



NICWA

National Indian Child Welfare Association

Child and Family Policy Update

March 2020

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Hot Topics

Fifth Circuit Court of Appeals Rehears Earlier Decision in *Brackeen v. Bernhardt*

In October of 2019, the United States Fifth Circuit Court of Appeals granted a petition by the plaintiffs in *Brackeen v. Bernhardt* to rehear the earlier three-judge panel decision in the Fifth Circuit supporting the Indian Child Welfare Act's (ICWA) constitutionality. The plaintiff's petition asked for a rehearing en banc which sought to have the earlier decision reheard by all of the judges that sit on the Fifth Circuit, which in this case was 16 judges. The plaintiffs, who are seeking to have ICWA declared unconstitutional, include three states (Texas, Indiana, and Louisiana) and several private parties. After granting the plaintiff's petition, the Fifth Circuit set oral argument for January 22, 2020, in New Orleans, Louisiana.

At the oral argument, two judges asked a majority of the questions with several others asking only one or two questions each. Four of the sixteen judges did not ask questions during the hearing. Most of the questions focused on whether ICWA violates the United States Constitution by unlawfully commandeering state governments to enforce ICWA and whether ICWA is a race-based law. While state courts are required to honor federal law, state officials and state executive branch agencies are not required to enforce federal law unless funding is attached to their enforcement/implementation activity. The arguments in court examined whether state agencies were significantly burdened by ICWA's requirements and whether states received any federal support (funding) for their part in ICWA. The other central issue centered on whether ICWA's application was based upon an Indian child's race or political status as a citizen of a sovereign tribal nation. The plaintiffs argued that ICWA was based upon a racial classification while the federal government and tribal intervenors argued it was based upon a political status as a citizen of a tribal nation. One additional observation from the hearing was that many of the judges were not familiar with how child welfare typically works. This clouded the debate on how different legal theories in the case applied. Because of the complexity of the case, a decision from the Fifth Circuit is not expected until this summer or possibly into the fall of 2020. You can find an audio recording of the hearing [here](#).

In preparation for the oral argument on January 22, 2020, 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 amicus brief parties filed their written briefs in December of 2019 supporting the constitutionality of 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 [here](#), as well as the briefs of the plaintiffs and their amici parties. 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)

NICWA and our Protect ICWA Campaign Partners, the National Congress of American Indians, the Association on American Indian Affairs, and the Native American Rights Fund want to thank all of the amicus brief parties for helping the litigation team present a strong showing of support for ICWA. NICWA, in our role of leading media and strategic communications will continue to monitor and facilitate proactive 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. You can find descriptions and materials regarding this and other ICWA lawsuits on the Turtle Talk website under the ICWA Appellate page under Open Case Materials at <https://turtletalk.blog/icwa/>.

House and Senate Approve Spending Bill with New Funding for Tribal Child Welfare Services

On December 20, 2019, Congress approved legislation that will provide tribes and tribal organizations operating a Title IV-B, Subpart 1 program (Stephanie Tubbs Jones Child Welfare Services program) with new funding for children in the child welfare system. The new funding was contained in H.R. 1865 (Further Consolidated Appropriations Act of 2020) that funded the federal government and programs for Fiscal Year 2020. The new tribal child welfare funding can be found in Division N, Subtitle F, Section 602 of the law (entitled the Family First Transition Act). The new funding is temporary and will be available in FY 2020 (October 1 – September 30) with the opportunity to continue using the funds in FY 2021. The funding, \$15 million for tribes and tribal organizations, is only available one time unless Congress continues the funding in future legislation.

The Administration for Children and Families (ACF) under the Department of Health and Human Services oversees the Title IV-B, Subpart 1 program and will distribute the funds. Tribes that are currently Title IV-B, Subpart 1 grantees should contact their regional ACF office for more details on how they can receive the funds.

The funding comes as part of Congress's effort to assist tribes and states that are implementing the Family First Prevention Services Act (Family First). With the passage of Family First in 2018, a portion of Title IV-E Foster Care and Adoption Assistance funding became eligible for use for prevention services to help keep families together instead of funding limited for use after children are removed from their families. Family First provides states and tribes that are approved to operate Title IV-E Foster Care program with the opportunity to seek reimbursement for prevention services, such as parent training, individual and family counseling, and mental health and substance abuse treatment.

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 next steps are for the Senate and House conferees to develop consensus legislation that can pass both the House and Senate. The conference process where key members of the Senate and House develop a consensus bill is expected to occur in January and then the consensus bill will go to the full Senate and House for approval. You can find a copy of the Senate bill as introduced [here](#). While overall very similar, the Senate introduced CAPTA bill does have a few differences from the Senate committee approved bill. A copy of the Senate committee approved bill was not available at the time of this update being published. A copy of the House bill can be found [here](#).

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 (Family First) 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 Family First 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 that are operating the Title IV-E Foster Care program directly through the federal government 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. For tribes operating the Title IV-E program through an agreement with a state or for tribes not operating the Title IV-E program, there is currently less flexibility. Opportunities still exist to access the funds. For more information on Family First, please refer to a document that NICWA published with several other leading child welfare organizations in late 2019. The document is entitled, "*Implementing the Family First Prevention Services Act: A Technical Guide for Agencies, Policymakers and Other Stakeholders.*" You can find a copy of the document [here](#).

Some highlights of the new Family First guidance for tribes operating the Title IV-E program directly through the federal government are listed below. You can find a copy of the federal guidance [here](#):

- 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).

Family First 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 AI/AN children subject to ICWA's requirement for active efforts to prevent removal and rehabilitate families. NICWA urges tribes and states to work together to identify culturally based prevention services that have shown to be successful with Native children and families and work to document the evidence of this success so these cultural prevention services may be approved for funding under Family First. If you would like more information about tribal implications for Family First funding and services, please contact NICWA Government Affairs Director, David Simmons at desimmons@nicwa.org.

Budget

House and Senate Reach Budget Agreement for Fiscal Year 2020

On December 20, 2019, 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 (H.R. 1865, the Further Consolidated Appropriations Act of 2020). This omnibus legislation included funding to allow the federal government to continue operating through FY 2020 and set larger budget targets for FY 2021. It also included a number of other provisions (riders) that were not specifically related to FY 2020 appropriations. 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 legislation are still being identified, but most programs received funding at the FY 2019 level. Some notable exceptions in federal human services programs for tribes included the following:

- \$50 million in funding under the Public Health Services Act for tribes and tribal organizations to address the opioid epidemic in Indian Country (Division A, Title I, Substance Abuse Treatment)
- \$174.8 million for tribal Child Care and Developmental Block Grant programs (Division A, Title I, Administration for Children and Family Payments to States for the CCDBG)
- \$15 million for tribes that operate the Title IV-B, Subpart One program to assist them in developing services for children at risk of being placed in out of home care due to child abuse and neglect (Division N, Subtitle F, Section 602, Family First Transition Act)
- \$1 million in grant funding for off-reservation ICWA programs (see joint explanatory statement for language published on page H11289 of the Congressional Record, December 17, 2019). This funding has not been appropriated since 1996 and previously funded over 30 urban ICWA programs.

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