



**NICWA**

National Indian Child Welfare Association

## Child and Family Policy Update

May 2023

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

#### **Tribal Advocates Wait for *Brackeen v. Haaland* Decision While Supreme Court Addresses Back Log of Decisions Waiting Release**

The United States Supreme Court (Court) heard oral arguments in the *Haaland v. Brackeen* case (21-376) on November 9, 2022. Many court watchers expect a decision late in the term given the complexity of the issues. The Court has come under some [scrutiny](#) regarding the slow pace of decisions being released this term.

In the *Haaland v. Brackeen* case, the Court was asked to assess whether the Indian Child Welfare Act (ICWA) was constitutional. The plaintiffs, the State of Texas and private parties (foster and adoptive parents), asked the Court to focus on the following issues: (1) that Congress did not have the constitutional authority to enact ICWA (Does Congress have the authority to legislate on behalf of Indian tribes and what are the boundaries of this authority?), (2) that ICWA violates the Equal Protection Clause (Is ICWA a race-based law?), (3) that certain provisions of ICWA violate the anti-commandeering doctrine (Does ICWA require state agencies to pursue federal purposes unlawfully?), and (4) whether ICWA violates the non-delegation doctrine (Does the ICWA requirement that requires a state court to accept tribal placement preferences violate the delegation doctrine?). Defendants in the case included the federal government and intervening tribes, Cherokee Nation of Oklahoma, Oneida Nation in Wisconsin, Morongo Band of Mission Indians, Quinault Indian Nation, and Navajo Nation. Materials for the case, including oral argument [audio](#) and [transcripts](#) are available [here](#).

The Court used its time to focus on the authority of Congress to enact ICWA, whether ICWA violates the anti-commandeering doctrine under the Tenth Amendment, and whether ICWA, in particular one of its placement preferences (other Indian families that are not members of the child's tribe), violates the equal protection clause. The Court did not explore the non-delegation doctrine. One unusual thing about the hearing was the amount of time the Court allowed for oral arguments, which significantly exceeded the scheduled time and continued for just over three hours. This underscores the complexity of the legal issues being addressed and the interest of the Court's justices.

While it is difficult to determine how the Court will rule in this case, the defendants presented their arguments and responded to questions from the justices very well. In addition, it was clear that a number of the justices had very strong interest and good questions that pushed back on arguments made by the plaintiffs.

NICWA, with Protect ICWA Campaign partners the National Congress of American Indians, Native American Rights Fund, and Association on American Indian Affairs, are leading efforts to defend ICWA through litigation, communications, and policy work. Currently, the Protect ICWA Campaign partners are working to help Indian Country and their allies prepare for the decision with communication and policy materials. You can find information on how to support ICWA by following the Protect ICWA Campaign @ProtectICWA on [Twitter](#) and [Instagram](#).

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### **Native American Child Protection Act Reintroduced in 118th Congress**

The [Native American Child Protection Act](#) (H.R. 663) was reintroduced by original co-sponsor Representative Ruben Gallego (D-AZ) on January 31, 2023. The legislation reauthorizes the two grant programs and the national resource center for tribes, clarifies that cultural programs and services may be used in the grant programs, and increases the funding authority Congress has to appropriate funding for the tribal grants authorized in the legislation. This is some of the only dedicated tribal funding regarding access to for child abuse prevention and child abuse victim treatment. The legislation was introduced in the last Congress and was approved by the House of Representatives and the Senate Committee on Indian Affairs.

NICWA is working with tribes and Indian organizations to seek support for H.R. 663 and is encouraging you to contact your House of Representatives members and ask them to support the legislation and sign on as a co-sponsor. The legislation is currently in the House Natural Resources Committee. This legislation is one of NICWA's top policy priorities in 2023 and we need your help to get this through Congress this year. You can find contact information for your congressional representatives [here](#).

### **Tribal Family Fairness Act Legislation Reintroduced in 118<sup>th</sup> Congress**

Congresswoman Sidney Kamlager-Dove (D-CA) with co-sponsors Don Bacon (R-NE) and Sharice Davids (D-K) introduced the Tribal Family Fairness Act ([H.R. 2762](#)) in the House of Representatives on April 20, 2023. The bill would provide additional funding for tribes under the Promoting Safe and Stable Families Program (Title IV-B, Subpart Two under the Social Security Act) 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 legislation was introduced first in the 117<sup>th</sup> Congress in 2021 but needed to be reintroduced to be considered in the current 118<sup>th</sup> Congress. Senate members are considering introducing a version of this legislation in the Senate as well.

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. Please ask your House of Representative members to sign on to the legislation as a co-sponsor and support the legislation.

### **NICWA Provides Testimony on FY 2025 DHHS Budget Development**

Each year, the Department of Health and Human Services (DHHS) holds a tribal budget consultation, typically sometime between March and April, to solicit testimony on DHHS programs that fund tribal governments and urban Indian programs. The budget consultation comes early in the budget process for DHHS as they begin development of the budget they will submit to Congress the following year. The tribal budget consultation allows tribal nations and urban Indian programs to provide information on the need for DHHS funding, priorities, and funding level recommendations. This year, the tribal budget consultation occurred on April 19 and was the 25<sup>th</sup> annual budget consultation. NICWA has provided testimony on child welfare and children's mental health programs under DHHS each year. President Gil Vigil provided NICWA's testimony this year and you can find our written testimony [here](#).

### **NICWA Provides Funding Recommendations on FY 2024 Bureau of Indian Affairs Programs**

On March 8, 2023, NICWA Board Treasurer Aurene Martin provided testimony on NICWA's FY 2024 appropriations recommendations to the House of Representatives Interior, Environment, and Related Agencies Appropriations Subcommittee. Each year the Subcommittee hosts two days of public testimony for tribal nations, tribal organizations, and Indian organizations. NICWA has provided testimony at these hearings since the early 1990s.

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Ms. Martin shared with the Subcommittee how few federal dollars are available to tribal nations and Indian organizations for social services and how the need for these services has increased over the last several years, especially in the aftermath of the pandemic. In her testimony, Ms. Martin shared how many tribes have decolonized their programs and how this has greatly improved outcomes for Native children and families in their care, outperforming states in similar program areas. Investments in tribal nations also help state agencies that depend on tribal expertise, resources, and training to improve their services to Native families under their care.

You can find a copy of NICWA's testimony [here](#) and see a recording of Ms. Martin's testimony [here](#). NICWA encourages advocates for Native children and families to review NICWA's testimony and reach to your congressional members to share your thoughts on funding for BIA programs. You can find contact information for your congressional representatives [here](#).

### **Administrative**

#### **Administration for Children and Families Seeks Changes to Foster Care Licensing of Relative Care Providers Regulations**

On February 14<sup>th</sup>, the Administration for Children and Families (ACF) submitted a Notice of Proposed Rulemaking (NPRM) on Separate Licensing Standards for Relative or Kinship Foster Family Homes. ACF is proposing rule changes to allow state and tribal child welfare agencies to adopt one set of licensing or approval standards for all relative or kinship foster family homes that is different from the standards used for non-relative foster homes. Currently, the federal regulation requires agencies use the same licensing or approval standards for all families. The rule would give agencies flexibility on how "relative" and "kin" are defined with regard to licensing standards and also ensure that eligible children receive the same amount of foster care payments regardless of whether the child is placed in a relative, kinship, or unrelated foster family home.

NICWA recognizes the importance of placing American Indian and Alaska Native children in relative homes when they can't remain at home, whether they are in tribal or state care, and is encouraging Indian Country and their supporters to file comments to this proposed regulation change. You can view NICWA's comments and sample comments letter [here](#). The public comment period ended on April 17, 2023 but you can see examples of comments already submitted [here](#).

#### **HHS Continues to Move Forward with Proposed Changes to AFCARS after Decision in Lawsuit**

Plaintiffs and advocates for Native children were glad the wait was over for a decision in the lawsuit filed by tribes, Indian organization, and LGBTQ+ groups, but the outcome did not help efforts to restore the 2016 Adoption and Foster Care Analysis Reporting System (AFCARS) data elements for Native children in state court proceedings. The decision from Judge Maxine Chesney ruled in favor of the federal government and against tribal and LGBTQ+ advocates who were hoping the court would rule in favor of the plaintiff's request for summary judgement and set aside a later 2020 Final Rule which removed over 85% of the Native data elements. [Judge Chesney's decision](#) relies on HHS concerns that the 2016 AFCARS Final Rule would unnecessarily burden states while also finding that HHS's lack of focus on the benefits of the 2016 Final Rule were appropriately considered. The plaintiffs have publicly shared that they are going to file an appeal, but there are questions about how this will further delay an acceptable solution. Meanwhile, Department of Health and Human Services (HHS) officials have said they are in favor of restoring the 2016 data elements and are moving forward with a proposed regulation change starting this year. According to HHS announcements they are expecting to publish a Notice of Public Rulemaking (NPRM) in June of this year that will propose these types of changes to AFCARS.

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The Native data elements were part of a 2016 Final Rule that would have provided, for the first time, federal data collection from states of specific data elements related to implementation of the Indian Child Welfare Act and other Native child and family specific data. The coalition of tribes and advocacy organizations that filed the lawsuit claimed the removal of the Native 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. 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.

### **Commission on Native Children Continues 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 its first hearing in Indian Country. Hearings were suspended until 2022, although the commission continued work to virtually 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 its [website](#) regarding its schedule and agendas.

### **Budget**

President Biden's FY 2024 budget recommendations to Congress were released mid-March with some recommendations for increases to federal programs that tribal nations rely on. The annual budget recommendations are an important marker for the budget and policy priorities of the president as Congress considers their budget and policy priorities for FY 2024. Some of the president's FY 2024 recommendations for child and family programs that tribal nations use include:<sup>1</sup>

- Increase Head Start funding (discretionary funds) \$1.1 billion over FY 2023 levels.
- Increase Child Care and Developmental Block Grant funding (discretionary funding) \$900,000 over FY 2023 levels.

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<sup>1</sup> The proposed budget increases include funding that would be shared by states and tribes. Specific data on how much of the proposed increase would accrue to tribal nations is not specified.

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- Increase child welfare program funding (discretionary funding under the Child Abuse Prevention and Treatment Act and Title IV-B, Subparts 1 and 2 programs) \$135 million over FY 2023 levels.<sup>2</sup>
- Increase BIA Indian Child Welfare Act funding \$8 million over FY 2023 levels.
- Increase BIA Social Services \$24.6 million over FY 2023 levels.<sup>3</sup>

New House leadership and the ability of Senate Democrats to find agreement with Senate Republicans on appropriations will be major factors in the ability to reach agreement on a bipartisan appropriation bill for FY 2024. The House and Senate have both said they want to avoid the continuing resolution process used in previous years and instead pass individual appropriation bills as was the standard prior to the mid-2000s. The president's budget recommendations will be considered, but likely will carry little weight with House Republican leadership.

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

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<sup>2</sup> The president's budget recommendation does not specify how much of the increase is intended for each of these child welfare programs or to eligible tribal nations. This increase also includes two new grant programs that address racial inequities in child welfare and child welfare workforce totaling \$80 million of the \$135 total increase proposed.

<sup>3</sup> The increase would also be used to support implementation of the Indian Child Protection and Family Violence Prevention Act programs (P.L. 101-630).