



NICWA

National Indian Child Welfare Association

Child and Family Policy Update

January 2021

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Hot Topics

Congress Approves Omnibus Bill with Funding for Federal Government Programs and COVID-19 Relief

On December 21, 2020, the House and Senate approved legislation to fund the federal government for the rest of the fiscal year (September 30, 2021) and provide funding for COVID-19 relief activities. The Consolidated Appropriation Act, 2021 was signed into law by the president on December 27, 2020 (P.L. 116-260). The appropriations bill was attached to a COVID-19 relief package to create a bill with just under 5,600 pages. Members of Congress were glad to get the appropriations and COVID relief packages approved after months of debate and political maneuvering, but many were frustrated that there was almost no time for review before the actual votes. The final vote on the legislation came after four different continuing resolutions were passed to keep the federal government funded (one in September and three in December) and ongoing differences on what should be in a COVID-19 relief bill. The process was also complicated by veto threats from the president as well.

The appropriations language funds most government programs at FY 2020 levels with increased funding in some programs (see below). Key Bureau of Indian Affairs (BIA) tribal child and family program funding levels for FY 2021:

- BIA Indian Child Welfare Act On-Reservation Program—\$1.5 million increase to \$15.9 million
- BIA Indian Child Welfare Act Off-Reservation Program—\$1.0 million (same as FY 2020 level)
- BIA Welfare Assistance—\$2.0 million increase to \$78 million.

COVID-19-specific human service funds for tribal nations in FY 2021 include:

- Substance Abuse and Mental Health Services Administration—additional \$125 million for tribes, tribal organizations, and urban Indian health organizations to provide behavioral health services
- Administration for Community Living—additional \$7 million for tribal nutrition programs serving adults that qualify under the Older Americans Act
- Extension of deadline for expending Cares Act Relief funds for states and tribes to December 31, 2021 (earlier deadline was December 30, 2020)

Some additional federal child and family program funding and highlights include:

- Administration for Children and Families (ACF) Tribal Court Improvement Program—increase of \$500,000 for tribal court improvement programs related to COVID-19 activities in FY 2021 (tribes eligible to apply for discretionary grants)
- ACF Chafee Independent Living Program—additional \$400 million for Chafee-related activities and additional flexibility and expansion of program benefits in several areas through FY 2021 (tribes eligible to enter into agreements with states for the funds or receive direct funding)

- ACF Prevention services under Title IV-E—increase in reimbursement rate for prevention services provided under Title IV-E from 50% to 100% in FY 2021
- ACF Title IV-B, Subpart 2 program—additional \$85 million in Title IV-B, Subpart 2 funds in FY 2021 (tribes receive 3% set-aside)
- ACF Kinship Navigator program—temporarily waives evidence-based requirements for Kinship Navigator programs funded under Title IV-E and increases reimbursement from 50% to 100% in FY 2021 (tribes operating the Title IV-E program through agreement with state or directly are eligible to receive funds)
- Department of Education Free Application for Federal Student Aid (FAFSA)—streamlines the FAFSA process to assist foster care youth who are applying for financial aid for higher education
- Streamlining the process for Family Unification Program vouchers for foster care youth who are at risk to be homeless to make it easier for them to access these housing benefits. Public housing agencies work with public child welfare agencies to help coordinate these vouchers and housing needs for foster care youth at risk of becoming homeless

President Biden has indicated that he will be forwarding a COVID-19 relief bill to Congress as soon as he takes office that will be more comprehensive than the recently passed coronavirus relief bill. The administration's bill is estimated to cost just under \$2 trillion and contain more COVID-19 support for state and tribal governments. This includes additional funding for stimulus payments to individuals (\$1,400); a boost in aid to the unemployed (\$400 a week); additional funds for rental assistance and an extension of the eviction moratorium; an extended increase in food stamps benefits; more funding for child care and child tax credits; restoration of emergency paid leave (paid sick and family leave); aid to small businesses and establishment of state, tribal, and nonprofit financing programs; aid to state, tribal, and local governments and schools for COVID-19-related activities; support for vaccine and testing programs (creation of national program); and increasing the federal minimum wage to \$15 an hour.

Biden Administration Sets Sights on Executive Orders and Regulations Issued by Trump Administration

The Biden Administration has stated that they will be reviewing and possibly reversing several controversial executive orders and regulations that the Trump Administration issued during their term. On his first day in office President Biden signed 17 executive orders, including one that reverses a Trump Administration executive order establishing the 1776 Commission and prohibiting diversity training by federal agencies and federal grantees and contractors. The 1776 Commission sought to restore “patriotic education” in schools and their report was widely criticized for rewriting American history to minimize past injustices. The Trump Administration order would have made it very difficult to include any content in training or reference materials that discussed racial equity or systemic racism. The Biden Administration executive order not only reverses the Trump executive order, but requires all federal agencies to take actions to ensure racial equity.

One regulation of concern is the recently published Final Rule on January 8, 2021, referred to as the [“Sunset Rule,”](#) that requires the Department of Health and Human Service agencies to review all of their federal regulations within a short time period or have them expire if the review does not occur. Current federal law requires federal agencies to review their regulations on a regular basis, which includes making decisions about whether to revise or eliminate certain regulatory provisions. The concern with the Trump-issued final rule is it would place an unreasonable timeline on the review of federal regulations across the board which could cause some regulations to go unreviewed and then expire without public comment. This could affect regulations that provide critical protections for American Indian and Alaska Native (AI/AN) children and families. An additional concern is the final rule does not consider the federal trust relationship between tribal nations and the federal government or federal consultation policy. NICWA provided comments on the earlier Notice of Proposed Rule Making that you can find on our website.

Biden Administration Issues Executive Order to Improve Relationships with Tribal Nations

On January 26, 2021, the president issued an [Executive Order](#) to strengthen tribal consultation and the nation-to-nation relationship. The Executive Order supports and improves upon earlier Executive Orders (like Executive Order 13175, November 6, 2000) to require all federal agencies to submit a plan within 90 days to implement Executive Order 13175, as well as provisions in President Biden's Executive Order, and to develop the agency plan in consultation with tribal nations and tribal officials. Also required are annual progress reports from federal agencies on their progress to implement the Executive Order and the naming of an individual within each agency to coordinate activities. With the timelines set in the Executive Order, it is anticipated that outreach to tribal nations will be occurring soon. This might come from acting officials in many federal agencies where political appointments have not been confirmed yet, and possibly through existing tribal/federal advisory committees like the Department of Health and Human Services Secretaries Tribal Advisory Committee or Administration for Children and Families Advisory Committee.

Legislation

New Congress Contains New Leadership in the Senate with Several Big Challenges Awaiting

Each session of Congress lasts two years. The 116th Session completed with Congress adjourning in December making way for the 117th Session to begin January 3, 2021. New in the 117th Congress will be the Senate switching from Republican control to Democratic control. With the victories by both Democratic Senate candidates in the Georgia runoff election on January 5, the United States Senate has 50 Democratic senators (48 Democratic Party affiliated and 2 Independent Party affiliated senators that caucus with the Democratic Party) and 50 Republican senators. When you have a tie like this, the tiebreaker is the sitting Vice President who serves as the President of the Senate, giving the Democratic senators the necessary numbers to control the Senate. While this gives the Democratic Party control of the Senate, which includes chairing committees and setting the Senate agenda, the slim margin means that Senate Democrats will need to work closely with their Republican counterparts to get many parts of their legislative and budget agenda accomplished.

In the House of Representatives Democrats retained control with Speaker Pelosi retaining her leadership position, but the Democrats lost 13 seats, narrowing their margin of control. The House has many more members of Congress (435) than the Senate (100) so even a 10-seat advantage can be much less commanding than it would be in the Senate.

Several big-ticket legislative priorities have been announced by the Biden Administration, including additional coronavirus relief, reversing earlier tax cuts, extending the Voting Rights Act, immigration reform, climate change advancements, criminal justice reform, and health care improvements, that will take up a lot of the 117th Congress's time, but there will also likely be some other legislation taken up including child welfare at some point in the next two years. NICWA will continue to work with Congress and the Biden Administration to highlight issues of importance to Indian Country in child welfare and encourage engagement with tribal nations.

Administrative Policy

NICWA Meets with Biden-Harris Transition Team

When a new presidential administration begins preparing to take office, they develop a transition team that involves people with experience in different areas of government services and working with different populations. The Biden-Harris transition team was established before the election and has been meeting with different groups and organizations since their inception. NICWA was contacted to meet with transition team members that have experience in Department of Health and Human Services programs, like child welfare, and in Bureau of Indian Affairs programs. Prior to contact with the transition team members NICWA contributed to the Indian child welfare section of the [National Congress of American Indian's transition document](#) that was disseminated to the Biden-Harris team. NICWA highlighted critical

policy gaps that have created barriers to Native children and families receiving child welfare services and concerns about implementation of the Indian Child Welfare Act. The transition team has been reaching out to Indian Country through several different tribal organizations and NICWA has been participating in as many of those as possible to ensure child welfare issues are discussed. As the new administration takes office and new political appointments for federal agencies are announced, NICWA will be reaching out to encourage tribal outreach and engagement and sharing our experiences with Indian child welfare issues. NICWA has shared with the Biden-Harris transition team that all agency political appointees should have experience in working with tribal nations or at least a demonstrated interest in learning how to effectively engage Indian Country and support for basic tenets of federal Indian policy and administrative consultation policy.

Children’s Bureau Issues Guidance to Allow Some Cultural Adaptations in Evidenced-Based Prevention Services

On January 13, 2021, the Children’s Bureau released an Information Memorandum (IM) that provides new guidance on the use of cultural adaptations to approved evidence-based prevention services ([see ACYF-CB-IM-21-04](#)) under Title IV-E of the Social Security Act (also known as Title IV-E program). Prevention services under the Title IV-E program include mental health services, parent training, and substance abuse prevention and treatment. Prevention services are a new component of the Title IV-E program that was authorized in 2018 under the [Family First Prevention Services Act](#) (P.L. 115-123, Division E, Title VII).

The IM clarifies that states and tribes that are in agreements to operate the Title IV-E Program may seek reimbursement for certain adapted (culturally or otherwise) prevention services and programs already approved by the Title IV-E Prevention Services Clearinghouse. Adaptations that are allowable are discussed in the IM, along with substantial adaptations that will not be allowed to seek reimbursement of Title IV-E prevention funds.

In the IM, the Children’s Bureau recognizes the importance of providing cultural services to AI/AN children and families to address longstanding disparities and disproportionality affecting AI/AN families and urges states to consult with tribes to develop plans for culturally adapting prevention services and programs. This policy clarification opens the door for states and tribes to work together to develop prevention services that are more culturally appropriate and eligible for funding support under the Title IV-E program.

Tribes and Advocacy Organizations File Lawsuit Challenging Removal of AFCARS Data Elements

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.

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 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.

While the lawsuit continues to move forward, NICWA urges 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.

Budget

FY 2022 Budget Process Will Likely Get Underway Later Than Usual with Administration Change

During the transition from one president to the next the federal budget process can look a little different than in other years. While the outgoing administration will have already worked on a budget to submit to Congress in case they continue in office, the Congress will be looking more to the incoming president's budget priorities. Because the typical budget process for an administration can take up to 12 months, the incoming president has a much shorter amount of time and contact with existing agency staff to prepare and submit their budget priorities to Congress. This usually means the new president's priorities will be less detailed than usual and will be transmitted to Congress a little later than usual too. For FY 2022, which begins October 1, 2021, the Biden Administration will likely be transmitting their budget priorities sometime between February and April of 2021. NICWA is encouraging tribal nations to share budget priorities for human service programs like child welfare with their members of Congress and the new administration so they can be informed and have guidance on federal programs that serve American Indian and Alaska Native people.

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. 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.