



**NICWA**

National Indian Child Welfare Association

## **Child and Family Policy Update**

**June 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**

#### **Supreme Court Delivers a Huge Win for ICWA, Native Children, and Tribal Nations**

The United States Supreme Court (Court) issued their long-awaited [decision](#) in the *Haaland v. Brackeen* case (21-376) on June 15, 2023, in a 7-2 majority decision affirming the constitutionality of the Indian Child Welfare Act (ICWA).

The Court rejected two of the constitutional challenges raised by the state of Texas and private parties in the case (plaintiffs) and dismissed two others based upon a lack of standing by the plaintiffs. Many in Indian Country and regular court watchers were concerned that the Court might strike down some, or all of ICWA, but the majority rejected many of the plaintiffs' primary arguments and provided a strong defense of ICWA's constitutional basis. NICWA and the Protect ICWA Campaign [released a statement](#) regarding the decision.

The majority decision was authored by Justice Barrett who joined the Court in 2020. Her decision was joined by Chief Justice Roberts and Justices Sotomayor, Kagan, Gorsuch, Kavanaugh, and Jackson. Justice Gorsuch, with Justices Sotomayor and Jackson joining in part, filed a concurring opinion to the majority decision that provided an in-depth background on the history of ICWA and the United States Constitution's recognition and support of tribal sovereignty. Another concurring opinion was filed by Justice Kavanaugh where he agreed that the plaintiffs did not have standing to raise equal protection issues and that the Court did not address the merits of these issues in the majority decision. Justice Kavanaugh also characterized the issue of whether ICWA violates equal protection (whether ICWA is a race-based law in whole or part) as "serious." Justices Clarence Thomas and Samuel Alito did not join the majority decision with each filing a dissenting opinion instead.

#### **ICWA is consistent with Congress's constitutional authority.**

Regarding claims raised by the plaintiffs that Congress did not have authority to legislate ICWA under the United States Constitution (Article 1), the majority decision vigorously rejected this claim and laid out the long held precedent that supports Congress's authority in this area. The Court cited the Indian Commerce Clause, the Treaty Clause, and the trust relationship between tribal nations and the federal government as the basis for rejecting the plaintiffs' claims. The plaintiffs tried to advance arguments that child welfare fell outside the boundaries of the Indian Commerce Clause, but the Court rebuffed this argument citing the boundaries of this authority extending beyond just economic or trade interests.

#### **ICWA does not violate Tenth Amendment anti-commandeering principles.**

The majority decision rejected claims that ICWA unlawfully commandeered state agencies and resources to implement ICWA. The Court reversed the judgment of the Fifth Circuit Court of Appeals en banc decision regarding anti-commandeering claims. In the Fifth Circuit's en banc decision they stated that ICWA's requirements to provide active efforts, use qualified expert witnesses, and require collection of

data by states related to ICWA activities, violated anti-commandeering principles under the Tenth Amendment of the Constitution. The US Supreme Court found that ICWA provided an even-handed application with state and private parties, a key test of whether a law unlawfully commandeers a state. Other anti-commandeering rulings from the Court found ICWA's placement preferences fall primarily to state courts to enforce and data collection is related to a court's implementation and enforcement of federal law. State courts are required to enforce federal law and are typically not subject to claims of anti-commandeering as opposed to state agencies.

### **No party had standing to raise equal protection challenges to ICWA's placement preferences or non-delegation challenges.**

Equal protection claims raised by the plaintiffs sought to characterize ICWA as a law based upon racial preference as opposed to political status (native people as citizens of sovereign tribal nations). The plaintiffs also challenged the authority of tribal nations under ICWA to bring different orders of placement preference into state child custody proceedings as an impermissible act of delegating federal powers to other entities (delegation powers). Regarding the equal protection claims, the plaintiffs focused on ICWA eligibility (a member or eligible for membership in a federally recognized tribe) and application of the third placement preference (other Indian family). Rather than address the merits of this claim, the Court focused on the lack of standing the plaintiffs had to raise these issues. To have "standing" in a federal court a party must be able to present evidence that they have suffered harm because of a particular law and that harm is attributable to the party being sued (federal government). There must also be an opportunity for the Court to construct a remedy related to the harm (ability of the court to correct or make up for the injury). In this case, the Court said neither the State of Texas or the private parties met the test for standing, so the Court rejected their ability to raise these issues.

The majority decision was well crafted and thorough in many areas. By not addressing the merits of claims related to equal protection, they have left a door open for additional lawsuits to be pursued. The plaintiffs have already said they plan to move forward to find new cases that can form the basis for new challenges in this area. However, the Court's thoroughness and well-crafted language in the majority decision will make the task of finding an appropriate case and being successful in court much harder for opponents of ICWA. While NICWA is celebrating this hard-fought win, it is clear that we will need to build upon the successes we have achieved, in and outside the courtroom, to improve ICWA's compliance and defend against new challenges. Our previous work to defend ICWA has led to many improvements, such as new state ICWA laws. By growing our partnerships and increasing the capacity of tribal nations to care for their children and families, we can meet these future challenges with confidence.

NICWA wishes to thank our partners within the Protect ICWA Campaign, the National Congress of American Indians, the Native American Rights Fund, and the Association on American Indian Affairs. The collective work of the Campaign created a strong defense of ICWA and reset media narratives about ICWA, tribal sovereignty, and the importance to Native children and families' well-being. We also thank our allies, federal and state partners, and community advocates for their part in this critical work. NICWA and the Protect ICWA Campaign will be continuing our work to improve ICWA's compliance. Follow us on social media @ProtectICWA on [Twitter](#) and [Instagram](#). Our work is not done, and we thank you for your generous support and efforts.

### **Indian Boarding Schools Legislation Reintroduced in 118<sup>th</sup> Congress**

On May 18, 2023, Senator Elizabeth Warren with 26 senators introduced the [Truth and Healing Commission on Indian Boarding School Policies Act](#) (S. 1723). This is a reintroduction of the legislation that was introduced in the House and Senate in the 117<sup>th</sup> Congress. NICWA submitted [written testimony](#) for a May 2022 hearing on the legislation 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 on Indian Affairs held a markup of the legislation on June 6, 2023, with the legislation expected to be approved in committee and then forwarded to the full Senate for consideration.

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 and support its passage. You can find contact information for your congressional representatives [here](#).

### **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-KS) 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, 2023, 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.

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

### **ACF Proposes Regulation Change to Eliminate Tribal Match in Child Support Enforcement Programs**

On April 21, 2023, the Administration for Children and Families (ACF) issued a Notice of Public Rulemaking (NPRM) that seeks to eliminate tribal match payments (non-federal match) for tribal nations operating the Child Support Enforcement Program. Approximately, 60 tribes operate child support enforcement programs in the United States. The proposed change is the result of tribal advocacy asking for reductions in tribal match payments in several ACF programs over the years. Many tribal governments have few opportunities to raise significant amounts of tribal revenue to support federal match payments, which has become a barrier to expanding federal human service grant programs in Indian Country. NICWA is very encouraged by this proposed change and strongly encouraged tribal nations and tribal advocates to submit written comments before the June 20, 2023, deadline. As a result, over 50 comments from tribal nations, states, and Indian organizations provided supportive comments. The proposal represents an important step in responding to tribal requests to remove barriers to federal grant programs and can help provide precedent for future changes like this in other grant programs. **You can find a copy of the NPRM [here](#).**

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

On February 14, 2023, 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 LGBTQIA+ 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 LGBTQIA+ 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) sometime in the Fall of 2023 that will propose these types of changes to AFCARS.

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 LGBTQIA+ 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 increasing<sup>1</sup>

- Head Start funding (discretionary funds) \$1.1 billion over FY 2023 levels.
- 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.

- 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>
- BIA Indian Child Welfare Act funding \$8 million over FY 2023 levels.
- 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).