



**NICWA**

National Indian Child Welfare Association

## **Child and Family Policy Update**

**April 2020**

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](http://www.nicwa.org).

### **Hot Topics**

#### **Phase III COVID-19 Legislation Contains Support for Human Services Programs**

On March 27, 2020, the president signed into the law the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). The new law contains almost \$2 trillion of funding to provide support to individuals, governments, and businesses impacted by COVID-19. The legislation also provides approximately \$10 billion of funding for tribal citizens, governments, urban Indian organizations, and tribal businesses impacted by COVID-19 through different programs and funding mechanisms. The biggest source of funding in the legislation for tribal and state governments comes from the Coronavirus Relief Fund at \$150 billion, which has \$8 billion reserved for tribes. The funds under this fund can be used for costs that are necessary to address COVID-19.

The CARES Act is the third bill that Congress has passed since early March to address impacts by from the COVID-19 pandemic. Highlights of the legislation include funding for individual payments to taxpayers, expansion of unemployment benefits, student loan forbearance, food for food banks, loans and grants to small and large businesses, funding for hospitals and health providers, and funding to stabilize state, tribal, and local governments.

The first bill, H.R. 6074 (Phase I), contained \$8.3 billion of emergency funding to address the prevention and treatment of COVID-19 focusing on support for testing, vaccine development, and additional costs for state and local health department staffing and supplies. Tribes were allocated \$40 million under the Phase I bill through the Centers for Disease Control, but the process of getting these funds out to tribes has been slow and overly complex according to many tribal health advocates. The second bill, H.R. 6201 (Phase II), contained \$100 billion of aid for paid sick leave, free coronavirus testing, expanded food assistance, additional unemployment benefits, and requirements that employers provide additional protection for healthcare workers. Tribal funding under the Phase II legislation included \$64 million for the Indian Health Service and a \$10 million set-aside for Older Americans Act grants in Indian Country (for nutrition and other direct services).

In the Phase III legislation tribal funding is much more extensive than in the previous bills. There is funding for economic development, employment, tribal governance, human services, housing, health, education, and nutrition programming. You can find a summary of the tribal provisions [here](#). Tribal human services funding in the legislation includes the following:

- \$453 million in additional Bureau of Indian Affairs (BIA) Operation of Indian Programs funding with \$450 million reserved for direct tribal programs (638 contracted or self-governance). The remaining \$3 million is for BIA operations. The funding includes BIA programs under the Human Services category such as Welfare Assistance (General Assistance, Emergency Assistance, Burial Assistance, Adult Care Assistance, and Child Assistance), Indian Child Welfare Act On-Reservation

Grants, Social Services, Tiwahe Initiative (Human Service Tribal Design), and Housing Improvement Program.<sup>1</sup>

- \$4.5 million for tribal domestic violence shelters through the Family Violence and Prevention Services Act (10 percent tribal set-aside from \$45 million overall).
- \$45 million in additional Title IV-B Subpart One funds. Tribes and states receive these child welfare funds that are very flexible in terms of the child welfare services that can be funded. How much of the funds will be allocated to tribes is unclear. The Title IV-B statute provides for funds to be available for tribal governments but does not contain a specific set-aside. The new funds represent about 16% of the FY 2020 appropriated levels, and tribes received about \$5 million in that year, so the likely the increase for tribes will be small in comparison (\$850,000 estimated).
- \$3.5 billion for the Child Care and Developmental Block Grant. The statute contains a tribal set-aside of at least 2% with discretion for the Department of Health and Human Services to increase the set-aside if funding is increased. Currently, the set-aside is 2.5%; using this figure, tribes would be eligible for approximately \$87.5 million.
- \$750 million for Head Start programs nationally. There are over 155 tribal communities that operate Indian Head Start programs, and while the legislation does not specify how much of the funding will go to these programs, there will likely be funds allocated to existing programs in Indian Country.
- \$250 million for the Community Behavioral Health Clinic Expansion Grant program, which includes \$15 million allocated to tribes, tribal organizations, or health or behavioral health service providers to tribes. This \$250 million allocation includes at least \$50 million for suicide prevention programs.
- \$100 million for Indian Community Development Block Grants. This funding pays for infrastructure development and some human services.

There are a number of other human service-related programs funded in the Phase III legislation, many of which tribes do not receive direct allocations from, but have potential for Native people in general. You can find a summary of these [here](#).

NICWA has been working closely with both Native and non-Native advocacy organizations to advocate for additional resources and program flexibility in federal legislation addressing COVID-19 (Phase III and the upcoming Phase IV). We are also involved in working with federal agencies and educating tribal leadership and program directors on how to implement recently enacted human service provisions in the Phase III legislation. Currently, we are reaching out to tribal and urban Indian human services directors to identify concerns related to COVID-19 and developing written information and webinars to respond to respond to these issues. NICWA provided the first in a series of webinars on COVID-19 impacts to tribal human services programs on March 19 and has launched a page on our website dedicated to COVID-19 resources for tribal leadership and human services staff. The webpage is <https://www.nicwa.org/coronavirus/>. We will continue to send out Constant Contact emails and post information on our social media platforms as well. We have also been using our communications expertise to raise awareness of human service issues that impact Native children and families with the media (see Truthout article [here](#)). If you have any questions or would like to share your experiences with COVID-19, please contact NICWA Government Affairs and Advocacy Director David Simmons at [desimmons@nicwa.org](mailto:desimmons@nicwa.org).

### **New Funding for Tribal Child Welfare Services Available!**

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 FY 2020.

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<sup>1</sup> The amount of funding available under each BIA program under the budget category of Operation of Indian Programs is not specified under the legislation. Likely, the BIA and individual tribes will need to compare tribal base funding levels under each program, determine funding priorities, and allocate funds based upon a proportionate share of the \$450 million of COVID-19 funding in the Phase III legislation. Tribal human service directors may want to consult with their tribal leadership to share information on the impacts to their community and programs. As a reference, \$450 million represents approximately 20% of the total funds appropriated in FY 2020 for all Operation of Indian Programs, including Bureau of Indian Education programs but not including BIA Operations.

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. **All tribes that are Title IV-B, Subpart 1 grantees are eligible, which is over 300 tribes. The funds will be dispersed to tribal grantees as soon as possible by the Administration for Children and Families (ACF).** Contact your Administration for Children and Families Regional Office for more information. You can find a list of ACF Regional Offices [here](#).

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). The funds can be used to 1) support implementation of the Family First Prevention Services Act, 2) continue activities previously funded under a Title IV-E waiver program, or 3) other child welfare activities allowable under the Title IV-B Subpart One program. While only a few tribes will be implementing the Family First Prevention Service Act programming within the next few years, most tribal Title IV-B grantees will find activities under category three the best fit, which include a broad array of child abuse and neglect prevention activities.

### Legislation

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

On December 5, 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](http://www.nicwa.org). Ms. Martin provided detailed testimony on the effects of child abuse and neglect on children, the 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 for which tribes do not have to compete with states or other entities, 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 as well as 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. It 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 1% to 5%. The set-aside has only funded a couple tribal grant programs each three-year grant cycle historically under the 1% set-aside. The other opportunity for tribes is a study conducted by the

Government 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 conferences to develop consensus legislation that can pass both the House and Senate. The conference process, when 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," and 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 been 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](mailto:desimmons@nicwa.org).

## **Budget**

### **House and Senate Reach Budget Agreement for Fiscal Year 2020—New Funding for Off-Reservation ICWA Programs!**

On December 20, 2019, the House and Senate budget negotiators reached an agreement to fund the federal government through FY 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.

## **Judicial**

### **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 that 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 16 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 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](mailto: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/>.

*For more information relating to this update, please contact NICWA Government Affairs Director David Simmons at [desimmons@nicwa.org](mailto:desimmons@nicwa.org).*