



NICWA

National Indian Child Welfare Association

Child and Family Policy Update

June 2019

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.

Hot Topics

Fifth Circuit Court of Appeals Hears Oral Arguments in ICWA Case; Texas Family Court Ignores ICWA in Child Custody Proceeding; and SCOTUS Denies to Review Arizona ICWA Case

On March 13, 2019, the United States Court of Appeals in the Fifth Circuit heard oral arguments from plaintiffs and defendants in the *Brackeen v. Bernhardt* case. Several representatives from tribal nations and Native organizations were in attendance, including the National Indian Child Welfare Association's executive director, Sarah Kastelic; board member Robert McGhee; and former board member Derek Valdo. Overall, the Fifth Circuit judges seemed receptive to the arguments being made by the defendants in the case (federal government and intervening tribes) and spent most of their time questioning arguments made by the plaintiffs (states and private parties). You can find a recording of the oral argument [here](#) (*Enter docket number 18-11479 in Search*). Under appeal in the Fifth Circuit by the defendants in this case (federal government and tribal intervenors) is a decision by Judge Reed O'Connor in the United States Federal District in Northern Texas that found ICWA unconstitutional. You can find a copy of the federal district court decision [here](#). To reach this decision, the federal district court had to ignore decades of federal court precedent that affirmed inherent tribal sovereignty and the government-to-government relationship between tribal nations and the United States as enshrined in the U.S. Constitution, countless federal laws, and treaties between tribal nations and the U.S. government. A decision from the Fifth Circuit is expected within the next six months. Should either side wish to appeal the ruling, the most likely next step is a petition for cert to the U.S. Supreme Court.

In a separate but related case, a Texas family court judge decided to rely on the lower federal court's decision in the *Brackeen v. Bernhardt* case that found ICWA unconstitutional and apply only state law in deciding custody for a sibling of the Native child in the Brackeen case. The judge awarded primary possession of the sibling to the Brackeen family who wanted to adopt the child who is a sibling of the Navajo Nation child they already have in their home, but also awarded custody to the Navajo Nation. This shared custody decision occurred despite a Navajo aunt of the child coming forward early in the case asking to have the child placed with her and the Fifth Court of Appeals having granted a stay earlier regarding the lower federal court's decision finding ICWA unconstitutional. The Texas family court judge ignored ICWA's placement preferences and state law giving preference to relatives in placement decisions in creating this very unusual decision.

In a victory for ICWA supporters the Supreme Court of the United States (SCOTUS) declined a petition to review a decision by the Ninth Circuit Court of Appeals regarding a federal lawsuit decided earlier in an Arizona federal district court. The lower federal district court dismissed the case in part because it said the plaintiffs lacked standing because they failed to prove there was substantive harm to the Native children named in the case because of ICWA's application. The plaintiffs then appealed the federal district court decision to the Ninth Circuit Court of Appeals where the Ninth Circuit vacated the lower federal district court's decision dismissing for lack of standing and remanded the case to the federal district court with instructions to dismiss the action as moot (children successfully adopted and ICWA no longer needing to be applied).

NICWA and our ICWA Defense partners, the National Congress of American Indians, Native American Rights Fund, and the Association on American Indian Affairs, are engaged with our federal, state, and tribal partners in this litigation. NICWA is leading work with our ICWA Defense partners on communications with the media and policy-related strategies 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.

ACF Considering Elimination of over 90% of Native Children's Data Elements in AFCARS

In 2016 the Obama Administration finalized [regulations](#) that for the first time would require states to report on Indian Child Welfare Act (ICWA)-related data for American Indian and Alaska Native (AI/AN) children and families in state foster care systems. The data elements for AI/AN children were to be added to the federal Adoption and Foster Care Analysis Reporting System (AFCARS). This capped over 20 years of efforts by tribes, tribal organizations, and leading national child advocacy groups to track data in ICWA cases. Comments submitted on the proposed data elements for AI/AN children received overwhelming support from tribes and child advocacy groups as well as from the majority of states that submitted comments.

As part of the Trump Administration's goal to streamline and/or eliminate regulations across the federal government, the Administration for Children and Families published a [Notice of Proposed Rulemaking](#) (NPRM), published April 19, 2019, in the *Federal Register*, to eliminate over 90% of the AFCARS data elements for AI/AN children from the 2016 regulations. Public comments on the NPRM were due June 18, 2019. While the NPRM proposes to keep five data elements for AI/AN children that track whether ICWA applies and the child, parents, and placement tribal affiliation, most of the data elements are proposed for elimination. Data elements proposed for elimination in the NPRM regulations include the following:

- whether there was a request to transfer jurisdiction to tribal court,
- reasons for denial of transfer of jurisdiction,
- court findings related to legal requirements in involuntary and voluntary termination of parental rights,
- whether qualified expert witness testimony occurred in foster care and termination of parental rights proceedings,
- whether active efforts were made prior to removal or termination of parental rights,
- detailed information on active efforts provided
- whether legal requirements for foster care removals under ICWA were met,
- what available ICWA foster care and adoptive placement preference homes existed,
- whether adoptive placement preferences under ICWA were met, and
- whether good cause to deviate from placement preferences occurred and details on the basis for good cause under ICWA.

The primary justification given by ACF for the dramatic reduction in data elements is the 2016 regulations overly burden state governments. NICWA filed comments regarding the NPRM which you can find on our website under "News from NICWA" at www.nicwa.org. You can also find copies of other comments submitted online at <https://www.regulations.gov/document?D=ACF-2018-0003-0224>.

GAO Conducting Listening Session at NICWA Annual Conference Regarding Juvenile Justice Issues

The U.S. Government Accountability Office (GAO) conducted a listening session on April 2 to hear from tribal nations, Indian organizations, and Native people regarding federal programs that fund activities related to juvenile delinquency for Native youth. The session was conducted during the 2019 Protecting Our Children National American Indian Conference on Child Abuse and Neglect in Albuquerque, New Mexico. The listening session was the second held in Indian Country since GAO began their study in 2018. The first listening session occurred at the National Indian Nations Conference: Justice for Victims of Crime in December 2018. In the first phase of the study, GAO released a report in September 2018 that identified data related to Native youth who are at risk or have been involved in a juvenile delinquency system and identified 122 federal grant programs that could assist in addressing these issues for Native youth. In this second phase, GAO is focusing on collecting information from Indian Country directly that highlight the challenges and successes that have been part of the experience in addressing juvenile delinquency with Native youth. If you were not able to attend the listening session, you may still be able to provide input into the study. To inquire about opportunities for providing input, please contact GAO staff members David Blanding at BlandingD@GAO.gov or Gretta Goodwin at GoodwinG@gao.gov.

Administrative Policy

Administration for Children and Families Releases Guidance on Family First Prevention Services Act

The Administration for Children and Families (ACF) published a substantial portion of expected federal guidance on the Family First Prevention Services Act (FFPSA) on November 30, 2019 (ACYF-CB-PI-18-10). The guidance instructs tribes on how to implement many sections of the new law, including what qualifies as eligible prevention services for children and families being served in the child welfare system. The FFPSA statute requires ACF to specify specific tribal requirements and criteria related to the provision of prevention services contained within the law and allowing the use of cultural services unique to the tribal community being served. Overall, the new guidance provides tribes with significant flexibility regarding the use of cultural services to help prevent removal of children either prior to or after reunification with their family, as well as services to help the child's parents rehabilitate in these situations. You can find a copy of the federal guidance for tribes [here](#).

Some highlights of the new FFPSA guidance for tribes are the following:

- Tribes can claim for prevention services within the eligible categories of services that they deem culturally appropriate and meet the unique needs and context of the community instead of only being able to use evidence-based services described in the law.
- In meeting the requirement that prevention services must be trauma informed, tribes may define what a trauma-informed service is in a way that reflects the components of historical trauma unique to their communities.
- Tribes can define the practice criteria used to define different prevention services (e.g., values base, longevity of practice, community approval, traditional basis, evaluation) rather than having to adhere to those identified in the law. Tribes are not required to meet the requirement for amounts of expenditures in different practice categories.
- Tribes may use alternative evaluation strategies to evaluate their prevention services such as exploratory, community-based participatory research, and qualitative designs.
- Tribes are not required to meet maintenance of effort requirements (i.e., requirements to continue expending the same or higher levels of tribal funding in prevention services in addition to amount of FFPSA funds received).

FFPSA is contained within the larger [Bipartisan Budget Act of 2018](#) (under Division E, Title VII) that was enacted into law in February 2018. The FFPSA contains prevention services funding for states and tribes that operate the Title IV-E Foster Care and Adoption Assistance program, and also has implications for American Indian and Alaska Native (AI/AN) children who are in state care and are eligible for the protections of ICWA, especially for AI/AN children subject ICWA's requirement for active efforts to prevent removal and rehabilitate families.

The FFPSA's funding is available to support prevention services such as parent training/education, individual and family counseling, and mental health and substance abuse treatment. Prevention services can be supported for up to 24 months and are available to children who are candidates for foster care or a foster child who is pregnant or parenting foster children. Candidates for foster care include children who are at risk of being removed from their homes (parent or relative caregiver home) and placed in foster care. Also included are children who have been returned home after being in foster care and are at risk of re-entering foster care. Parents and relative caregivers are also eligible to receive these prevention services.

Tribes that operate the Title IV-E program directly through the federal government are eligible to seek reimbursement for the new prevention services. The services will be reimbursed at 50% until fiscal year 2026, when they will be reimbursed at the tribe's Federal Medical Assistance Percentage or FMAP, which can be as high as 83%. This level of reimbursement is much higher than other Title IV-E program components (administrative and training services). Tribes that have an agreement with a state to operate the Title IV-E program may also be eligible to seek reimbursement for the new services, depending upon the terms of their agreement and the state's decision on whether they choose to offer the prevention services in their state (optional).

Budget

Fiscal Year 2019 Appropriations Finally Signed into Law—On to Fiscal Year 2020

Following on the heels of the completion of the fiscal year 2019 appropriations process is the fiscal year 2020 process. The president usually kicks off the process in January or February by releasing his budget recommendations to Congress followed by appropriations committees holding hearings to gather testimony from the administration and the public. This year the president's budget was released late on March 11 and contains cuts to all BIA Human Services programs with the exception of the Tiwahe Initiative (Human Services Tribal Design line item), which received a modest increase. BIA Human Services programs proposed for the largest cuts include ICWA On-Reservation grant program (30%) and BIA Housing Improvement program (funding proposed for elimination). The president has proposed large reductions in funding for the last two years while in office, but fortunately Congress has not followed these proposals and instead has either kept BIA Human Services funding at the current levels or provided a small increase. You can find a description of the president's budget proposal for BIA programs in fiscal year 2020 [here](#).

The National Indian Child Welfare Association has provided testimony in person to the House of Representatives Interior Appropriations Subcommittee on BIA Human Services programs since the early 1990s, and on March 7, 2019, NICWA board member Aurene Martin provided NICWA's testimony for fiscal year 2020. NICWA's testimony focused on BIA Human Services programs such as ICWA grants for on- and off-reservation programs and BIA Social Services programming. In addition, NICWA also highlighted the need to provide funding for the prevention and treatment grant programs under the Indian Child Protection and Family Violence Prevention Act (P.L. 101-630). Since this law was enacted in 1991, no funding has been appropriated for the child abuse and domestic violence prevention and treatment grant programs. The law authorizes up to \$43 million of funding for these programs. You can find a copy of NICWA's testimony on our home page under "News from NICWA" [here](#).

Judicial

Opponents of ICWA Continue to Mount Challenges to ICWA in Federal Courts

While tribal nations and the federal government have been successful so far in defending against several lawsuits challenging ICWA since 2015, opponents of ICWA continue to file lawsuits in federal court. At this time, three different federal lawsuits challenging ICWA have been filed and are pending. Another recent action is the filing of a cert. petition to the United State Supreme Court in the *Oglala Sioux Tribe v. Flemming [Van Hunnik]* case. In this case the Eighth Circuit Court of Appeals overturned a lower federal court decision that ordered South Dakota to change policies that deprived Native parents of due process in state child custody proceedings and alleged ICWA violations. The Eighth Circuit said the appeal should have been heard in state court rather than federal court.

All of the lawsuits filed by ICWA opponents claim that ICWA violates the United States Constitution. The constitutional claims are varied, but include allegations that ICWA is a race-based law and deprives Native children and non-Native foster parents of constitutional protections while in state child custody proceedings. A number of these constitutional claims have very serious implications for tribal sovereign authority beyond ICWA and federal acknowledgment of tribes as governments.

Below are the lawsuits that have been filed that challenge ICWA. You can find [descriptions](#) and case materials regarding the cases on the Turtle Talk website under the ICWA Appellate page under Open Case Materials:

- *Brackeen (Texas) v. Bernhardt*—Northern District of Texas Federal District Court
- *Watso v. Piper*—on appeal to Eighth Circuit Court of Appeals
- *Americans for Tribal Court Equality v. Piper D.*—Minnesota Federal District Court (stayed pending appeal in *Watso v. Piper*)

Tribal challenge to ICWA and due process failures in South Dakota District Court:

- *Oglala Sioux Tribe v. Fleming (Van Hunnik)*—Cert. Petition to the United States Supreme Court

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