



NICWA

National Indian Child Welfare Association

Child and Family Policy Update

December 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

ICWA Supporters File Briefs in Rehearing of Fifth Circuit Court of Appeals Decision

The federal government, five intervenor tribes (Quinault Indian Nation, Morongo Band of Mission Indians, Cherokee Nation, Navajo Nation, and Oneida Nation), and a host of supportive amici parties filed their briefs in December supporting the constitutionality of the Indian Child Welfare Act (ICWA). Most of the supporting amicus briefs had also been filed earlier in the first hearing before the Fifth Circuit, but the number of signatories increased significantly in several of the briefs and some briefs included revisions or additional language. You can find a copy of the federal government, intervenor tribes and amicus briefs on Turtle Talk at <https://turtletalk.blog/icwa/texas-v-zinke-documents-and-additional-materials/texas-v-zinke-fifth-circuit-document/> and later the briefs of the plaintiffs and their amici parties (between January 7-14, 2020). The parties filing amicus briefs in support of ICWA included the following:

- 486 federally-recognized tribes and 59 tribal organizations
- 26 States and District of Columbia
- 77 Members of Congress (bipartisan)
- Native American Women, American Civil Liberties Union, and others
- Quapaw Nation
- Casey Family Programs and 30 Child Welfare organizations
- Indian Law Professors
- Administrative Law and Constitutional Law Professors
- Professor Greg Ablavsky – Stanford School of Law (Constitutional Originalist)

The decision by the Fifth Circuit to rehear the earlier three judge panel decision supporting ICWA's constitutionality came about as a result of the plaintiffs petitioning the Fifth Circuit to rehear the case en banc. A rehearing en banc asks the court to rehear the case before all of the judges that sit on the Fifth Circuit (approximately 15-17). The plaintiffs which are seeking to have ICWA declared unconstitutional include three states (Texas, Indiana, and Louisiana) and several private parties, The Fifth Circuit granted the petition at the end of October and have set oral argument for January 22, 2020 in New Orleans, Louisiana at the Fifth Circuit Court of Appeals building. The oral argument will occur in the morning of January 22, 2020 and the Fifth Circuit posts a recording on their website after 5:00 p.m. on the day of the oral argument. You can find a copy of this recording at <http://www.ca5.uscourts.gov/oral-argument-information/oral-argument-recordings>.

NICWA and our ICWA Defense partners, the National Congress of American Indians, Native American Rights Fund, and the Association on American Indian Affairs, want to thank all of the amici parties for helping the litigation team present a strong showing of support for ICWA. NICWA in our role of leading media communications will continue to monitor and facilitate pro-active engagement with the media and coordination with our federal, state, and tribal partners in this litigation. NICWA is also supporting policy-

related strategies to support the litigation 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.

House Committee Passes Bill Reauthorizing Tribal Grant Programs Addressing Child Abuse and Neglect and Family Violence Prevention

On December 5th, 2019 the House of Representatives Natural Resources Committee unanimously passed the Native American Child Protection Act (H.R. 4957). The legislation reauthorizes two different grant programs for tribes and funding for a national resource center focused on child maltreatment and family violence. The House passed the legislation after they held a hearing on the bill on November 13, 2019 where Aurene Martin, National Indian Child Welfare Association Board of Directors member, testified to the need in Indian Country for this legislation and increasing the funding authorizations to match the need and current cost of services for tribes. You can find a copy of Ms. Martin's testimony at www.nicwa.org. Ms. Martin provided detailed testimony on the effects of child abuse and neglect on children, benefits of taking a prevention approach to addressing child maltreatment, data collection barriers, and promising practices in Indian Country. Representative Gallego (D-AZ), original co-sponsor of the legislation and Chairman of the House Natural Resources Subcommittee for Indigenous Peoples and Ranking Member Paul Cook (R-CA) introduced the bill in October. Both Representatives recognized the extreme need for the resources contained in the bill and how important they were to protecting children in Indian Country.

The grant programs and resource center were originally authorized in the Indian Child Protection and Family Violence Prevention Act (P.L. 101-630) in 1991, but no funds have ever been appropriated by Congress except for a one year appropriation of a few million dollars for the resource center. Furthermore, at the end of 2010 the authorizations for the grant programs and resource center expired making it more difficult to get Congress to appropriate funding for these grant programs and the resource center. The grant programs are the only tribal-specific funding sources to address child abuse and neglect prevention that tribes do not have to compete with states or other entities for and they also provide funding for treatment of child victims. The next step is for the full House of Representatives to vote on and approve the bill before it can go to the Senate for consideration, most likely before the Senate Committee on Indian Affairs. To obtain a copy of the legislation please go to <https://www.congress.gov/bill/116th-congress/house-bill/4957>.

Houses Passes Child Abuse Prevention and Treatment Act Bill with Increased Tribal Funding

On May 20, 2019 the House of Representatives passed the Stronger Child Abuse Prevention and Treatment Act (H.R. 2480). The legislation reauthorizes the Child Abuse Prevention and Treatment Act (P.L. 93-247) and addresses some of the challenges tribes have had accessing grant programs under this law and the lack of data available on how tribes are addressing child abuse and neglect successfully in their communities. The Child Abuse Prevention and Treatment Act is the federal government's primary source of targeted funding for child abuse and neglect prevention, which includes funding to support child abuse and neglect prevention programs, services, research, and demonstration projects. In the legislation the tribal set-aside for supporting community-based grants to address child abuse and neglect prevention has been increased from one percent to five percent. The set-aside has only funded a couple tribal grant programs each three-year grant cycle historically under the one percent set-aside. The other opportunity for tribes is a study conducted by the General Accountability Office in coordination with tribes that will examine some of the challenges that tribes have to obtaining funding for child abuse and neglect prevention services, promising practices that tribes are using, and barriers to improved data collection.

On December 12, 2019, the Senate Health, Education, Labor, and Pensions Committee voted on their version of a Child Abuse Prevention and Treatment Act reauthorization bill (S. 2971) with similar tribal provisions to the House bill. The full Senate is expected to take up their bill soon and after passage a conference will occur between the Senate and House of Representatives to iron out the differences between their bills. You can find a copy of the Senate bill at <https://www.congress.gov/bill/116th-congress/senate-bill/2971/text> and a copy of the House bill at <https://www.congress.gov/bill/116th-congress/house-bill/2480?q=%7B%22search%22%3A%5B%22h.r.+2480%22%5D%7D&s=2&r=1>.

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). Tribes with state agreements will not have the same flexibility in what services they can have reimbursed as tribes operating Title IV-E directly, but NICWA along with some other advocacy groups are looking at opportunities for how tribes in agreements and even tribes that don't operate Title IV-E might be able to benefit from this new law.

Budget

House and Senate Reach Budget Agreement for Fiscal Year 2020

In December the House and Senate budget negotiators reached an agreement to fund the federal government through fiscal year 2020 staving off another short-term continuing resolution to keep the government operating. President Trump gave his approval to the agreement reach allowing the House and Senate to take up the omnibus appropriations bill before Congress goes home for the Christmas Recess. High level issues in the agreement included significant increases in both domestic and defense programs, along with funding to support continued building of the southern border wall, a priority of the President. Details for specific human service programs in the budget agreement were not readily available as of December 17, 2019, but most federal human services programs were thought to be funded at FY 2019 levels or slightly higher. More details will become available as the House and Senate act on the appropriations bills.

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 2013, opponents of ICWA continue to file lawsuits in federal court. At this time, one federal lawsuits challenging ICWA is pending, but 16 have been filed since 2013. 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.

You can find [descriptions](#) and materials regarding the cases on the Turtle Talk website under the ICWA Appellate page under Open Case Materials at <https://turtletalk.blog/icwa/>.

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