



NICWA

National Indian Child Welfare Association

Child and Family Policy Update

March 2019

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

Fifth Circuit Court of Appeals Hears Oral Arguments in ICWA Case

On March 13, 2019, the United States Court of Appeals in the Fifth Circuit heard oral arguments from plaintiffs and defendants in the *Brackeen v. Bernhardt* case. Several representatives from tribal nations and Native organizations were in attendance, including the National Indian Child Welfare Association's executive director, Sarah Kastelic; board member Robert McGhee; and former board member Derek Valdo. You can find a recording of the oral argument [here](#) (*Enter docket number 18-11479 in Search*). Under appeal in the Fifth Circuit by the defendants in this case (federal government and tribal intervenors) is a decision by Judge Reed O'Connor in the United States Federal District in Northern Texas that found ICWA unconstitutional. You can find a copy of the federal district court decision [here](#). To reach this decision, the federal district 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. A decision from the Fifth Circuit is expected within the next six months. Should either side wish to appeal the ruling, the most likely next step is a petition for cert to the U.S. Supreme Court.

Despite the lack of significant experience with federal Indian law and tribal issues, the judges appeared to be open minded and asked several good questions, predominantly centered on anti-commandeering claims and Congress's authority to pass laws that direct state action as a valid form of preemption. One of the claims by the plaintiffs is that ICWA unlawfully commandeers state resources to assist the federal government in enforcing ICWA's requirements. Additionally, the legal parties addressed issues of whether certain parties have standing in the case, application of equal protection with ICWA (whether ICWA is a race-based law), Congress's plenary power and the delegation of federal authority, the Administrative Procedures Act and the clear and convincing evidence standard applied in certain ICWA regulations provisions, and the spending clause. Overall, the judges seemed to be receptive to the defendants' arguments.

The lawsuit was originally 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 that 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 additional private individuals (birth parent, adoptive, and pre-adoptive parents) 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 Navajo Nation was later granted permission to join the lawsuit as a defendant by the Fifth Circuit Court of Appeals.

NICWA and our ICWA Defense partners, the National Congress of American Indians, Native American Rights Fund, and the Association on American Indian Affairs, are engaged with our federal, state, 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.

GAO Conducting Listening Session at NICWA Annual Conference Regarding Juvenile Justice Issues

The U.S. Government Accountability Office (GAO) is conducting a listening session on April 2 to hear from tribal nations, Indian organizations, and Native people regarding federal programs that fund activities related to juvenile delinquency for Native youth. The session will be conducted during the 2019 Annual Protecting Our Children National American Indian Conference on Child Abuse and Neglect in Albuquerque, New Mexico. The listening session will be the second held in Indian Country since GAO began their study in 2018. The first listening session occurred at the National Indian Nations Conference: Justice for Victims of Crime in December 2018. In the first phase of the study, GAO released a report in September 2018 that identified data related to Native youth who are at risk or have been involved in a juvenile delinquency system and identified 122 federal grant programs that could assist in addressing these issues for Native youth. In this second phase, GAO is focusing on collecting information from Indian Country directly that highlight the challenges and successes that have been part of the experience in addressing juvenile delinquency with Native youth. If you cannot attend the listening session, you may still be able to provide input into the study. To inquire about opportunities for providing input, please contact GAO staff members David Blanding at BlandingD@GAO.gov or Gretta Goodwin at GoodwinG@gao.gov.

Administrative Policy

Administration for Children and Families Releases Guidance on Family First Prevention Services Act

The Administration for Children and Families (ACF) published a substantial portion of expected federal guidance on the Family First Prevention Services Act (FFPSA) on November 30, 2019 (ACYF-CB-PI-18-10). The guidance instructs tribes on how to implement many sections of the new law, including what qualifies as eligible prevention services for children and families being served in the child welfare system. The FFPSA statute requires ACF to specify specific tribal requirements and criteria related to the provision of prevention services contained within the law and allowing the use of cultural services unique to the tribal community being served. Overall, the new guidance provides tribes with significant flexibility regarding the use of cultural services to help prevent removal of children either prior to or after reunification with their family, as well as services to help the child's parents rehabilitate in these situations. You can find a copy of the federal guidance for tribes [here](#).

Some highlights of the new FFPSA guidance for tribes are the following:

- Tribes can claim for prevention services within the eligible categories of services that they deem culturally appropriate and meet the unique needs and context of the community instead of only being able to use evidence-based services described in the law.
- In meeting the requirement that prevention services must be trauma informed, tribes may define what a trauma-informed service is in a way that reflects the components of historical trauma unique to their communities.
- Tribes can define the practice criteria used to define different prevention services (e.g., values base, longevity of practice, community approval, traditional basis, evaluation) rather than having to adhere to those identified in the law. Tribes are not required to meet the requirement for amounts of expenditures in different practice categories.
- Tribes may use alternative evaluation strategies to evaluate their prevention services such as exploratory, community-based participatory research, and qualitative designs.
- Tribes are not required to meet maintenance of effort requirements (i.e., requirements to continue expending the same or higher levels of tribal funding in prevention services in addition to amount of FFPSA funds received).

FFPSA is contained within the larger [Bipartisan Budget Act of 2018](#) (under Division E, Title VII) that was enacted into law in February 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, especially for AI/AN children subject ICWA's requirement for active efforts to prevent removal and rehabilitate families.

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. Prevention services can be supported for up to 24 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 include 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).

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

Fiscal Year 2019 Appropriations Finally Signed into Law—On to Fiscal Year 2020

On February 15, 2019, President Trump signed into law the Consolidated Appropriations Act of 2019 (H.J. Res. 31). This followed a record 35-day government shutdown prior to Congress and the president agreeing on an omnibus appropriations bill for fiscal year 2019. The appropriations bill completes the 2019 appropriations process by authorizing funding for operations and programs in several different federal departments, including subagencies like the Bureau of Indian Affairs and Indian Health Services. The bill included small increases over fiscal year 2018 funding levels for BIA Human Services programs like Social Services, Indian Child Welfare Act On-Reservation grants, and the Tiwahe Initiative. Other BIA Human Services programs, such as Welfare Assistance and Housing Improvement, received the same level of funding as they did in fiscal year 2018.

Following on the heels of the completion of the fiscal year 2019 appropriations process is the fiscal year 2020 process. The president usually kicks off the process in January or February by releasing his budget recommendations to Congress followed by appropriations committees holding hearings to gather testimony from the administration and the public. This year the president's budget was released late on March 11 and contains cuts to all BIA Human Services programs with the exception of the Tiwahe Initiative (Human Services Tribal Design line item), which received a modest increase. BIA Human Services programs proposed for the largest cuts include ICWA On-Reservation grant program (30%) and BIA Housing Improvement program (funding proposed for elimination). The president has proposed large reductions in funding for the last two years while in office, but fortunately Congress has not followed these proposals and instead has either kept BIA Human Services funding at the current levels or provided a small increase. You can find a description of the president's budget proposal for BIA programs in fiscal year 2020 [here](#).

The National Indian Child Welfare Association has provided testimony in person to the House of Representatives Interior Appropriations Subcommittee on BIA Human Services programs since the early 1990s, and on March 7, 2019, NICWA board member Aurene Martin provided NICWA's testimony for fiscal year 2020. NICWA's testimony focused on BIA Human Services programs such as ICWA grants for on- and off-reservation programs and BIA Social Services programming. In addition, NICWA also highlighted the need to provide funding for the prevention and treatment grant programs under the Indian Child Protection and Family Violence Prevention Act (P.L. 101-630). Since this law was enacted in 1991, no funding has been appropriated for the child abuse and domestic violence prevention and treatment grant programs. The law authorizes up to \$43 million of funding for these programs. You can find a copy of NICWA's testimony on our home page under News From NICWA [here](#).

Judicial

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

While tribal nations and the federal government 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, four different federal lawsuits challenging ICWA have been filed and are pending. Most recent is a lawsuit filed in a federal district court in Western Arkansas on March 1, 2019. The lawsuit was filed on behalf of a birth mother, step-parent, and the birth mother's child asking the federal court to rule that ICWA is not applicable in the Arkansas state child custody proceeding, or if ICWA is applicable, rule that it is unconstitutional. Another recent action is the filing of a cert. petition to the United State Supreme Court in the *Oglala Sioux Tribe v. Flemming [Van Hunnik]* case. In this case the Eighth Circuit Court of Appeals overturned a lower federal court decision that ordered South Dakota to change policies that deprived Native parents of due process in state child custody proceedings and alleged ICWA violations. The Eighth Circuit said the appeal should have been heard in state court rather than federal court.

All of the lawsuits filed by ICWA opponents claim that ICWA violates 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 custody proceedings. 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
- *Fisher v. Cook, Sweeney*—Western District of Arkansas 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)*—Cert. Petition to the United States Supreme Court

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