



**NICWA**

National Indian Child Welfare Association

## **Child and Family Policy Update**

**November 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**

#### **Tribes and Advocacy Organizations File Lawsuit Claiming Removal of AFCARS Data Elements Was Unlawful**

On August 27, 2020, a coalition of tribes and advocacy organizations filed a [lawsuit](#) in the Federal District Court in the Northern District of California claiming the removal of Adoption and Foster Care Analysis Reporting System (AFCARS) data elements by the Trump Administration for American Indian and Alaska Native and LGBTQ+ children was unlawful. The plaintiffs include the California Tribal Family Coalition, Yurok Tribe, Cherokee Nation, Facing Foster Care in Alaska, Ruth Ellis Center, Ark of Freedom Alliance, and True Colors. The lawsuit asserts that the U.S. Department of Health and Human Services, Administration for Children and Families violated the Administrative Procedures Act when the agency issued its May 12, 2020, AFCARS Final Rule. The Final Rule eliminated over 85% percent of the previous 60-plus AFCARS data elements for American Indian and Alaska Native children established in the 2016 AFCARS Final Rule, which provided critical data elements including the first ever data on requirements of the Indian Child Welfare Act (ICWA). AFCARS is the federal government's largest source of data on children who are in out-of-home placement.

NICWA has led efforts since the early 1990s to include ICWA data elements in AFCARS and has previously provided testimony and comments promoting the critical importance of new data elements in AFCARS to address disparities in outcomes and disproportionality in state foster care systems for American Indian and Alaska Native children. Of important note, ICWA is the only major federal child welfare law that does not have a structured and regular data collection system that tracks implementation.

#### **House Passes Legislation to Reauthorize Child Abuse Prevention and Treatment Grant Programs**

On September 21, 2020, the House of Representatives passed the [Native American Child Protection Act](#) (H.R. 4957). The legislation reauthorizes two different grant programs for tribes and funding for a resource center focused on child maltreatment and family violence. The House passed the legislation after a hearing on the bill on November 13, 2019, where Aurene Martin, NICWA 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 [here](#). Original co-sponsor Representative Gallego (D-AZ), with 11 other bipartisan co-sponsors of the legislation, recognized the significant need for the resources contained in the bill and how important they were to protecting children and individuals at risk of child abuse and family violence in Indian Country. The House-passed legislation not only reauthorizes the grant programs and resource center funding, but also significantly increases the authorization levels. Reauthorization was needed for Congress to be able to appropriate funding to the grant programs and resource center.

On October 1, 2020, Senator Martha McSally (R-AZ) announced the introduction of a companion bill to in the Senate (S. 4787) and is working with tribal advocates to pass the bill in the Senate. You can find a copy of the text [here](#).

The grant programs and resource center were originally authorized in the Indian Child Protection and Family Violence Prevention Act (P.L. 101-630) in 1990, but no funds have ever been appropriated by Congress except for a one-year appropriation of a few million dollars for the resource center. NICWA will be working with tribes and Indian organizations to advocate for passage of the bill in the Senate and appropriation of funds in the next fiscal year. The commission will also develop recommendations for Congress to support healing of the historical and intergenerational trauma passed down in American Indian and Alaska Native families and communities and provide a forum for victims to speak about personal experiences tied to these human rights violations. A summary of the bill can be found [here](#).

### **Senate and House Members Introduce Bills to Address Impacts of Boarding Schools**

Representative Deb Haaland (D-NM) and Senator Elizabeth Warren (D-MA) introduced the Truth and Healing Commission on Indian Boarding School Policy in the United States Act in the House and Senate on September 29, 2020, to establish a formal commission to investigate, document, and acknowledge past injustices of the federal government's cultural genocide and assimilation practices through its Indian boarding school system. A summary of the bills can be found [here](#). H.R. 8420 and S. 4752 are the first federal legislation to specifically ask for a formal examination into the boarding school policies of the United States and its impact upon tribal children, families, and communities. The trauma experienced and passed down by generations of American Indian and Alaska Native families related to the abuses that occurred in boarding schools is widely recognized as contributing significantly to the risk of child maltreatment in Indian Country today.

## **Legislation**

### **Senators Introduce Legislation to Support Native Families**

U.S. Senators Lisa Murkowski (R-AK), Joe Manchin (D-WV), and Kyrsten Sinema (D-AZ) introduced the [Emergency Family Stabilization Act](#) on June 9, 2020 (S. 3923). The legislation provides \$800 million of one-time emergency funding for states and tribes to support children and families experiencing homelessness, including a 10% set-aside for American Indian and Alaska Native tribal governments (\$80 million). Off-reservation Indian organizations are specifically mentioned as eligible for the funding through provisions that would make grants to local public or private nonprofit organizations. The legislation recognizes the impact COVID-19 has had upon communities and families across the country and the increased vulnerability of homeless families and youth as a result. The tribal funding also allows for services and supports related to domestic violence, human trafficking, disabilities, and child safety issues within families and youth who are experiencing homelessness. The DHHS secretary is also authorized to waive selected requirements for Indian tribes or tribal organizations.

"The COVID-19 pandemic has increased threats to American Indian and Alaska Native children, youth, and their families' well-being. Increasing numbers of tribal children, youth, and families face the risk of becoming homeless, experiencing domestic violence and/or child abuse or neglect, or becoming victims of human trafficking. We applaud Senator Murkowski for recognizing the increased threats to our communities during this pandemic and introducing the Emergency Family Stabilization Act that provides vital resources for tribal governments to address these challenges. Our tribal programs, many of which are in remote, rural locations, often don't have adequate resources to fight these threats to our communities. This legislation recognizes this by providing funding that is specifically for tribal governments," said Sarah Kastelic, executive director of the National Indian Child Welfare Association.

NICWA is encouraging tribal governments and advocates to reach out to their senators to express their support for S. 3923. Please ask your senators to co-sponsor the legislation and think about how it can be included in any future COVID-19 relief legislation that Congress considers.

### **Senate Democrats Introduce Emergency Child Welfare Legislation to Address COVID-19**

On July 2, 2020, Senators Brown, Harris, Casey, and Cortez Masto introduced the [Child Welfare Emergency Assistance Act](#) (S. 4172). The legislation responds to a variety of critical needs that children and families in tribal and state child welfare systems have as a result of COVID-19. The legislation provides funding for tribes and states and modifies existing federal child welfare policies to reduce barriers for children and families. The legislation contains the following provisions:

- \$60 million for eligible tribes, tribal organizations, and tribal consortia under Title IV-B of the Social Security Act (3% set-aside). No matching funds required.
- States, tribes, tribal organizations, and tribal consortia have until July 1, 2022, to obligate the funds, which must be used by September 30, 2022.
- The funds may be used for a variety of child welfare purposes under Title IV-B with the requirement that they address COVID-19 issues. These include, but are not limited to, kinship placement support services, child welfare services, adoption promotion and support services, and development and training for case workers.
- Additional funding (\$30 million) for states and tribes to support kinship navigator programs and services. No matching funds required.
- States, tribes, tribal organizations, and tribal consortia have until July 1, 2022, to obligate the funds, which must be used by September 30, 2022.
- The funds may be used to help kin caregivers improve their access to resources and helping kin caregivers care for children outside of the foster care system.
- \$750,000 for eligible tribes, tribal organizations, and tribal consortia under the John F. Chafee Foster Care program (youth aging out of foster care). No matching funds required and the funds are available through September 30, 2023.
- The funding can be used for eligible services under the Chafee program and direct payments to foster care youth for basic services and needs.
- \$5 million for eligible tribes, tribal organizations, and tribal consortia to support tribal court improvement programs (funding provided to tribes funded under this program in FY 2020).
- Eligible tribes, tribal organizations, and tribal consortia have until July 1, 2022, to obligate the funds, which must be used by September 30, 2022. There is no match requirement for the funds.
- \$5 million will be reserved for tribes, tribal organizations, and tribal consortia for health oversight and coordination. These funds will be divided among tribes and tribal consortia that receive funds under Title IV-B Subpart 1 and operate a Title IV-E program in FY 2020 (direct funded programs). For tribes that operate Title IV-B, but not Title IV-E, there will be competitive grant process.
- Waive requirement under Title IV-E Guardianship Assistance Program that requires a child live in the home of a prospective relative guardian who was a licensed foster home.
- During the period from February 1, 2020, to September 30, 2022, any child that exits foster care because of age will be provided notice they may re-enter foster care regardless of whether the state or tribe has chosen to extend foster care for youth beyond age 18.
- The federal matching rate for Title IV-E Guardianship Assistance Program and Adoption Assistance will be increased to 100% from March 31, 2020, to October 1, 2022.
- The Court Improvement Program will be reauthorized with an increase for tribal court improvement programs to \$5 million.
- During fiscal years 2020 to 2022, states and tribes will be eligible for grant funding to train on de-escalation strategies with families that come into contact with law enforcement and improve collaboration between law enforcement, caseworkers, and other child welfare staff.

No House companion bill has been introduced, but Senate supporters will be working with their Senate Republican colleagues to explore opportunities to include some or all of the provisions in the next COVID-19 relief legislation.

### **HEROES Act Includes Funding for Tribal Social Services Impacted by COVID-19**

The House of Representatives approved their next round of COVID-19 relief measures on May 15, 2020, in the form of [the Health and Economic Recovery Omnibus Emergency Solutions Act](#) (HEROES Act, H.R. 6800). The legislation contains numerous funding provisions, including one that would provide emergency funding from the Social Services Block Grant (SSBG) to states and tribes to address COVID-19 impacts in social services (Section 100201). The funding provision would provide one-time grants to tribes that are currently Low Income Home Energy Assistance Program (LIHEAP) or Community Service Block Grant (CSBG) grantees. Currently, there are almost 300 tribes receiving LIHEAP funds and close to 60 tribes receiving CSBG funds. The SSBG funding reserved for tribal grantees is \$400,000,000 and can be spent through December 31, 2021. Another stand-alone bill introduced in the House of Representatives (H.R.

6862) also contains the same tribal Social Services Block Grant funding provision contained in the HEROES Act.

The Social Services Block Grant was established in 1981 (currently funded at \$1.7 billion annually) and uses tribal populations to determine state allocations, but tribes have never been eligible to receive the funding directly. States use the funding to fill gaps in federal and state funding in areas such as domestic violence, child welfare, disabilities, and other social services. NICWA has been advocating for tribal eligibility to the SSBG since 1988 to address the inequities in access to federal funds that tribes face and provide much needed support for basic social services in their communities.

NICWA is encouraging tribal governments and advocates to reach out to their senators to express their support for language that provides tribal governments eligibility to receive SSBG funding similar to the approaches taken in H.R. 6800 and H.R. 6882. Please ask your senators to support the tribal SSBG provisions and think about how it can be included in any future COVID-19 relief legislation that Congress considers.

### **Administrative Policy**

#### **AFCARS Final Rule Eliminates Over 50 ICWA Data Elements**

On May 12, 2020, DHHS published their [Adoption and Foster Care Analysis Reporting System \(AFCARS\) Final Rule](#) eliminating all but a handful of the previous 60 Indian Child Welfare Act (ICWA) data elements established during the Obama Administration 2016 AFCARS Final Rule. Advocates for AI/AN children who have worked for decades to increase the number of data elements for this population were shocked at the current administration's policy change, especially in light of the huge disparities and disproportionality that this population faces in state child welfare systems. "It defies reason to decrease data collection for American Indian and Alaska Native children and families as they face immense obstacles in state child welfare systems across the nation, especially when you consider that many states were in support of the ICWA data elements," said David Simmons, government affairs and advocacy director of NICWA. DHHS's primary reasons for eliminating the ICWA data elements were the perceived burden to states to collect the new data and questioning the value and relevance of the data to the Title IV-E Foster Care and Adoption Assistance program that provides the authority to collect AFCARS data for children in out of home care. Ironically, these same issues were addressed in detail in the 2016 Final Rule that established the new ICWA data elements for Native children and families, but the current administration did not accept the rationale and data supporting the 2016 ICWA data elements.

The remaining ICWA data elements in the 2020 AFCARS Final Rule include the following:

- Whether inquiries were made regarding if the child is an Indian child under ICWA.
- Whether ICWA applies for the child and the date that the state title IV-E agency was notified by the Indian tribe or state or tribal court that ICWA applies.
- Whether notification to the child's tribe of state child custody proceedings occurred.
- The tribal affiliation of the child, birth mother, birth father, foster parents, adoptive parents, and legal guardian.

NICWA is urging tribes to consult with their state child welfare agency on how they will be implementing the remaining ICWA data elements and encourage them to collect data on all of the previous 60 data elements.

#### **Children's Bureau Disseminates Letter Regarding Termination of Parental Rights During Pandemic**

On June 23, 2020, the Children's Bureau under DHHS disseminated a [letter](#) to state and tribal child welfare leaders clarifying federal requirements under Title IV-E of the Social Security Act pertaining to termination of parental rights. In this letter, the Children's Bureau emphasizes that the filing of a petition for termination of parental rights has far-reaching ramifications for children and families in child welfare proceedings and every effort should be made to ensure that petitions are only filed when appropriate. The letter goes on to say that the Children's Bureau recognizes that during this pandemic, services to help families reunify with their children have often been impeded, and that the federal law provides flexibility to

not file termination of parental rights petitions when it is not in the best interests of the child or when services included in the case plan designed to support the safe return of the child to the home have not been provided. The Children's Bureau also encourages states and tribes to seek alternative methods of providing services when more conventional methods are not available and links to their COVID-19 website, which has guidance on the use of federal funds and available flexibility during the pandemic. Lastly, the Children's Bureau urges states and tribes to provide support to adoptive families, recognizing that some of them may also be experiencing additional stressors during this time.

NICWA strongly urges tribal and state practitioners to read this letter and discuss it with their tribal or state counterparts to ensure that all appropriate flexibility is being extending to AI/AN children and families in state child welfare systems. It is also important to remember that the Indian Child Welfare Act contains higher legal requirements for termination of parental rights proceedings, and these requirements are not modified or superseded by other federal child welfare laws.

## **Budget**

### **Congress Passes Stopgap Measure to Continue Funding of Federal Government**

On September 30, 2020, Congress passed and the president signed a continuing resolution (CR) to continue funding for the federal government through December 11, 2020. The CR authorizes funding for federal programs and operations at the previous fiscal year levels with only a few exceptions. The legislation, Continuing Appropriations Act 2021 and Other Extensions Act of 2020 (H.R. 8337), also extends the authorizations for the Temporary Assistance for Needy Families Act (TANF) and contains a provision to renew some pandemic related funding for subsidized meals for children who would normally receive them when schools are open. There are also some provisions that provide flexibility for the Supplemental Nutrition Assistance Program (SNAP) program related to pandemic circumstances.

After the election, Congress will need to take up finalizing the fiscal year 2021 appropriations or develop another continuing resolution by December 11, 2020. Advocates are hoping that a final appropriations bill will be passed to avoid disruptions in program funding and services as we have seen in previous years appropriations cycles.

## **Judicial**

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

In October 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. The Fifth Circuit is now working on crafting a decision in the case. While no specific date is available, the decision is expected sometime in the fall of 2020.

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 the 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). Descriptions and materials regarding this and other ICWA lawsuits are available 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).*