



# NICWA

National Indian Child Welfare Association

## Child and Family Policy Update

April 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

#### **Federal District Court in Arizona Dismisses ICWA Lawsuit**

On March 16, 2017, Federal District Court Judge Neil Wake ordered a federal lawsuit challenging the application of the Indian Child Welfare Act (ICWA) upon constitutional grounds be dismissed. Defendants in the lawsuit—the United States Department of Justice (representing the federal government), State of Arizona, Navajo Nation, and Gila River Tribe—previously filed petitions asking the court to dismiss the case. In the judge's order, he stated that the plaintiffs were not able to demonstrate any particular or concrete injury to the Native children or foster or adoptive parents named in the lawsuit based on the application of ICWA. Judge Wake also found that the plaintiffs lacked standing to bring the lawsuit in federal court stating that he felt the federal court was being asked to pre-adjudicate the claims for the state court in that he believed that the state court was the proper jurisdiction to hear the case.

The Goldwater Institute and the other plaintiffs in this case now have a choice to decide whether they want to appeal this ruling by Judge Wake or, for plaintiffs like Goldwater Institute, move on to other ICWA cases at the state level they are involved in. The Goldwater Institute and the American Academy of Adoption Attorneys have been involved in a number of other state level ICWA cases and are likely looking for another case that has potential to receive review by the United States Supreme Court. ICWA Defense Project partners (National Indian Child Welfare Association, Native American Rights Fund, National Congress of American Indians, and the Michigan State University Indian Law Clinic's ICWA Appellate Project) are monitoring these cases and working with different parties in the case that are trying to enforce ICWA's requirements. If you know of a case that you think has this potential, please let us know by contacting David Simmons at the National Indian Child Welfare Association ([desimmons@nicwa.org](mailto:desimmons@nicwa.org)) or Matt Newman at Native American Rights Fund ([mnewman@narf.org](mailto:mnewman@narf.org)).

To learn more about the ICWA Defense Project, lawsuits challenging ICWA, and how you can help protect ICWA, please go to the [ICWA Defense Project website](#) on Turtle Talk.

#### **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 the act 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.

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 trainings. If you are interested in obtaining a summary of the regulations or guidelines, please visit our home page at [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 types 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.

The development process for these new data elements at the state level is going to begin soon and tribes are encouraged to work with their state in this process. 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. NICWA is working 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 who 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 a foster care placement is approved or a foster care license is 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 describes 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 are appointed through a process that allows the president and congressional leadership from both parties to appoint individuals to the commission. On January 20, 2017, before President Obama left office, he appointed Anita Fineday, Managing Director for the Indian Child Welfare Program at Casey Family Programs, and Russ McDonald, President of United Tribes Technical College, to the commission. No congressional appointments have been made as of March 21, 2017.

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.

One potential barrier to implementation of the commission was the removal of the provision that provides authority for appropriations to support its operations (\$2 million). NICWA is working with NCAI to monitor the progress for appointments, and is talking with members of Congress and incoming administration officials that will likely be involved in making appointments.

### **Budget**

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

As has been the situation previously, Congress has not been able to approve individual appropriations bills for the current 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 individual appropriations bills. The

current continuing resolution 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 enact a FY 2017 budget. Normally, the House and Senate would first pass budget resolutions that provide the individual committees within the House and Senate with instructions on budget priorities and budget targets for different program areas. However, this year the Congress has modified its normal process to speed through the FY 2017 budget and begin work on the FY 2018 budget. Most federal budget analysts believe the Senate and House will approve another continuing resolution for FY 2017 appropriations to keep the government functioning through September 30. The process for FY 2018 appropriations, which will also happen this year, will also use the budget reconciliation process (see description below) and will likely contain more emphasis on cuts to discretionary programs and entitlement reform in programs like Medicaid.

The budget reconciliation process this year does not tell the individual committees how they should achieve the required budget changes and instead leaves it to the individual congressional committees to select the best method for achieving the budget or policy targets. The budget reconciliation process has advantages and disadvantages. One advantage is the budget reconciliation process is not subject to the usual Senate rules that require 60 votes to block a filibuster of legislation and instead only requires a simple majority of 51 votes making it easier to pass legislation in the Senate where the margin for the majority is smaller with only 52 Republican senators. The disadvantage is the reconciliation process is limited to tax and budget issues and cannot be used to change non-budget related mandates authorized under federal laws. The limited scope means that a combination of processes (budget reconciliation and regular legislative process) must be used to achieve full reform of the Affordable Health Care Act, for example.

In addition to the FY 2017 budget processes, Republican leadership has 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.

The president submitted his "skinny budget" for FY 2018 on March 16, 2017. It contains a high-level blueprint of his budget priorities for FY 2018. The blueprint only addresses discretionary programs, which does not include mandatory and entitlement programs where the funding levels are already set. The blueprint outlines increases or decreases to federal discretionary programs comparing the changes to FY 2017 levels in operation in the current continuing resolution for FY 2017. The president's full FY 2018 budget, which will likely contain details on mandatory and entitlement programs as well as tax policy, is expected in May of 2017.

The president's FY 2018 budget blueprint proposes major cuts in domestic or non-defense programs (\$54 billion) to offset increases in defense spending (\$54 billion). In addition, the Department of Veterans Affairs and Department of Homeland Security would also see significant increases. This proposal would break the statutory budget caps on defense and non-defense spending adopted by Congress in 2011 and require Congress to amend the 2011 law that establishes the budget caps, with 60 votes needed in the Senate to accomplish this. For this and several other reasons, the reception to the president's budget in the Congress has not been favorable in many regards and will likely mean that this budget proposal will not be adopted in its current form. While the president's skinny budget does not provide specific details for many federal programs, the proposal has a consistent theme of targeting programs for budget cuts that are considered outdated, duplicative, or ineffective. In addition, the budget proposal contains language in the Department of Health and Human Services section that lists Indian Health Services as a top priority, but does not provide specific funding levels being recommended. In the Department of Interior section where Bureau of Indian Affairs programs are found, the administration states their support for tribal sovereignty and self-determination, but also contains language that suggests cuts to recent demonstration projects and programs that only serve a few tribes are intended. To receive more details on the president's budget, advocates will likely have to wait until May when the full FY 2018 budget is expected.

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