more detailed summary of the law NICWA's website under [News from NICWA](#) on the homepage and a copy of the decision [here](#).

The lawsuit was filed on October 25, 2017, by the State of Texas and a non-Indian foster family in Texas who had an American Indian child placed with them. The foster family is represented by an attorney that also represented clients challenging ICWA in *Adoptive Couple v. Baby Girl* (2013) and *Natl. Council for Adoption v. Jewell* (2017). The foster family, the Brackeens, had petitioned a Texas district court to find good cause under ICWA to deviate from the placement preferences and adopt the child, but their petition was denied. Soon after, the attorney general of Texas filed a federal lawsuit alleging ICWA was unconstitutional on several grounds and the 2016 ICWA regulations were unlawful. On December 15, 2017, the complaint was amended to include the States of Louisiana and Indiana as plaintiffs and two foster families in different states (Nevada and Minnesota). The Department of Health and Human Services was also added as a defendant for the federal government with the Department of Interior. Besides the federal government, tribal intervenors named as defendants include the Morongo Band of Mission Indians, Quinault Indian Nation, Cherokee Nation, and Oneida Nation of Wisconsin.

The decision relied heavily on viewing ICWA as a race-based law that violates the Equal Protection Clause of the United States Constitution and exceeds Congress's authority under the Indian Commerce Clause. This is in stark contrast to previous decisions by the United States Supreme Court that have upheld the federal governmental interest in legislating Indian affairs. This includes two United States Supreme Court decisions regarding ICWA cases that did not find ICWA unconstitutional.

Tribal defendants have requested a stay in the decision pending appeal to the United States Fifth Circuit Court of Appeals (suspending implementation of the decision). There will likely be a number of different procedural issues coming before the federal district court that will need to be addressed in the near future so as more is known, NICWA with our ICWA Defense partners will provide that information.

The immediate impact of the decision is uncertain pending motions to stay and appeal, but certainly it will have a chilling effect on ICWA compliance in those states that were plaintiffs and possibly in other states that are closely watching this case. NICWA is also concerned how this will impact tribal-state relations and ongoing efforts to implement ICWA's 2016 regulations. With increasing cooperation between states and

tribes to implement ICWA, there are very serious questions about how this will impact the progress being made and the potential to return to widespread increases in the number of vulnerable Native children being removed from their homes and communities.

NICWA and our ICWA Defense partners, the National Congress of American Indians, Native American Rights Fund, Association on American Indian Affairs, and Michigan State University ICWA Appellate Project, are engaged with our federal and tribal partners in this litigation. NICWA is leading work with our ICWA Defense Partners on communications with the media and policy related strategies with Congress, state, and private agency partners. If you have questions about the lawsuit or how you can help, please direct them to NICWA Government Affairs and Advocacy Director David Simmons at desimmons@nicwa.org.

Implementation of Family First Prevention Services Act Moves Forward

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 ICWA.

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. Candidates 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. Also included are 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 can be as high as 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. Few tribes participated; many were concerned that not enough time was given prior to consultation sessions and limited education on the new law by ACF.

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](#).

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 NICWA's 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.

NICWA Submits Comments on National Foster Care Standards

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 with comments due October 1, 2018. NICWA filed comments that you can see [here](#). 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.

Budget

Congress Passes DHHS Funding Bill for FY 2019 and Continuing Resolution for Interior

With fiscal year 2018 funds expiring on September 30, 2018, Congress moved to pass a mix of separate appropriations bills and a continuing resolution for federal agencies that were not covered under the separate appropriations bills. The Departments of Health and Human Services, Education, Labor, and Defense all had separate appropriations bills that were passed and signed by the president that continue funding through September 30, 2019. All other agencies, such as Bureau of Indian Affairs under the Department of Interior, are under a continuing resolution until December 7, 2018. Congress will need to take up the remaining agency funding bills after the election before the December 7 deadline or pass another continuing resolution bill. Continuing resolutions set agency funding at last year's levels in fiscal year 2018.

Some highlights of the appropriations bills include additional funds for the Adoption-Kinship Incentive Funds which support states when they increase their adoption and guardianship placements over previous years. Some tribes that have Title IV-E programs directly or through agreements with states may be eligible too. Childcare funding also increased significantly, which impacts both states and tribes. Two other notable items are the extensions of the authorization for the Violence Against Women Act and Temporary Assistance to Needy Families. Both were set to expire on October 1, 2018.

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 since 2015, opponents of ICWA continue to file lawsuits in federal court. At this time, three different federal lawsuits challenging ICWA have been filed. 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 (*Brackeen [Texas] v. Zinke*; see description under Hot Topics). One additional lawsuit was filed by a tribe asking for relief from due process and ICWA violations (*Oglala Sioux Tribe v. Flemming [Van Hunnik]*). 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 and non-Native foster parents of constitutional protections while in state child welfare court proceedings. In the *Brackeen (Texas) v. Zinke* case, constitutional claims were also made that ICWA interferes with state authority to regulate child welfare matters. A number of these constitutional claims have very serious implications for tribal sovereign authority beyond ICWA and federal acknowledgment of tribes as governments.

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:

- *Brackeen (Texas) v. Zinke*—Northern District of Texas Federal District Court
- *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, 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).

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