



NICWA

National Indian Child Welfare Association

Child and Family Policy Update

January 2022

An electronic copy of this update can be found on the National Indian Child Welfare Association's (NICWA) website at <https://www.nicwa.org/policy-update/>.

Hot Topics

U.S. Supreme Court Asked to Review Fifth Circuit Court of Appeals En Banc Decision in *Brackeen v. Haaland* ICWA Case

Following a decision in [Brackeen v. Haaland](#) Indian Child Welfare Act (ICWA) case from the Fifth Circuit Court of Appeals en banc (reviewed before all sitting judges within the federal circuit), four of the parties in the case filed petitions asking the United States Supreme Court to review the decision. On September 3, 2021, the federal government, four intervenor tribes, State of Texas, and private parties (adoptive and foster care parents) in the case all filed [petitions](#) asking for review. Following the filing of the petitions, three amicus briefs were filed supporting the federal government and tribal intervenors' petitions. The three amicus briefs were filed by 25 states, 10 child welfare and adoption organizations, and 180 tribal nations and 35 Native organizations. NICWA is supporting the federal government and tribal intervenors in the case and issued [press statements](#) at the submission of the petitions asking for review and filing of the amicus briefs.

The next phases of the case will involve the U.S. Supreme Court (the Court) reviewing the petitions and coming to a decision on whether they want to accept the case for review and which issues in the *Brackeen v. Haaland* case they want to review. The Court is expected to issue a decision on whether they want to accept review of the case sometime in late January. If they accept review, the Court will identify which questions it wants the parties to brief in the case, the briefing schedule, and a date for oral argument before the Court. Given the extra time the Court is using to reach a decision it is likely that the Court will hold over the case until the fall term which starts in October of 2022. NICWA will be monitoring these events closely with our Protect ICWA Campaign partners (National Congress of American Indians, Association on American Indian Affairs, and Native American Rights Fund) and will be providing updates as information is available. If the Court accepts review of the case, there will likely be a new round of amicus briefs developed and opportunities for tribal nations and Native organizations to sign on to an amicus brief supporting ICWA.

The Fifth Circuit Court of Appeals en banc decision, which took nearly 14 months to be issued, is 325 pages long and unusually complex compared to typical en banc decisions. The full decision is comprised of multiple individual decisions on different issues, two of which attracted a majority of the court and others that were evenly split with eight judges on each side. One large question before the court was whether ICWA was constitutionally based. A majority of the court found that ICWA was constitutionally based, citing Congress's plenary power to enact legislation like ICWA for the benefit of Indian people. However, the court also found some specific requirements of ICWA, such as active efforts, qualified expert witness, and data collection requirements, in violation of the anti-commandeering doctrine of the U.S. Constitution that prohibits the federal government from commandeering, or requiring the use of state government resources for federal purposes, in this case namely state agencies. Nonetheless, the vast majority of ICWA requirements remain intact after the decision.

The application of the Fifth Circuit Court of Appeals en banc decision also has some complexity, but generally speaking the *decision is not applicable outside the states within the jurisdiction of the Fifth Circuit Court of Appeals (Texas, Louisiana, and Mississippi)*. In addition, the decision is only binding upon federal courts, which don't hear ICWA cases, and is not binding upon state courts. This will allow state courts within the Fifth Circuit to decide whether they will incorporate the decision. For now, this decision should not change ICWA's current application in states outside the Fifth Circuit. For more information on the application of the decision, please see this [decision tree](#). You can find additional case materials on this page.

Department of Interior and Congress Introduce Measures to Address Boarding School Experience

In June of 2021, Secretary Deb Haaland announced the Department of Interior's (Department) initiative to collect and review Department information and records related to Indian boarding schools. The initiative comes after large numbers of unmarked graves of First Nations children at several residential school sites in Canada were discovered. Secretary Haaland recognized the need to "shed light on the unspoken traumas of the past." The Department's initiative will identify boarding school facilities and sites; the location of known and possible student burial sites located at or near school facilities; and the identities and tribal affiliations of children interred at such locations. The Department is expected to complete their investigation and publish a report by April of 2022. Estimates are that over 350 Indian boarding schools were operated in the United States in the nineteenth and twentieth centuries.

The Department held tribal consultations on November 17, 18, and 23, 2021, to hear from tribal nations and tribal organizations on their thoughts and concerns regarding a number of topics related to the Department's initiative. You can find a letter from the Department with more information on the initiative [here](#). Please note the consultation dates listed in the letter were rescheduled from those that appeared in the original letter.

On September 30, 2021, Senator Elizabeth Warren and Representative Sharice Davids introduced companion bills (identical bills) entitled "Truth and Healing Commission on Indian Boarding School Policies Act." The Senate bill is S. [2907](#) and the House of Representatives bill is H.R. [5444](#). The legislation establishes a commission to formally document and investigate Indian boarding school policies and practices in the United States. The commission members are appointed by Senate and House of Representatives leadership and the president. The legislation also establishes an advisory committee to provide advice and recommendations to the commission that is comprised of representatives that include, but are not limited to:

- National Indian organizations with expertise in child welfare, education, and boarding school issues
- Federal agencies, such as Bureau of Indian Affairs Education, Office of Indian Education in Department of Indian Affairs, and Commissioner of Administration for Native Americans
- Members of federally recognized tribes and Native Hawaiian organizations
- Mental health, health care, or Native healing practitioners that have experience working with descendants of board school students
- Family members of students that attended boarding schools, current teachers, and students that have attended a boarding school in the past or currently are attending one

The Commission will be holding public hearings to gather evidence and will be making recommendations on how to address and heal the historical and intergenerational trauma caused by the Indian boarding school policies and practices. The Commission will also collaborate and exchange information with the Department of Interior during its investigation.

Tribes and advocates for Native children and families are encouraged to contact your congressional representatives and urge them to sign on as co-sponsors to the legislation. You can find contact information for your congressional representatives [here](#).

Legislation

Senate Considering Child Abuse Prevention and Treatment Act Legislation with Provisions to Increase Funding for Tribes

On March 16, 2021, the House of Representatives passed the [Stronger Child Abuse Prevention and Treatment Act](#) (H.R. 485). The legislation reauthorizes the Child Abuse Prevention and Treatment Act (CAPTA—P.L. 93-247) and addresses some of the challenges tribes have had accessing the Community-Based Child Abuse Prevention grant program under this law, as well as supporting a study of culturally based child abuse and neglect strategies that tribal communities have successfully employed. Congressman Bobby Scott (D-VA), with several co-sponsors, including Congressman Raul Grijalva (D-AZ) who has championed the tribal provisions, worked to ensure tribal grants were increased within the bill and support for additional data on tribal efforts in child abuse and neglect prevention.

Senators Warren and Murkowski introduced a Senate bill not long after the House passed their CAPTA bill that specifically addresses issues for tribes under CAPTA (S. 1868). The Senate legislation contains similar provisions for tribes that were contained in the House-passed bill, H.R. 485, such as increasing the set-aside for tribes from the CAPTA Community-Based Child Abuse Prevention grant program. Following the introduction of the Warren-Murkowski bill, the Senate Health, Education, Labor, and Pensions Committee approved a more comprehensive CAPTA reauthorization bill (S. 1927) that contains most of the provisions in the Warren-Murkowski legislation. The next step is scheduling a vote on the bill before the full Senate. If the full Senate approves the legislation, it will go to conference with the House where they will work out the differences and send a revised bill to both House and Senate for final approval.

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 Senate and House legislation currently, the tribal set-aside for supporting community-based grants to address child abuse and neglect prevention has been increased from 1% to 5%. The current 1% set-aside has only funded a couple of tribal grant programs each three-year grant cycle. The other opportunity for tribal nations is a study authorized under the legislation that would be conducted by the Government Accountability Office in coordination with tribes to examine some of the challenges that tribes have to obtain funding for child abuse and neglect prevention services, promising practices that tribes are using, and barriers to improved data collection. A study like this has never been conducted and could be very helpful in supporting advocacy to increase funding for child abuse and neglect prevention programs for tribes.

NICWA is working with members of the Senate on continuing and building support for S. 1927. We encourage you to contact your senators to support S. 1927 as it moves to the full Senate for consideration. You can find contact information for your congressional representatives [here](#).

NICWA President Provides Testimony at Hearing Before Senate Committee on Indian Affairs on Native American Child Protection Act

On July 21, 2021, the Senate Committee on Indian Affairs held a hearing on the Native American Child Protection Act (S. 2326). This legislation is similar to an earlier bill, H.R. 1688, that was approved by the House of Representatives. Giving testimony at the hearing was Gil Vigil, president of the National Indian Child Welfare Association. In his testimony, President Vigil discussed how Indian Country has a long history of using their culture as the basis for helping keep children safe and preventing child abuse and neglect. "Our natural helping systems in our communities use our culture, teachings, and extended families to keep children safe and strengthen our families. When we have the resources, our communities have shown that they can develop and operate some of the most successful child abuse and neglect prevention programs anywhere in the nation." President Vigil also noted the inequity in access to funding for child abuse and neglect prevention between the tribes and states and how this has stymied tribal efforts to address child abuse and neglect. NICWA is hopeful that the Senate Committee on Indian Affairs will approve S. 2326 and the full Senate will pass the legislation so it can become law this year.

The House legislation reauthorizes two different grant programs for tribes and funding for a resource center focused on child maltreatment and family violence under the Indian Child Protection and Family Violence Prevention Act (P.L. 1010-630). The legislation not only reauthorizes the grant programs and resource center funding but also significantly increases the authorization levels to \$93 million. The current authorizations for the grant programs have not changed since the legislation was enacted in 1990 and have been outpaced by increases in the cost of providing prevention services. In addition, the legislation was last reauthorized in 2010 and is overdue to be reauthorized.

NICWA is working with tribes and Indian organizations to seek support from Senate members on S. 2326 and is encouraging you to contact your senators and ask them to support the legislation as it moves through the Senate. This is one of NICWA's top policy priorities in 2022 and we need your help to get this through Congress this year. You can find contact information for your congressional representatives [here](#).

Administrative 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. Allowable adaptations are discussed in the IM, along with more substantial adaptations that will not be allowed to seek reimbursement.

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 Elimination of Native 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. The new Biden-Harris Administration will also be looking to hear from tribes on their position with regards to restoring the 2016 data elements, so NICWA encourages tribal nations to share their thoughts with DHHS leadership.

Budget

FY 2022 Congressional Budget Process Goes Long as Continuing Resolution Gets Ready to Expire in February

As has been the case for the last several years, Congress was again unable to pass a budget for the new year on time by October 1, 2021. The continuing resolution (CR) process is used when Congress can't finish their budget work on time to extend the authority and funding for federal government operations and programs until the CR expires or Congress passes another CR or final budget for the year. In some years, Congress has had to pass multiple CRs to keep the government running. The current CR for FY 2022 funding expires on February 18, 2022. This is the second CR Congress passed to keep federal operations and programs running since the fall of 2021.

While Congress continues their work to finalize an FY 2022 budget, the president provided his recommendations for funding levels last spring. These include the following:

- Bureau of Indian Affairs, Social Services—\$63.3 million (increase of \$12.1 million over FY 2021 enacted)
- Bureau of Indian Affairs, Welfare Assistance—\$77.9 million (decrease of \$0.6 million under FY 2021 enacted)
- Bureau of Indian Affairs, Indian Child Welfare Act On-Reservation—\$16.9 million* (same level as FY 2021 enacted).
- Bureau of Indian Affairs, Indian Child Welfare Act Off-Reservation—\$2 million* (\$1 million over FY 2021 enacted).
- Bureau of Indian Affairs, Human Services Tribal Design (Tiwahe Initiative)—\$290,000 (same level as 2021 enacted).
- Administration for Children and Families, Child Abuse Prevention and Treatment Act, Community-Based Child Abuse Prevention (set-aside for tribal funding)—\$80 million (increase of \$19.4 million over FY 2021 enacted).
- Administration for Children and Families, Title IV-B Subpart 1, Child Welfare Services (reserved funding for tribes)—\$275 million (increase of \$6.3 million over FY 2021 enacted).
- Administration for Children and Families, Title IV-B Subpart 2, Promoting Safe and Stable Families (set-aside for tribal funding)—\$451 million (increase of \$43,2 million over FY 2021 enacted).

* The president's FY 2022 budget for Indian Child Welfare Act On-Reservation and Off-Reservation programs lacks detail about the specific budget requests under these two programs. The information

above is NICWA's best sense of what the requests are for each program. For more information, please contact the Bureau of Indian Affairs, Division of Human Services.

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