



**NICWA**

National Indian Child Welfare Association

## **Child and Family Policy Update**

**March 2022**

An electronic copy of this update can be found on the National Indian Child Welfare Association's (NICWA) website at <https://www.nicwa.org/policy-update/>.

### **Hot Topics**

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

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

NICWA and other Protect ICWA Campaign partners (National Congress of American Indians, American Association on American Indian Affairs, and Native American Rights Fund) will be working with tribes and others on the development of an amicus brief strategy for the case and will be reaching out to tribes and Indian organizations in the coming months. You can find a copy of the Protect ICWA Campaign's press statement [here](#).

#### **Department of Interior and Congress Introduce Measures to Address Boarding School Experience**

In June of 2021, Secretary Deb Haaland announced the Department of Interior's (Department) initiative to collect and review Department information and records related to Indian boarding schools. The initiative comes after large numbers of unmarked graves of First Nations children at several residential school sites in Canada were discovered. Secretary Haaland recognized the need to "shed light on the unspoken traumas of the past." The Department's initiative will identify boarding school facilities and sites, the location of known and possible student burial sites located at or near school facilities, and the identities and tribal affiliations of children interred at such locations. The Department is expected to complete their investigation and publish a report by April of 2022.

On September 30, 2021, Senator Elizabeth Warren and Representative Sharice Davids introduced companion bills (identical bills) entitled the Truth and Healing Commission on Indian Boarding School Policies Act. The Senate bill is S. [2907](#) and the House of Representatives bill is H.R. [5444](#).

The legislation establishes a commission to formally document and investigate Indian boarding school policies and practices in the United States. The commission members are appointed by Senate and House of Representatives leadership and the president. The legislation also establishes an advisory committee to provide advice and recommendations to the commission comprised of representatives that include, but are not limited to:

- National Indian organizations with expertise in child welfare, education, and boarding school issues.
- Federal agencies, such as Bureau of Indian Education, Office of Indian Education in the Department of Education, and Commissioner of the Administration for Native Americans
- Members of federally recognized tribes and Native Hawaiian organizations.
- Mental health, healthcare, or Native healing practitioners that have experience working with descendants of board school students.
- Family members of students that attended boarding schools, current teachers, and students that have attended a boarding school in the past or currently are attending one.

The commission will be holding public hearings to gather evidence and will be making recommendations on how to address and heal the historical and intergenerational trauma caused by the Indian boarding school policies and practices. The commission will also collaborate and exchange information with the Department of Interior during its investigation.

Tribes and advocates for Native children and families are encouraged to contact your congressional representatives and urge them to sign on as co-sponsors to the legislation. You can find contact information for your congressional representatives [here](#).

### Legislation

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

On March 16, 2021, the House of Representatives passed the [Stronger Child Abuse Prevention and Treatment Act](#) (H.R. 485). The legislation reauthorizes the Child Abuse Prevention and Treatment Act (CAPTA—P.L. 93-247) and addresses some of the challenges tribes have had accessing the Community-Based Child Abuse Prevention grant program under this law, including increasing funding for tribes for child abuse prevention services and supporting a study of culturally based child abuse and neglect strategies that tribal communities have successfully used.

Senators Warren and Murkowski introduced a Senate bill not long after the House passed their CAPTA bill that specifically addresses issues for tribes under CAPTA ([S. 1868](#)). This bill was later included in the Senate Health, Education, Labor, and Pensions Committee approved CAPTA reauthorization bill ([S. 1927](#)). The next step is a vote on S. 1927 before the full Senate. If the full Senate approves the legislation, it will go to conference with the House where they will work out the differences and send a revised bill to both House and Senate for final approval.

The Senate Committee on Indian Affairs approved a bill, the [Native American Child Protection Act](#) (S. 2326), that reauthorizes tribal funding for child abuse prevention and treatment of victims. The legislation increases the amount of authority Congress has to appropriate funding for the tribal grants authorized in the legislation. This legislation is similar to an earlier bill, H.R. 1688, that was approved by the House of Representatives. With passage by the Senate Committee on Indian Affairs the legislation is ready for consideration by the full Senate. Since the Senate bill is identical to the House-passed bill, if it passes the Senate it will go to the president's desk to be signed into law.

NICWA is working with tribes and Indian organizations to seek support from senators on S. 1927 and S. 2326 and is encouraging you to contact your senators and ask them to support the legislation as it moves through the Senate. These are some of NICWA's top policy priorities in 2022 and we need your help to get this through Congress this year. You can find contact information for your congressional representatives [here](#).

## Administrative Policy

### **Tribes and Advocacy Organizations File Lawsuit Challenging Elimination of Native Data Elements**

On August 27, 2020, a coalition of tribes and advocacy organizations filed a lawsuit in the Federal District Court in the Northern District of California claiming the removal of Adoption and Foster Care Analysis Reporting System (AFCARS) data elements by the Trump Administration for American Indian and Alaska Native and LGBTQ+ children was unlawful. The plaintiffs include the California Tribal Family Coalition, Yurok Tribe, Cherokee Nation, Facing Foster Care in Alaska, Ruth Ellis Center, Ark of Freedom Alliance, and True Colors. The lawsuit asserts that the U.S. Department of Health and Human Services, Administration for Children and Families violated the Administrative Procedures Act when the agency issued its May 12, 2020, AFCARS Final Rule. The 2020 AFCARS Final Rule eliminated over 85% percent of the previous 60-plus AFCARS data elements for American Indian and Alaska Native children established in the 2016 AFCARS Final Rule, which provided critical data elements including the first-ever data on requirements of the Indian Child Welfare Act (ICWA). AFCARS is the federal government's largest source of data on children who are in out-of-home placement.

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 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.

While the lawsuit continues to move forward, NICWA has been advocating for the Biden-Harris Administration to restore the 2016 data elements in AFCARS. The Department of Health and Human Services (DHHS) has indicated that they also support restoring these data elements and is working to develop a strategy to do so after a decision in the lawsuit occurs. NICWA encourages tribal nations to provide their perspective on the restoration of these AFCARS data elements in consultations and communications with DHHS agencies.

## Budget

On March 10, 2022, Congress approved a fiscal year 2022 spending bill. This came after a series of continuing resolutions starting last October to keep the federal government funded. The final spending bill, H.R.2471 Consolidated Appropriations Act, 2022, contains a number of very important provisions that benefit tribal nations and Native women and children more specifically. The omnibus legislation includes historic tribal provisions, including:

- Reauthorization of the Violence Against Women Act (VAWA). Tribes can now prosecute non-Indian perpetrators of child violence, sexual violence, sex trafficking, stalking, crimes against tribal law enforcement and correctional officers, and obstruction of justice on tribal lands. There's also a pilot program for Alaska. This program will exercise special tribal criminal jurisdiction over non-Indian perpetrators and increases resources for tribal nations to carry out this jurisdiction.
- \$5 million for the Missing and Murdered Indigenous Women Initiative.
- \$7 million to implement the Native Boarding School Initiative at the Department of Interior.
- Increase of \$500,000 for the off-reservation Indian Child Welfare Act grant program.

NICWA will be reviewing the omnibus bill in more detail to identify other appropriations amounts for federal programs that serve Native children and families under the Bureau of Indian Affairs and Department of Health of Human Services and will be sharing that information once it is available.

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