



# NICWA

National Indian Child Welfare Association

## Child and Family Policy Update

January/February 2017

An electronic copy of this update, with live links, can be found on the National Indian Child Welfare Association's (NICWA) website under News and Events (Latest Policy Update) at [www.nicwa.org](http://www.nicwa.org).

### Hot Topics

#### **United States Supreme Court Denies Review of California ICWA Case**

On January 9, 2017, the Supreme Court of the United States (SCOTUS) issued an order stating they would not accept review of an Indian Child Welfare Act (ICWA) case in California involving a Choctaw child (referred to as the Lexi case). The non-Indian foster parents, who temporarily had placement of the child until she was placed with relatives, filed a petition last October asking SCOTUS to review the case (*In the Matter of A.P.*). The child in this case endured almost four years of appeals brought by the foster parents, who believed they provided a more appropriate placement for the child than her extended family. The attorney for the foster parents also represented the non-Indian adoptive couple in the 2013 United States Supreme Court ICWA case (*Adoptive Couple v. Baby Girl*) that resulted in a Cherokee girl being removed from her biological father and returned to a non-Indian adoptive couple in South Carolina. Some state litigation remains in this case, but without SCOTUS accepting review the non-Indian foster parents have few opportunities to elevate this case on the federal level.

NICWA works closely with the ICWA Defense Project, a collaboration between NICWA, the National Congress of American Indians (NCAI), Native American Rights Fund (NARF), and Michigan State University Indian Law Clinic's ICWA Appellate Project. The ICWA Defense Project monitors state and federal ICWA cases and intervenes in select cases at the appellate level. We expect additional attempts by ICWA opponents to get an ICWA case before SCOTUS and are following cases at the state and federal level that are being targeted. If you know of a case that you think has this potential, please let us know by contacting David Simmons at NICWA ([desimmons@nicwa.org](mailto:desimmons@nicwa.org)) or Matt Newman at NARF ([mnewman@narf.org](mailto:mnewman@narf.org)).

#### **BIA Releases Revised ICWA Guidelines to Supplement New ICWA Regulations**

On December 12, 2016, the Bureau of Indian Affairs (BIA) released revised Indian Child Welfare Act (ICWA) [guidelines](#). Guidelines are not legally binding, but provide the agency's suggested practices for implementing ICWA. This is the same day the new 2016 ICWA regulations went into effect. The revised guidelines supersede the guidelines that were published in 2015 prior to the regulations being released. The guidelines provide further information for state courts and public and private child welfare agencies on the BIA's suggested instructions on how to implement ICWA and the regulations. This likely completes federal guidance on ICWA that was intended to address 37 years of uneven and sometimes improper implementation of ICWA in state courts and in public and private child welfare agencies. Several leading national Indian organizations, nationally recognized child advocacy organizations, and tribes have come out in support of the new regulations. Opponents of the regulations continue to be private adoption attorneys and the Goldwater Institute along with a few other organizations.

NICWA has developed a webinar and ICWA trainings discussing the new ICWA regulations and will soon be incorporating the new guidelines in these materials and training. If you are interested in obtaining a summary of the regulations, please visit our home page [www.nicwa.org](http://www.nicwa.org) and go to the News and Events section. If you are interested in a webinar or ICWA training for your program or organization, please contact NICWA Events and Training Director Lauren Shapiro at [lauren@nicwa.org](mailto:lauren@nicwa.org).

## **ACF Publishes New Federal Child Welfare Data Regulations that Include ICWA Data Elements**

On December 14, 2016, the Administration for Children and Families (ACF) published [regulations](#) that add new data elements reporting requirements for states and tribes to the Adoption and Foster Care Analysis and Reporting System (AFCARS). Included in the new regulations are over 30 new ICWA data elements that states will need to collect data on and report to ACF. Since ICWA requirements only apply to states, tribes will not be required to report on the new ICWA data elements. States will be required to begin collecting the data on October 1, 2019, they will submit their first data report on May 15, 2020, and twice a year thereafter.

The new AFCARS ICWA data elements include, but are not limited to, the following data elements:

- Did the state agency inquire as to whether the child in custody was an Indian child under ICWA?
- Is the Indian child's domicile on an Indian reservation or Alaska Native Village?
- Did the state court make a determination that ICWA applies?
- Is child in placement a member or eligible in a federally recognized tribe?
- Are the Indian child's parents members of a tribe?
- Was legal notice provided to the child's parents or Indian custodian, or tribe within the required timelines specified under ICWA?
- Did the state court apply ICWA's legal requirements in ordering a removal of an Indian child from their home and placement in foster care?
- Is the placement for the Indian child (foster care, guardianship, or adoptive home) consistent with the ICWA placement preferences?
- Was a good cause determination to deviate from the placement preferences made by the court?
- Were active efforts provided and what type of active efforts were provided (follows ICWA regulations active efforts examples)?
- Did the state court apply ICWA's legal requirements in ordering a termination of parental rights?
- Did the state court approve a petition granting transfer of jurisdiction to the child's tribal court?

In addition to the new ICWA data elements, new data elements related to relative guardianship placements, the child's sexual orientation (for youth 14 years of age and older), and whether the child was a victim of sex trafficking before or while in foster care are included.

While advocates will have to wait three years before being able to access the new data, the development process for these new data elements is a critical time for tribes to begin working with their states. Care needs to be given to how data elements are incorporated within state data collection systems, procedures for state workers on how to collect ICWA data need to be clear and ensure the integrity of the data, and opportunities for sharing the data with tribes should be provided on a regular basis. NICWA is working with our research and government affairs departments to examine opportunities to provide assistance to states and tribes that want to develop the new AFCARS data elements.

## **Legislation**

### **Native American Children's Safety Act Enacted into Law (P.L. 114-165)**

On June 3, 2016, President Obama signed into law a [bill](#) that provides new criminal background check requirements for tribally licensed foster care homes. Before this legislation was enacted into law, tribes were required to piece together criminal background check standards from three separate, but sometimes conflicting, federal laws when licensing or approving tribal foster care homes. The new law amends the Indian Child Protection and Family Violence Prevention Act (25 U.S.C. § 3207 *et seq.*) and streamlines and integrates many of the different federal requirements into one law for tribes. NICWA played a crucial role in helping Senator Hoeven's office address tribal concerns and provide suggestions on how to improve the legislation. The legislation has been supported by NICWA and many tribes over the last two years.

The new requirements, in conjunction with some of the existing requirements under the Indian Child Protection and Family Violence Prevention Act, provide more flexibility and certainty for tribes that are licensing foster care homes, while also increasing protections for Indian children placed in those homes. Below are descriptions of the key requirements in the new law:

- Defines who is required to receive a criminal background check (person 18 years of age or older that resides or is employed in the household where the placement is occurring), including adults who move into the home after the home is licensed.
- Describes the standards under which criminal background checks and checks of child abuse registries must occur before foster care placement is approved or a foster care license issued.
- Exempts tribal emergency placements from having completed criminal background checks before placement.
- Requires that the tribal social service agency meet the requirements under Title IV-E of the Social Security Act (42 U.S.C. § 671(A)(20)(a)) that describe which crimes will prohibit the licensing of a foster care home and placement of a child in that home.
- Requires that the tribal social service agency do periodic recertification of foster care homes, which includes new individuals not present in the home during the previous certification.
- Allows a tribe the flexibility to establish additional requirements that they determine necessary within its existing authority.
- Requires the Secretary of the Department of the Interior to issue guidance, after consultation with tribes, on procedures for criminal background checks, self-reporting requirements for individuals residing in a foster care home, promising practices by tribes with regard to emergency placement procedures, and procedures for certifying compliance with the legislative requirements.

NICWA will be developing resource materials and training on how to use the law in the future and encourages all tribes that are licensing foster care homes to begin learning more about the law and discussing the new requirements with states that they are working with regarding the licensing of tribal foster care homes on tribal lands.

### **Commission on Native American Children Established**

On October 14, 2016, President Obama signed into law the [Alyce Spotted Bear and Walter Soboleff Commission on Native Children Act \(S. 246\)](#). The new law establishes a commission that will examine issues that impact the well-being of American Indian and Alaska Native children over a three-year period. The commission will also make recommendations on how to improve the lives of AI/AN children and related programs at the tribal, state, and federal levels. The commission members will be appointed through a process that allows the President and congressional leadership from both parties to appoint individuals to the commission. A Native American Advisory Committee will also be established to assist the commission and will consist of one representative from each of the Bureau of Indian Affairs regional areas and one Native Hawaiian representative. Issues to be studied by the commission include, but are not limited to, the impacts of concurrent jurisdiction on child welfare systems, federal and private funding barriers, data collection, sustainability of programs, cultural and socioeconomic challenges, examples of successful programs, and interagency coordination issues.

No appointments have been made as of January 16 by Congress or the Administration. One potential barrier was the removal of the provision that provides authority for appropriations to support the operation of the commission (\$2 million). NICWA is working with the NCAI to monitor the progress for appointments and talking with members of Congress and incoming Administration officials that will likely be involved in making appointments.

### **Tribal Adoption Parity Act Doesn't Pass in 114<sup>th</sup> Congress (H.R. 1542 and S. 835)**

The 114<sup>th</sup> Congress adjourned in December of 2016 with no action on the Tribal Adoption Parity Act. NICWA, with several Indian and non-Indian partners, has been pursuing a legislative fix to a gap in federal law that makes adoptive parents adopting in tribal courts ineligible for a federal tax credit. The bipartisan-supported legislation was first introduced in 2014, but was reintroduced for consideration in 2015 and 2016 in both the House and Senate. You can find a copy of the legislation [here](#).

The adoption tax credit was enacted several years ago to help alleviate the financial burden experienced by families adopting children, with a specific focus on supporting those families who adopt a child designated as special needs. Children with special needs are often those children who are hard to place and are not likely to be adopted unless the prospective adoptive family receives financial assistance.

Under current law, the adoptive parents of a special needs child adopted through a tribal court cannot claim the flat special needs adoption credit and must document their qualified upfront expenses. Although tribes

have the authority to arrange and sanction the adoptions of children who are members of the tribe, current tax law does not recognize the authority of tribal courts to determine which of these adopted children are “special needs” for the purposes of the adoption tax credit.

Because this provision of the tax code does not recognize determinations made in tribal court, adoptive parents face additional financial burdens and barriers to adopting Native children designated as special needs. NICWA will be working with Congress to educate them on the benefits of the legislation and have it reintroduced for the 115<sup>th</sup> Congress.

## **Budget**

### **Congress Continues Work on FY 2017 Appropriations and Set Course for FY 2018 Appropriations**

As has been the case almost every year over the last 12 years, Congress has not been able to approve individual appropriations bills for the upcoming fiscal year (FY 2017), which started on October 1, 2016. The path for FY 2017 appropriations was expected to be difficult, especially in an election year. As a result, Congress ended up passing continuing resolutions to keep the government functioning, rather than full appropriations bills. The current continuing resolution bill was the second one passed since September of 2016. The first one extended appropriations until December 9, 2016, and the current one extends FY 2017 appropriations until April 28, 2017. The continuing resolutions maintain funding at FY 2016 levels.

The Republican leadership, who now control both the House of Representatives and Senate, are moving to pass a FY 2017 budget resolution that will provide instructions to the appropriate committees on policy priorities and spending level targets for appropriations. The budget resolution will identify budget priorities such as increases to defense spending, repealing the Affordable Care Act, and reducing spending on domestic programs with a focus on reforms to entitlement programs such as Medicaid and Medicare. Within the budget resolution a process called budget reconciliation will be used to address policy priorities, such as repealing the Affordable Care Act and entitlement reform. The budget resolution will include instructions to the appropriate committees on reducing or increasing federal revenues, spending levels, or changing the debt ceiling. The reconciliation process does not tell the committees how they should achieve the required changes and instead leaves it to the individual congressional committees to select the best method for achieving the budget or policy targets.

In addition to the FY 2017 budget processes, Republican leadership have also said they will use budget reconciliation for the FY 2018 budget process this year. This will most likely occur later in the spring or early summer and could be the best vehicle for more extensive entitlement reform efforts and budget reductions to domestic programs. Once a FY 2017 budget resolution is available for review, NICWA will be doing analysis and provide further updates.

## **Judicial**

### **Lawsuits Filed Challenging the Validity of the New ICWA Guidelines, State ICWA Laws, and the Constitutionality of ICWA**

Four lawsuits were filed in 2015 and additional ones in 2016 challenging ICWA and efforts by the federal and state governments to promote ICWA compliance. One of the well-publicized cases, brought by the Goldwater Institute in Arizona, contains several claims that ICWA is unconstitutional and deprives Indian children and non-Indian foster care and adoptive parents who want to adopt Indian children, of their rights under the constitution. In addition, a number of these lawsuits are challenging state ICWA laws that tribes and states have established over the years that provide similar or higher protections than those contained in ICWA.

These cases are evidence of a larger coordinated attack on ICWA itself, as well as tribal sovereignty in general. In response, NARF, NCAI, NICWA, and the ICWA Appellate Clinic at Michigan State University are coordinating an ICWA Defense Project intended to provide coordinated legal support as well as media assistance on these and other cases which may arise. For more information on these lawsuits and how you and your tribe can help protect ICWA, please review the [ICWA Defense Project Memo](#).

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