



# NICWA

National Indian Child Welfare Association

## Child and Family Policy Update

July 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

#### **United States Supreme Court Grants Review of Brackeen v. Haaland ICWA Case**

On February 28, 2022, the United State Supreme Court issued an order accepting review of the Fifth Circuit Court of Appeals en banc decision in the [Brackeen v. Haaland](#) Indian Child Welfare Act (ICWA) case. Four of the parties to the case filed petitions with the Court asking for review of the decision by the Fifth Circuit Court of Appeals. The parties filing petitions included the federal government, four intervenor tribes, the State of Texas, and private parties (adoptive and foster care parents). The Court chose to consolidate the petitions and will be considering all of the questions that were before the Fifth Circuit Court of Appeals. The case will be argued before the Court sometime after their new term starts in October of 2022. The briefing schedule in the case is as follows.

#### Briefing Schedule

- Texas and foster parents' briefs are due Thursday, May 26.
  - Amicus briefs in support of these ICWA challengers are due Thursday, June 2.
- Department of Justice and tribal intervenors' briefs are due Friday, August 5.
  - Amicus briefs in support of these ICWA defenders are due Friday, August 12.
- Oral arguments have not yet been scheduled, but will take place sometime after the beginning of the Supreme Court term that will begin October 1, 2022.

NICWA and other Protect ICWA Campaign partners (National Congress of American Indians, American Association on American Indian Affairs, and Native American Rights Fund) will be working with tribes and other parties on the development of an amicus brief strategy for the case. The Native American Rights Fund will be circulating a copy of the draft tribes and Indian organizations brief around July 20 and will be asking tribes and Indian organizations to sign on by August 9. To learn more about the tribal and Indian organization amicus brief, please contact Erin Dougherty at the Native American Rights Fund at [dougherty@narf.org](mailto:dougherty@narf.org). You can find a copy of the Protect ICWA Campaign's press statement on the US Supreme Court's announcement to review the Brackeen decision [here](#).

#### **Department of Interior Releases First Report on Boarding School Initiative**

On May 11, 2022, the Secretary of the Department of Interior (DOI) released a long-awaited first [report](#) on their boarding school initiative which began in June of 2021. The report identified 408 Indian boarding schools operated in the United States between 1819–1969 and over 1,000 other federal and non-federal institutions that may have involved education of Native children during this time period. In addition, 50% of Indian boarding schools may have received support or involvement from a religious institution or organization. The report also details the types of methods used in boarding schools with the purpose of assimilating Native children. The systemic military and identity alteration methods included, but were not limited to (1) renaming Native children with English names; (2) cutting children's hair; (3) discouraging or preventing the practice of Native religions, cultural practices, and the speaking of Native languages; (4)

forcing Native children to engage in military drills. A major focus of the Indian boarding schools was manual labor and Native children were forced to engage in manual labor and learn skills that were often irrelevant to their tribal communities and the United States economy at the time. To enforce these rules and expectations, harsh punishment was often used to discipline Native children who were determined to have violated the rules.

The investigation also searched for marked and unmarked burial sites across the Indian boarding school system. At this phase of the DOI investigation, they have identified 53 different Indian boarding schools that have burial sites. In this initial phase, DOI has documented that 19 Indian boarding schools accounted for 500 child deaths. DOI states that as the investigation continues, these numbers are expected to increase.

The report cited COVID and a lack of funding as barriers to investigation during this first phase of the investigation, but in fiscal year 2022 appropriations Congress appropriated \$7 million for DOI's continuing investigation. The Assistant Secretary of the Bureau of Indian Affairs makes recommendations in the report regarding the next phases of the investigation, including producing a list of marked and unmarked burial sites, an approximation of the total amount of federal funding used to support the Indian boarding school system, including any monies that may have come from tribal or individual Indian trust accounts. The Assistant Secretary concludes that further investigation is necessary of the legacy and impacts of the Indian boarding school system on Native people.

### **Legislation to Establish a Commission to Examine the Boarding School System Gathers Support**

On September 30, 2021, Senator Elizabeth Warren and Representative Sharice Davids introduced companion bills (identical bills) entitled the 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 House Natural Resources Subcommittee on Indigenous Peoples of the United States held a [hearing](#) to receive testimony on the legislation on May 12, 2022. The hearing featured testimony from the National Native American Boarding School Healing Coalition, boarding school survivors, the president of a tribal college, and a tribal leader. The House Natural Resources Committee approved the legislation on June 15 and the bill is now ready for consideration by the full House. NICWA submitted [written testimony](#) for the May hearing that focused on the intersection of the Indian boarding schools and experience of Native children and families in state and private child welfare systems.

The Senate Committee held a hearing on their boarding school commission bill, S. 2907, on June 22. The Senate bill is a companion to the House bill, meaning it has very similar provisions. The Senate hearing featured testimony from Department of Interior Secretary Deb Haaland, National Native American Boarding School Healing Coalition President Sandra White Hawk, Penobscot Chief Kirk Francis, Native Hawaiian Policy Lead Ms. Norma Ryūkō Kawelokū Wong Roshī, and First Alaskans Institute President/CEO La Quen Náay Liz Medicine Crow. The Senate Committee on Indian Affairs has not scheduled committee consideration and vote on the bill yet (markup), but is expected to do so soon.

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 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 Education, Office of Indian Education in the Department of Education, and Commissioner of the Administration for Native Americans.
- Members of federally recognized tribes and Native Hawaiian organizations.

- Mental health, healthcare, 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](#).

### **Commission on Native Children Relaunches Hearings on Native Children's Issues**

The establishment of the [Alyce Spotted Bear and Walter Soboleff Commission on Native Children](#) was a vision of former Senator Heidi Heitkamp (D-ND) and Senator Lisa Murkowski (R-AK). It was established by Public Law 114-244 passed by Congress in 2016. The legislation authorized the establishment of a commission and advisory committee that would examine issues that impact the well-being of Native children and produce a report to Congress and recommendations. The appointment process for the Commission, recruitment of advisory committee members, securing appropriations to fund the commission's work, and hiring of staff took the next 2–3 years.

In October 2019, the Commission held its first meeting and created a schedule for public hearings in 2020. Unfortunately, the pandemic hit just as the Commission was getting ready for their first hearing in Indian Country. Hearings were suspended until 2022, although the Commission continued work to virtually to research and examine issues related to Native children's well-being. The public hearings relaunched in 2022 and the first hearing was held in Phoenix, Arizona. It featured several panels on issues like child welfare, behavioral and mental health, education, childhood development, and systems innovation and best practices in Indian Country. NICWA Board Member Mikah Carlos (Salt River Pima-Maricopa Indian Community) provided testimony for NICWA on child abuse and neglect in Indian Country, best tribal practices in child abuse and neglect prevention, and improving implementation of the Indian Child Welfare Act. Mikah provided background and examples on these issues, while also sharing some of her own experiences. The Commission is continuing to hold public hearings and has information on their [website](#) regarding their schedule and agendas.

## **Legislation**

### **Senate Preparing for Introduction of Tribal Family Fairness Act Bill**

Congresswoman Karen Bass introduced the Tribal Family Fairness Act ([H.R. 4348](#)) in the House of Representatives in 2021. The bill would provide additional funding for tribes under the Title IV-B, Subpart Two program that funds flexible family preservation and support services. The legislation also seeks to streamline the reporting and application requirements for tribes and increase funding for tribal court improvement grants for tribal family courts. The legislation is an important step forward in helping tribes secure more flexible child welfare funding that can help children avoid removal from their homes and strengthen families so children can be returned home safely. The Senate has been considering introducing a version of this legislation and recently key senators have indicated that they will be introducing a very similar bill to the House version in late July.

NICWA has been a supporter of this legislation and urges tribal advocates to contact their senators and urge them to sign on to the legislation as a co-sponsor. Senator Warren has been working to secure

original co-sponsors for the legislation, so ask your senators to contact her office and coordinate with her staff.

### **Full Senate Poised to Consider Two Bills to Fund Tribes to Address Child Abuse Prevention and Treatment Services**

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, including increasing funding for tribes for child abuse prevention services and supporting a study of culturally based child abuse and neglect strategies that tribal communities have successfully used.

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](#)). This bill was later included in the Senate Health, Education, Labor, and Pensions Committee approved CAPTA reauthorization bill ([S. 1927](#)). The next step is a vote on S. 1927 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 Senate Committee on Indian Affairs approved a bill, the [Native American Child Protection Act](#) (H.R. 1688 as approved by the House), that reauthorizes tribal funding for child abuse prevention and treatment of victims. The legislation increases the amount of authority Congress has to appropriate funding for the tribal grants authorized in the legislation. The Senate Committee on Indian Affairs chose to report out the House-approved legislation rather than their own companion bill, S. 2326, smoothing the way for the legislation to be approved by the Senate and then be able to be sent to the president for enactment into law. With passage by the Senate Committee on Indian Affairs, H.R. 1688 is ready for consideration by the full Senate.

NICWA is working with tribes and Indian organizations to seek support from senators on S. 1927 and S. 2326 and is encouraging you to contact your senators and ask them to support the legislation as it moves through the Senate. These are some 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**

#### **Tribes and Advocacy Organizations Await Decision in AFCARS Lawsuit to Restore Native Data Elements**

Plaintiffs and advocates for Native children are continuing to wait on a decision from the Northern District of California Federal Court to a motion filed in May of 2021 to vacate a 2020 Final Rule that eliminated over 85% of American Indian and Alaska Native (AI/AN) data elements in the Adoption and Foster Care Analysis Reporting System (AFCARS). These AI/AN data elements were part of a 2016 Final Rule that would have provided for the first time, federal data collection from states of data elements related to implementation of the Indian Child Welfare Act with AI/AN children subject to the law. The coalition of tribes and advocacy organizations that filed the lawsuit claimed the removal of the AI/AN and LGBTQ+ data elements was unlawful and the 2020 Final Rule eliminating these data elements should be vacated. The plaintiffs include the California Tribal Families 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. AFCARS is the federal government's largest source of data on children who are in out-of-home placement.

Tribal leadership and NICWA have expressed their interest in restoring the restoration of the 2016 data elements, and more recently, the Biden Administration has stated that they support the restoration of the

2016 data elements and is considering how they can restore the data elements depending upon the decision of the federal court.

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.

## **Budget**

### **President's FY 2023 Budget Request Contains Significant Increases to Tribal Child Welfare Programming and Policy Proposals**

The president's FY 2023 budget request contained new funding and policy recommendations for Congress as they develop their FY 2023 appropriations bills. While the president's budget requests do not determine final appropriation levels, as only Congress can pass appropriations bills into law, the president's request signals his administration's priorities to Congress. Appropriation committees within Congress are moving to markup appropriations bills starting this summer and are hoping to have FY 2023 appropriation bills for all of the federal government functions approved before the midterm elections in November 2022. Some highlights from the president's budget requests include the following:

- \$28.9 million increase to Bureau of Indian Affairs (BIA) Social Services.
- \$9.4 million increase to BIA ICWA grant program (tribal and off-reservation programs).
- \$23.5 million increase to Administration for Children and Families (ACF) Title IV-B, Subpart Two, discretionary programs (tribes receive a 3% set-aside from this program).
- Policy recommendations to extend tribal flexibility to use culturally based services under the Title IV-E Prevention Services Program to tribes that operate the Title IV-E program through a tribal-state agreement and for states and tribes to use culturally adapted evidenced-based services approved by the Title IV-E Clearinghouse.
- \$300 million increase to ACF's Title IV-B, Subpart Two, mandatory programs with \$180 million reserved for core program services (tribes receive a 3% set-aside from this program).
- Increase federal match rate by 10% for eligible kinship/relative care placements under ACF's Title IV-E Foster Care and Adoption Assistance program (lowers non-federal match payments required).
- Continue FY 2021 100% federal match rate for ACF's Title IV-E Prevention Services through 2022 and then 90% from 2023–2026. The Prevention Services Program under Title IV-E reimburses states and tribes that operate the program for prevention services that help children avoid out-of-home removal.

You can find copies of the president's budget request for these programs at the [BIA's FY 2023 Budget Justification](#) and [ACF's FY 2023 Budget Justification](#). You are encouraged to contact your congressional representatives to share your thoughts on the FY 2023 budget requests that impact services to Native children and families. You can find your congressional representatives and their contact information [here](#).

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