



**NICWA**

National Indian Child Welfare Association

## Child and Family Policy Update

June 2020

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### Hot Topics

#### **President Issues Executive Order on Strengthening Child Welfare Systems**

On June 24, 2020, President Trump issued an [executive order](#) (EO) on strengthening the child welfare system. The EO recognizes that every child deserves a family, that prevention efforts to reduce out-of-home placement need to be strengthened, and that foster children, especially those who age out of the foster care system, face serious challenges to securing a permanent home. In response, the president is proposing several actions by his administration to address these challenges. They include the following actions:

- Encouraging robust partnerships between state agencies and public, private, faith-based, and community organizations—The EO proposes to increase public access to accurate, up-to-date information. This includes a report on the numbers of children in care, patterns of entry into the system, how many are waiting for adoption, and data related to preserving sibling connections. It also requires the Department of Health and Human Services (DHHS) to provide options for collecting more data through the Child and Family Service Reviews on a number of data elements related to children in out-of-home care, including demographic data. Lastly, it requires DHHS to issue guidance on partnering with non-governmental agencies and makes it clear that these organizations should be eligible to partner on Title IV-E programs and services on an equal basis.
- Improving access to adequate resources for caregivers and youth—The EO requires DHHS to promote dissemination of the [National Training and Development Curriculum for Foster and Adoptive Parents](#) with states (and presumably tribes). The EO also promotes availability of trauma-informed training developed by the National Adoption Competency Mental Health Training Initiative and information to support guardianship through the Title IV-E program. Lastly, DHHS will be required to develop a plan on how to reduce barriers to accessing federal benefits and assistance for kinship care providers and youth aging out of the foster care system.
- Ensuring equality of treatment and access for all families—DHHS will be required to conduct a study of the implementation of the Multi-Ethnic Placement Act of 1994 as amended (P.L. 103-382, Section 553; see [DHHS Office of Civil Rights Description](#)). This law prohibits delays or denial regarding placement of children in foster care or adoptive homes based upon race, color, or national origin. DHHS will be required to update guidance as necessary and publish guidance regarding the rights of parents, prospective parents, and children with disabilities.
- Improve processes to prevent unnecessary removal and secure permanency for children—The EO requires DHHS to expand the current Child and Family Services Reviews to assess reasonable efforts to prevent removal, filing of termination of parental rights petitions within federal statutory timelines, assess reasonable efforts made to finalize permanency plans for children, and competition of required family search and notifications to relatives and how efforts are viewed by the courts. DHHS is also required to use their authority where statutory requirements are not met to withhold federal assistance and track state performance regarding permanency outcomes. DHHS is also required to develop guidance regarding flexibility in the use of federal funds to support high-quality legal representation for parents and children. Lastly, DHHS will collect individual states' standards for assessing risk and safety and then outline reasonable best practice standards in this area, including how to address substance abuse and domestic violence.

The EO contains a number of potentially beneficial provisions for American Indian and Alaska Native (AI/AN) children and families, such as improving access to data collection, improving support for partnerships, access to resources and training, reducing barriers to guardianship placements, and tracking efforts to meet federal statutory requirements, such as notification of relatives in child welfare proceedings. In addition, the EO states that implementation of the Indian Child Welfare Act should not be altered or replace tribal consultation processes. However, the emphasis on collecting data and using data to improve permanency for children raises the question of why this administration published a final rule in May 2020 that struck 85% of the existing data elements concerning AI/AN children, families, and caregivers from the Adoption and Foster Care Analysis Reporting System (AFCARS). There are also questions about how the current administration will involve tribes in the efforts to carry out the EO and assess the appropriateness of resources they promote for AI/AN populations. Tribes are encouraged to talk with DHHS officials at the Children's Bureau to better understand their plans for implementation of the EO and how tribes can be involved.

### **Children's Bureau Disseminates Letter Regarding Termination of Parental Rights During Pandemic**

On June 23, 2020, the Children's Bureau under DHHS disseminated a [letter](#) to state and tribal child welfare leaders clarifying federal requirements under Title IV-E of the Social Security Act pertaining to termination of parental rights. In this letter, the Children's Bureau emphasizes that the filing of a petition for termination of parental rights has far-reaching ramifications for children and families in child welfare proceedings and every effort should be made to ensure that petitions are only filed when appropriate. The letter goes on to say that the Children's Bureau recognizes that during this pandemic, services to help families reunify with their children have often been impeded, and that the federal law provides flexibility to not file termination of parental rights petitions when it is not in the best interests of the child or when services included in the case plan designed to support the safe return of the child to the home have not been provided. The Children's Bureau also encourages states and tribes to seek alternative methods of providing services when more conventional methods are not available and links to their COVID-19 website, which has guidance on the use of federal funds and available flexibility during the pandemic. Lastly, the Children's Bureau urges states and tribes to provide support to adoptive families, recognizing that some of them may also be experiencing additional stressors during this time.

NICWA strongly urges tribal and state practitioners to read this letter and discuss it with their tribal or state counterparts to ensure that all appropriate flexibility is being extending to AI/AN children and families in state child welfare systems. It is also important to remember that the Indian Child Welfare Act contains higher legal requirements for termination of parental rights proceedings, and these requirements are not modified or superseded by other federal child welfare laws.

### **Phase III COVID-19 Legislation Contains Support for Tribal Human Services Programs**

On March 27, 2020, the president signed into the law the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). The new law contains almost \$2 trillion of funding to provide support to individuals, governments, and businesses impacted by COVID-19. The legislation also provides approximately \$10 billion of funding for tribal citizens, governments, urban Indian organizations, and tribal businesses impacted by COVID-19 through different programs and funding mechanisms. The biggest source of funding in the legislation for tribal and state governments comes from the Coronavirus Relief Fund at \$150 billion, which has \$8 billion reserved for tribes. The funds can be used for costs that are necessary to address COVID-19.

The CARES Act is the third bill that Congress has passed since early March to address impacts by from the COVID-19 pandemic. Highlights of the legislation include funding for individual payments to taxpayers, expansion of unemployment benefits, student loan forbearance, food for food banks, loans and grants to small and large businesses, funding for hospitals and health providers, and funding to stabilize state, tribal, and local governments.

The first bill, H.R. 6074 (Phase I), contained \$8.3 billion of emergency funding to address the prevention and treatment of COVID-19 focusing on support for testing, vaccine development, and additional costs for

state and local health department staffing and supplies. Tribes were allocated \$40 million under the Phase I bill through the Centers for Disease Control and Prevention, but the process of getting these funds out to tribes has been slow and overly complex according to many tribal health advocates. The second bill, H.R. 6201 (Phase II), contained \$100 billion of aid for paid sick leave, free coronavirus testing, expanded food assistance, additional unemployment benefits, and requirements that employers provide additional protection for healthcare workers. Tribal funding under the Phase II legislation included \$64 million for the Indian Health Service and a \$10 million set-aside for Older Americans Act grants in Indian Country (for nutrition and other direct services).

In the Phase III legislation, tribal funding is much more extensive than in the previous bills. There is funding for economic development, employment, tribal governance, human services, housing, health, education, and nutrition programming. You can find a summary of the tribal provisions [here](#). Tribal human services funding in the legislation includes the following:

- \$453 million in additional Bureau of Indian Affairs (BIA) Operation of Indian Programs funding with \$450 million reserved for direct tribal programs (638 contracted or self-governance). The remaining \$3 million is for BIA operations. The funding includes BIA programs under the Human Services category such as Welfare Assistance (General Assistance, Emergency Assistance, Burial Assistance, Adult Care Assistance, and Child Assistance), Indian Child Welfare Act On-Reservation Grants, Social Services, Tiwahe Initiative (Human Service Tribal Design), and Housing Improvement Program.<sup>1</sup>
- \$4.5 million for tribal domestic violence shelters through the Family Violence and Prevention Services Act (10% tribal set-aside from \$45 million overall).
- \$45 million in additional Title IV-B Subpart One funds. Tribes and states receive these child welfare funds that are very flexible in terms of the child welfare services that can be funded. How much of the funds will be allocated to tribes is unclear. The Title IV-B statute provides for funds to be available for tribal governments but does not contain a specific set-aside. The new funds represent about 16% of the FY2020 appropriated levels, and tribes received about \$5 million in that year, so likely the increase for tribes will be small in comparison (\$850,000 estimated).
- \$3.5 billion for the Child Care and Developmental Block Grant. The statute contains a tribal set-aside of at least 2% with discretion for DHHS to increase the set-aside if funding is increased. Currently, the set-aside is 2.5%; using this figure, tribes would be eligible for approximately \$87.5 million.
- \$750 million for Head Start programs nationally. There are over 155 tribal communities that operate Indian Head Start programs, and while the legislation does not specify how much of the funding will go to these programs, there will likely be funds allocated to existing programs in Indian Country.
- \$250 million for the Community Behavioral Health Clinic Expansion Grant program, which includes \$15 million allocated to tribes, tribal organizations, or health or behavioral health service providers to tribes. This \$250 million allocation includes at least \$50 million for suicide prevention programs.
- \$100 million for Indian Community Development Block Grants. This funding pays for infrastructure development and some human services.

There are a number of other human service-related programs funded in the Phase III legislation, many of which do not allocate funds directly to tribes but have potential for Native people in general. You can find a summary of these [here](#).

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<sup>1</sup> The amount of funding available under each BIA program under the budget category of Operation of Indian Programs is not specified under the legislation. Likely, the BIA and individual tribes will need to compare tribal base funding levels under each program, determine funding priorities, and allocate funds based upon a proportionate share of the \$450 million of COVID-19 funding in the Phase III legislation. Tribal human service directors may want to consult with their tribal leadership to share information on the impacts to their community and programs. As a reference, \$450 million represents approximately 20% of the total funds appropriated in FY2020 for all Operation of Indian Programs, including Bureau of Indian Education programs but not including BIA Operations.

NICWA has been working closely with both Native and non-Native advocacy organizations to advocate for additional resources and program flexibility in federal legislation addressing COVID-19 (Phase III and the upcoming Phase IV). We are also involved in working with federal agencies and educating tribal leadership and program directors on how to implement recently enacted human service provisions in the Phase III legislation. NICWA has provided three different webinars on COVID-19 and dedicated a portion of our website to COVID-19 resources (see <https://www.nicwa.org/coronavirus/>). We will continue to send out emails and post information on our social media platforms as well. We have also been using our communications expertise to raise awareness of human service issues that impact Native children and families with the media (see Truthout article [here](#)). If you have any questions or would like to share your experiences with COVID-19, please contact NICWA Government Affairs and Advocacy Director David Simmons at [desimmons@nicwa.org](mailto:desimmons@nicwa.org).

### **AFCARS Final Rule Eliminates Over 50 ICWA Data Elements**

On May 12, 2020, DHHS published their [Adoption and Foster Care Analysis Reporting System \(AFCARS\) Final Rule](#) eliminating all but a handful of the previous 60 Indian Child Welfare Act (ICWA) data elements established during the Obama Administration 2016 AFCARS Final Rule. Advocates for AI/AN children who have worked for decades to increase the number of data elements for this population were shocked at the current administration's policy change, especially in light of the huge disparities and disproportionality that this population faces in state child welfare systems. "It defies reason to decrease data collection for American Indian and Alaska Native children and families as they face immense obstacles in state child welfare systems across the nation, especially when you consider that many states were in support of the ICWA data elements," said David Simmons, government affairs and advocacy director of NICWA. DHHS's primary reasons for eliminating the ICWA data elements were the perceived burden to states to collect the new data and questioning the value and relevance of the data to the Title IV-E Foster Care and Adoption Assistance program that provides the authority to collect AFCARS data for children in out of home care. Ironically, these same issues were addressed in detail in the 2016 Final Rule that established the new ICWA data elements for Native children and families, but the current administration did not accept the rationale and data supporting the 2016 ICWA data elements.

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 is urging 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.

### **New Funding for Tribal Child Welfare Services Available**

On December 20, 2019, Congress approved legislation that will provide tribes and tribal organizations operating a Title IV-B, Subpart 1 program (Stephanie Tubbs Jones Child Welfare Services program) with new funding for children in the child welfare system. The new funding was contained in H.R. 1865 (Further Consolidated Appropriations Act of 2020) that funded the federal government and programs for FY 2020. The new tribal child welfare funding can be found in Division N, Subtitle F, Section 602 of the law (entitled the Family First Transition Act). The new funding is temporary and will be available in FY2020 (October 1–September 30) with the opportunity to continue using the funds in FY2021. The funding, \$15 million for tribes and tribal organizations, is only available one time unless Congress continues the funding in future legislation. **All tribes that are Title IV-B, Subpart 1 grantees are eligible, which is over 300 tribes. The funds will be dispersed to tribal grantees as soon as possible by the Administration for Children and Families (ACF).** Contact your ACF Regional Office for more information. You can find a list of ACF Regional Offices [here](#).

The funding comes as part of Congress's effort to assist tribes and states that are implementing the Family First Prevention Services Act (Family First). The funds can be used to 1) support implementation of the Family First Prevention Services Act, 2) continue activities previously funded under a Title IV-E waiver program, or 3) other child welfare activities allowable under the Title IV-B Subpart One program. While only a few tribes will be implementing the Family First Prevention Service Act programming within the next few years, most tribal Title IV-B grantees will find activities under category three the best fit, which include a broad array of child abuse and neglect prevention activities.

## Legislation

### **Senators Introduce Legislation to Support Native Families**

U.S. Senators Lisa Murkowski (R-AK), Joe Manchin (D-WV), and Kyrsten Sinema (D-AZ) introduced the [Emergency Family Stabilization Act](#) on June 9, 2020 (S. 3923). The legislation provides \$800 million of one-time, emergency funding for states and tribes to support children and families experiencing homelessness, including a 10% set-aside for AI/AN tribal governments (\$80 million). Off-reservation Indian organizations are specifically mentioned as eligible for the funding through provisions that would make grants to local, public or private, nonprofit organizations. The legislation recognizes the impact COVID-19 has had upon communities and families across the country and the increased vulnerability of homeless families and youth as a result. The tribal funding also allows for services and supports related to domestic violence, human trafficking, disabilities, and child safety issues within families and youth who are experiencing homelessness. The DHHS secretary is also authorized to waive selected requirements for Indian tribes or tribal organizations.

"The COVID-19 pandemic has increased threats to American Indian and Alaska Native children, youth, and their families' well-being. Increasing numbers of tribal children, youth, and families face the risk of becoming homeless, experiencing domestic violence and/or child abuse or neglect, or becoming victims of human trafficking. We applaud Senator Murkowski for recognizing the increased threats to our communities during this pandemic and introducing the Emergency Family Stabilization Act that provides vital resources for tribal governments to address these challenges. Our tribal programs, many of which are in remote, rural locations, often don't have adequate resources to fight these threats to our communities. This legislation recognizes this by providing funding that is specifically for tribal governments," said Sarah Kastelic, executive director of the National Indian Child Welfare Association.

NICWA is encouraging tribal governments and advocates to reach out to their senators to express their support for S. 3923. Please ask your senators to co-sponsor the legislation and think about how it can be included in any future COVID-19 relief legislation that Congress considers.

### **HEROES Act Includes Funding for Tribal Social Services Impacted by COVID-19**

The House of Representatives approved their next round of COVID-19 relief measures on May 15, 2020, in the form of [the Health and Economic Recovery Omnibus Emergency Solutions Act](#) (HEROES Act, H.R. 6800). The legislation contains numerous funding provisions, including one that would provide emergency funding from the Social Services Block Grant (SSBG) to states and tribes to address COVID-19 impacts in social services (Section 100201). The funding provision would provide one-time grants to tribes that are currently Low Income Home Energy Assistance Program (LIHEAP) or Community Service Block Grant (CSBG) grantees. Currently, there are almost 300 tribes receiving LIHEAP funds and close to 60 tribes receiving CSBG funds. The SSBG funding reserved for tribal grantees is \$400,000,000 and can be spent through December 31, 2021. Another stand-alone bill introduced in the House of Representatives (H.R. 6862) also contains the same tribal Social Services Block Grant funding provision contained in the HEROES Act.

The Social Services Block Grant was established in 1981 (currently funded at \$1.7 billion annually) and uses tribal populations to determine state allocations, but tribes have never been eligible to receive the funding directly. States use the funding to fill gaps in federal and state funding in areas such as domestic violence, child welfare, disabilities, and other social services. NICWA has been advocating for tribal eligibility to the SSBG since 1988 to address the inequities in access to federal funds that tribes face and provide much needed support for basic social services in their communities.

NICWA is encouraging tribal governments and advocates to reach out to their senators to express their support for language that provides tribal governments eligibility to receive SSBG funding similar to the approaches taken in H.R. 6800 and H.R. 6882. Please ask your senators to support the tribal SSBG provisions and think about how it can be included in any future COVID-19 relief legislation that Congress considers.

### **House Committee Passes Bill Reauthorizing Tribal Grant Programs Addressing Child Abuse and Neglect and Family Violence Prevention**

On December 5, 2019, the House of Representatives Natural Resources Committee unanimously passed the Native American Child Protection Act (H.R. 4957). The legislation reauthorizes two different grant programs for tribes and funding for a national resource center focused on child maltreatment and family violence. The House passed the legislation after they held a hearing on the bill on November 13, 2019, where Aurene Martin, NICWA Board of Directors member, testified to the need in Indian Country for this legislation and increasing the funding authorizations to match the need and current cost of services for tribes. You can find a copy of Ms. Martin's testimony at [www.nicwa.org](http://www.nicwa.org). Ms. Martin provided detailed testimony on the effects of child abuse and neglect on children, the benefits of taking a prevention approach to addressing child maltreatment, data collection barriers, and promising practices in Indian Country. Representative Gallego (D-AZ), original co-sponsor of the legislation and chairman of the House Natural Resources Subcommittee for Indigenous Peoples, and Ranking Member Paul Cook (R-CA) introduced the bill in October. Both representatives recognized the extreme need for the resources contained in the bill and how important they were to protecting children in Indian Country.

The grant programs and resource center were originally authorized in the Indian Child Protection and Family Violence Prevention Act (P.L. 101-630) in 1991, but no funds have ever been appropriated by Congress except for a one-year appropriation of a few million dollars for the resource center. Furthermore, at the end of 2010, the authorizations for the grant programs and resource center expired, making it more difficult to get Congress to appropriate funding for these grant programs and the resource center. The grant programs are the only tribal-specific funding sources to address child abuse and neglect prevention for which tribes do not have to compete with states or other entities, and they also provide funding for treatment of child victims. The next step is for the full House of Representatives to vote on and approve the bill before it can go to the Senate for consideration, most likely before the Senate Committee on Indian Affairs. To obtain a copy of the legislation, please go to <https://www.congress.gov/bill/116th-congress/house-bill/4957>.

### **Houses Passes Child Abuse Prevention and Treatment Act Bill with Increased Tribal Funding**

On May 20, 2019, the House of Representatives passed the Stronger Child Abuse Prevention and Treatment Act (H.R. 2480). 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 grant programs under this law as well as the lack of data available on how tribes are addressing child abuse and neglect successfully in their communities. CAPTA 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 legislation, the tribal set-aside for supporting community-based grants to address child abuse and neglect prevention has been increased from 1% to 5%. The set-aside has only funded a couple tribal grant programs each three-year grant cycle historically under the 1% set-aside. The other opportunity for tribes is a study conducted by the Government Accountability Office in coordination with tribes that will examine some of the challenges that tribes have to obtaining funding for child abuse and neglect prevention services, promising practices that tribes are using, and barriers to improved data collection.

On December 12, 2019, the Senate Health, Education, Labor, and Pensions Committee voted on their version of a CAPTA reauthorization bill (S. 2971) with similar tribal provisions to the House bill. The next steps are for the Senate and House conferences to develop consensus legislation that can pass both the House and Senate. The conference process, when key members of the Senate and House develop a consensus bill, is expected to occur in January, and then the consensus bill will go to the full Senate and House for approval. You can find a copy of the Senate bill as introduced [here](#). While overall very similar, the Senate-introduced CAPTA bill does have a few differences from the Senate committee-approved bill.

A copy of the Senate committee-approved bill was not available at the time of this update being published. A copy of the House bill can be found [here](#).

### **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 (Family First) 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 Family First 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 that are operating the Title IV-E Foster Care program directly through the federal government 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.

For tribes operating the Title IV-E program through an agreement with a state or tribes not operating the Title IV-E program, there is currently less flexibility. Opportunities still exist to access the funds. The administration, in their FY 2021 budget proposal to Congress, proposed extending guidance and flexibility that provides tribes operating the Title IV-E program directly through the federal government to tribes operating the Title IV-E program through an agreement with a state (see [FY 2021 Administration for Children and Families Justification of Estimates for Appropriations Committees, page 311](#)). For more information on Family First, please refer to a document that NICWA published with several other leading child welfare organizations in late 2019. The document is entitled "Implementing the Family First Prevention Services Act: A Technical Guide for Agencies, Policymakers and Other Stakeholders," and you can find a copy of the document [here](#).

Some highlights of the new Family First guidance for tribes operating the Title IV-E program directly through the federal government are listed below. You can find a copy of the federal guidance [here](#):

- 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).

Family First also has implications for AI/AN children who are in state care and are eligible for the protections of ICWA, especially AI/AN children subject to ICWA's requirement for active efforts to prevent removal and rehabilitate families. NICWA urges tribes and states to work together to identify culturally based prevention services that have been shown to be successful with Native children and families and work to document the evidence of this success so these cultural prevention services may be approved for funding under Family First. If you would like more information about tribal implications for Family First funding and services, please contact NICWA Government Affairs Director David Simmons at [desimmons@nicwa.org](mailto:desimmons@nicwa.org).

## Budget

### **Fiscal Year 2020 Appropriations—New Funding for Off-Reservation ICWA Programs**

On December 20, 2019, the House and Senate budget negotiators reached an agreement to fund the federal government through FY 2020, staving off another short-term continuing resolution to keep the government operating (H.R. 1865, the Further Consolidated Appropriations Act of 2020). This omnibus legislation included funding to allow the federal government to continue operating through FY 2020 and set larger budget targets for FY 2021. It also included a number of other provisions (riders) that were not specifically related to FY 2020 appropriations. High-level issues in the agreement included significant increases in both domestic and defense programs, along with funding to support continued building of the southern border wall, a priority of the president. Details for specific human service programs in the legislation are still being identified, but most programs received funding at the FY 2019 level. Some notable exceptions in federal human services programs for tribes included the following provisions:

- \$50 million in funding under the Public Health Services Act for tribes and tribal organizations to address the opioid epidemic in Indian Country (Division A, Title I, Substance Abuse Treatment).
- \$174.8 million for tribal Child Care and Developmental Block Grant programs (Division A, Title I, Administration for Children and Family Payments to States for the Child Care and Developmental Block Grants).
- \$15 million for tribes that operate the Title IV-B, Subpart One program to assist them in developing services for children at risk of being placed in out-of-home care due to child abuse and neglect (Division N, Subtitle F, Section 602, Family First Transition Act).
- \$1 million in grant funding for off-reservation ICWA programs (see joint explanatory statement for language published on page H11289 of the Congressional Record, December 17, 2019). This funding has not been appropriated since 1996 and previously funded over 30 urban ICWA programs.

## Judicial

### **Fifth Circuit Court of Appeals Rehears Earlier Decision in *Brackeen v. Bernhardt***

In October 2019, the United States Fifth Circuit Court of Appeals granted a petition by the plaintiffs in *Brackeen v. Bernhardt* to rehear the earlier three-judge panel decision in the Fifth Circuit supporting the Indian Child Welfare Act's (ICWA) constitutionality. The plaintiff's petition asked for a rehearing en banc that sought to have the earlier decision reheard by all of the judges that sit on the Fifth Circuit, which in this case was 16 judges. The plaintiffs, who are seeking to have ICWA declared unconstitutional, include three states (Texas, Indiana, and Louisiana) and several private parties. After granting the plaintiff's petition, the Fifth Circuit set oral argument for January 22, 2020, in New Orleans, Louisiana. The Fifth Circuit is now working on crafting a decision in the case. While no specific date is available, the decision is expected either late this summer or in the fall of 2020.

At the oral argument, two judges asked a majority of the questions with several others asking only one or two questions each. Four of the 16 judges did not ask questions during the hearing. Most of the questions focused on whether ICWA violates the United States Constitution by unlawfully commandeering state governments to enforce ICWA and whether ICWA is a race-based law. While state courts are required to honor federal law, state officials and state executive branch agencies are not required to enforce federal law unless funding is attached to their enforcement/implementation activity. The arguments in court examined whether state agencies were significantly burdened by ICWA's requirements and whether states received any federal support (funding) for their part in ICWA. The other central issue centered on whether ICWA's application was based upon an Indian child's race or political status as a citizen of a sovereign tribal nation. The plaintiffs argued that ICWA was based upon a racial classification, while the federal government and tribal intervenors argued it was based upon a political status as a citizen of a tribal nation. One additional observation from the hearing was that many of the judges were not familiar with how child welfare typically works. This clouded the debate on how different legal theories in the case applied. Because of the complexity of the case, a decision from the Fifth Circuit is not expected until this summer or possibly into the fall of 2020. You can find an audio recording of the hearing [here](#).



In preparation for the oral argument on January 22, 2020, the federal government, five intervenor tribes (Quinault Indian Nation, Morongo Band of Mission Indians, Cherokee Nation, Navajo Nation, and Oneida Nation), and a host of supportive amicus brief parties filed their written briefs in December 2019 supporting the constitutionality of ICWA. Most of the supporting amicus briefs had also been filed earlier in the first hearing before the Fifth Circuit, but the number of signatories increased significantly in several of the briefs and some briefs included revisions or additional language. You can find a copy of the federal government, intervenor tribes, and amicus briefs on Turtle Talk [here](#), as well as the briefs of the plaintiffs and their amici parties. The parties filing amicus briefs in support of ICWA included the following:

- 486 federally recognized tribes and 59 tribal organizations
- 26 states and the District of Columbia
- 77 members of Congress (bipartisan)
- Native American women, American Civil Liberties Union, and others
- Quapaw Nation
- Casey Family Programs and 30 child welfare organizations
- Indian law professors
- Administrative law and constitutional law professors
- Professor Greg Ablavsky—Stanford School of Law (constitutional originalist)

NICWA and our Protect ICWA Campaign partners—the National Congress of American Indians, the Association on American Indian Affairs, and the Native American Rights Fund—want to thank all of the amicus brief parties for helping the litigation team present a strong showing of support for ICWA. NICWA, in our role of leading media and strategic communications, will continue to monitor and facilitate proactive engagement with the media and coordination with our federal, state, and tribal partners in this litigation. NICWA is also supporting policy-related strategies to support the litigation 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](mailto:desimmons@nicwa.org). Descriptions and materials regarding this and other ICWA lawsuits are available on the Turtle Talk website under the ICWA Appellate page under Open Case Materials at <https://turtletalk.blog/icwa/>.

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