PUBLIC SUBMISSION

As of: September 14, 2020
Received: April 06, 2018
Status: Posted
Posted: April 10, 2018
Tracking No. 1k2-92fu-fc81
Comments Due: June 13, 2018
Submission Type: Web

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0002
Comment on FR Doc # 2018-05042

Submitter Information

Name: Jessica Ullrich
Address: 99504
Email: jessica_ruck@hotmail.com

General Comment

From what I heard on a teleconference call yesterday, the Children's Bureau believes it shouldn't have to implement ICWA data collection as was agreed upon almost 2 years ago because:

1) It's too much of a burden on frontline staff to input ICWA data into state databases.
2) The Children's Bureau believes they would be collecting data for the Department of Interior since ICWA falls under the Bureau of Indian Affairs.
3) The Children's Bureau doesn't believe they have the expertise on ICWA compliance- because that responsibility falls on BIA.

I believe the collection of ICWA AFCARS data is the responsibility of the Children's Bureau because:

1) The federal legislation of the Indian Child Welfare Act mandates state agencies to comply with the law. The Children's Bureau should be responsible for evaluating whether this is happening, just as it does for other federal policies. You need ICWA AFCARS data to measure this.
2) Federally funded state agencies are removing tribal children, not the Bureau of Indian Affairs. How is BIA supposed to collect it's own ICWA compliance data, when tribes have zero access to state databases?
3) If it's too much of a burden on the state child protection caseworkers to enter this data, then the federal government needs to provide more resources to take the burden off frontline staff to do their jobs. Fund more frontline worker positions in states!! Until that happens, don't penalize states for non-compliance, but reward states that do what they are supposed to do.

Thank for you for reading my comments.
Jessica Saniguq Ullrich

As of: September 14, 2020
Received: April 14, 2018
Status: Posted
Posted: April 16, 2018
Tracking No. 1k2-92l6-hs95
Comments Due: June 13, 2018
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0003
Comment on FR Doc # 2018-05042

Submitter Information

Name: Joe Moran

General Comment

Hello, we are Joe Moran and Sam (Yunqu Li). We are taking a course on regulation at Indiana University, Kelley School of Business. Our assignment is to find a regulation that we thought could use changing an comment on it. We decided on this proposed regulation, Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking. The part of this proposed regulation that we deemed to be inadequate is the statement in the background section, "Number of foster children identified as sex trafficking victims before entering and while in foster care." The reason we believe this should be changed is because sex trafficking is too narrow to address all problems related to the trafficking of children in the United States. The term "sex trafficking" should be changed to simply say "trafficking". We believe the issue of child labor trafficking is crucial for the foster care system to be able to track. The problems of child trafficking in the United States occur in not only sex trafficking, but also many other industries, such as agriculture, manufacturing, and domestic work. For more information on these trafficking issues please refer to our source, https://humantraffickinghotline.org/resources/child-labor-trafficking-united-states.
Thank you in advance for your consideration.
- Joe and Sam

As of: September 14, 2020
Received: May 04, 2018
Status: Posted
Posted: May 08, 2018
Tracking No. 1k2-92y4-635k
Comments Due: June 13, 2018
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0004
Comment on FR Doc # 2018-05042

Submitter Information

Name: Lorraine Romero
Address: 91750
Email: lorraine.romero@laverne.edu

General Comment

I am a student at La Verne University in California. I oppose the new requirement of the Adoption and Foster Care Analysis and Reporting System.
The new requirements will cause a significant burden to reporting agencies. The revised data elements of:
timely plans to transition out of foster care and the frequency of caseworker visits;
the childs educational level, educational stability and involvement with special education; and
According to Childrenrights.org, on any given day, there are nearly 428,000 children in foster care in the United States. To report have to report frequency of caseworker visits, foster youths school placements and changes will greatly impact the caseworkers, already strenuous workload.
If collected manually and reported via spreadsheets this will be many hours of manual labor. Not to mention, as in many cases of reporting requirements, data collected through means of reports often takes so long to decipher because of multiple ways to report. By what means will this data be collected and analyzed? In the frequently asked questions provided for this rule about technical assistance (TA) the response given The Childrens Bureau will provide TA through site visits and AFCARS assessment reviews, conference calls with individual title IV-E agencies, technical bulletins, and questions and answers is not a sufficient answer. Technical assistance needs to be specifically outlined because the amount of data being requested will cause many systems to change and without clear guidance the data collection maybe compromised.

As of: September 14, 2020
Received: May 08, 2018
Status: Posted
Posted: May 08, 2018
Tracking No. 1k2-9313-nfd2
Comments Due: June 13, 2018
Submission Type: API

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0005
Florida Department of Children and Families Comment

Submitter Information

Name: Keith Perlman
Address: 32399
Email: keith.perlman@myflfamilies.com
Organization: Florida Department of Children and Families

General Comment

Attached are Florida's comments to this NPRM

Attachments

Florida

State of Florida
Department of Children and Families

Rick Scott
Governor

Mike Carroll
Secretary

May 4, 2018

Kathleen McHugh,
United States Department of Health and Human Services,
Administration for Children and Families, Director, Policy Division,
330 C Street SW,
Washington, DC 20024

Re: RIN: 0970-AC72

Dear Ms. McHugh:

Thank you for the opportunity to provide additional comments related to the cost and burden estimates for implementation of the AFCARS rule. Florida believes our original comments (ACF-2015-0001-0108 and ACF-2015-0001-0129) remain pertinent. The information below should be considered in concert with, and in addition to those original comments.

In preparation for implementing the AFCARS rule Florida contracted with a third-party vendor for a detailed feasibility study to identify the full scope of technology, training, policy, and practice requirements needed to align Florida's child welfare practice with the new AFCARS rule, and the financial impact of implementing the rule. Details from this study are incorporated below.

Data Collection:

The new AFCARS requirements will require additional time on the part of Child Welfare Professionals to collect and report information properly. Most of the additional time will be for Out-of-Home Care cases, when children are in foster care.

Some children, such as those eligible under the Indian Child Welfare Act (ICWA), require increased collection time. In addition, the estimate includes the new data points that need to be collected as the child enters out-of-home care, while others need repeat collection to ensure that the data still is valid. Some of these repeat collection requirements can be passively collected (i.e. the case worker does not need to routinely inquire about the data collection and can expect to be alerted if the situation changed) while others must be actively collected, with a case worker inquiring at regular intervals about certain data elements. Additionally, ad-hoc collecting may be required to external events, such as court dates or legal challenges. These events cannot be readily planned for. These factors were considered when estimating the time required to collect the new data elements.

Understanding there will be variability, Florida applied the ACF estimate of 3 hours per case[1], at $23.88 per hour[2] to the Florida caseloads to determine the estimated cost burden of data

[1] "Adoption and Foster Care Analysis and Reporting System", Fed. Reg. Vol 81, No 240, pp 90568 (December 14, 2016)
[2] "Adoption and Foster Care Analysis and Reporting System", Fed. Reg. Vol 81, No 240, pp 90567-90568 (December 14, 2016)

collection. The results are an additional cost of **$6,548,539** over the first four years of the implementation of the rule. This excludes any additional data collection costs associated with the ICWA requirements. The breakdown for FFY's 2020 -2023 is as follows:

Federal Fiscal Year	Average Number of Cases already in Out of Home Care that need to be updated for the new AFCARS data elements	Average Number of Cases entering Out of Home Care that need to be collected for the new AFCARS data elements	Number of Hours [Cases x 3 hrs.]	Estimated Costs [hrs. x 23.88]
FFY 2020	23,597	16,953	121,650 Hours	($2,905,000)
FFY 2021	0	16,953	50,859 Hours	($1,214,513)
FFY 2022	0	16,953	50,859 Hours	($1,214,513)
FFY 2023	0	16,953	50,859 Hours	($1,214,513)

Training:
Aligning with this rule will require Florida to provide additional training to newly hired Case Managers, Adoption Specialists and Licensing Specialists and Child Protective Investigators; and will require Florida to train current case workers and Child Protective Investigators on how to use the newly modified system and appropriately collect the new AFCARS data.
Florida estimates that there are 8,500 current individuals who will need an estimated 12 hours of in-service training on the updated system; and it is estimated there will be an average of 2,125 new hires who will need 4 hours of pre-service training each year after the initial year.
There are also administrative tasks associated with training personnel on the AFCARS requirements (e.g. reviewing instructions, developing the training and manuals), and training personnel on AFCARS requirements. The results are an additional cost burden of **$3,044,700** over the first four years of the implementation of the rule. The breakdown for FFY's 2020 -2023 is as follows:

Federal Fiscal Year	In-Service Training Hours per Staff Member	Pre-Service Training Hours per Staff Member	Number of Staff	Number of Hours [Hours x Staff]	Estimated Costs [hrs. x 23.88[3]]
FFY 2020	12	0	8,500	102,000 Hours	($2,435,760)
FFY 2021	0	4	2,125	8,500 Hours	($202,980)
FFY 2022	0	4	2,125	8,500 Hours	($202,980)
FFY 2023	0	4	2,125	8,500 Hours	($202,980)

[3] "Adoption and Foster Care Analysis and Reporting System", Fed. Reg. Vol 81, No 240, pp 90567-90568 (December 14, 2016)

Technology

Florida Safe Families Network (FSFN) is Florida's Child Welfare Information System. Extending FSFN to incorporate the additional elements for AFCARS will require changes to the following FSFN components:

Application Web Servers

This component contains the screens and navigation logic associated with the FSFN application. New AFCARS data elements will need to be incorporated into the screens, associated data validation and field navigation logic. In cases where new screens are required, the screen navigation logic will need to be updated to incorporate the screen into the application flow.

Reporting Servers

This will involve incorporating new AFCARS data elements into new, or existing, FSFN reports, and publishing these modifications to the appropriate File Servers. SAP Business Objects is currently being used for FSFN reporting.

Data Extract, Transform, and Load (ETL)

ETL is used primarily to move data within different FSFN databases and some external organizations. ETL is used to take data from FSFN's transactional databases and move them to reporting databases. This is done to isolate the production system from potential reporting performance issues. The reporting and transactional databases are designed considerably different based on their reporting and transactional purposes. ETL is used to handle the transformation of the transactional data structure into the data structure used to support reporting. The addition of AFCARS data elements will require changes to both the transactional and reporting data structures. The ETL will need to be modified to incorporate these changes.

Batch Processing

Batch processing typically involve activities that can be performed outside of peak hours. These might involve pushing copies of databases and reports out to the CBC's. The AFCARS updates should have minimal impact on FSFN Batch Processing but will require updates.

Databases

There are five FSFN databases. The new AFCARS elements will need to be added to each of those databases. This will require some database design effort to determine if the new columns are added to existing tables, or if new tables may be required. These new data elements would also need to be documented in the data dictionary.

The following is a list of the updates that would need to be made to FSFN to accommodate the new AFCARS requirements. The results are an estimated cost of **$8,946,630** over two years leading up to the implementation of the rule.

#	Title	LOE (hours)	Assumptions
1	Person Management (Existing Page)	4,200	This assumes modifications to the Basic tab, Additional tab and AFCARS/ Other Participant Information (this includes repeating groups to store historical information).
2	ICWA Child/ Adult (New Page)	4,320	New ICWA Page to capture all the ICWA Information for both children and adults.
3	Adoption Information (Existing Page)	578	Adoption Information is only impacted related to capturing Adoption Dissolutions and currently only pre-fills if the child was previously adopted from Person Management.
4	Title IV-E Adoption Eligibility (Existing Page)	2,620	Title IV-E Adoption Eligibility is only impacted related to capturing Adoption Dissolutions. There isn't detail as to what could change if impacted.
5	Case Plan Worksheet (Existing Page)	578	Case Plan Worksheet is only impacted related to the school proximity.
6	Young Adult Case Plan Worksheet (Existing Page)	578	Young Adult Case Plan Worksheet is only impacted related to the Transition Plan information for Element 1355.44(f)(8).
7	Education (Existing Page)	1,579	Adding AFCARS related Education elements to the existing system.
8	Title IV-E Foster Care Eligibility (Existing Page)	4,120	Title IV-E Foster Care Eligibility is impacted if Teen Parent check box changes are made, which are used for deeming calculations. In addition, if modifications are made to Removal Home Information on OHP, this may or may not impact Title IV-E FC Eligibility.
9	Legal Page (Existing Page)	578	This is only for reference value changes.
10	Medical Mental Health (Existing Page)	1,579	Adding AFCARS related MMH elements to the existing FSFN pages.
11	Out of Home Placement (Existing Page)	4, 120	Adding elements to capture Out of Home Placement information.
12	Person Provider (including Licensing) (Existing Pages)	4,120	This is assuming that Marital Status will be modified on the Person Provider page, as well as a modification to Licensing.
13	Organization Provider (Existing Page)	578	This is only for reference value changes.
14	SCHIP (New Page)	4,320	Adding elements to capture information on State Children's Health Insurance Program for AFCARS.
15	General TANF (Existing Page)	2,620	General TANF and Adoption TANF are being modified related to the Pre-Relative Caregiver Cash Assistance Program
16	Adoption TANF (Existing Page)	2,620	General TANF and Adoption TANF are being modified related to the Pre-Relative Caregiver Cash Assistance Program
17	Maintain Case (Existing Page)	578	This is only for reference value changes.
18	Child Investigation (Existing Page)	2,620	Child Investigation is being modified to capture if Law Enforcement was notified related to Human Trafficking, including a date field. This LOE includes restructuring the

#	Title	LOE (hours)	Assumptions
			group box on the Allegations/ Findings tab because there is no real estate currently.
19	AFCARS Online Exceptions (Existing Page)	4,320	Adding information for AFCARS Online Exception.
20	ETLs (including Data Warehouse and Data Mart, AFCARS file submission)	4,120	Data Dictionary and file submission is accounted for within this LOE for Functional.
21	BOE (Universes and Exception Report)	4,120	Universe Document and Exception Report is accounted for within this LOE for Functional.
22	CAMS Interface	1,579	Adding AFCARS elements to interface.
23	NYTD Interface	4,079	Adding AFCARS elements to interface.
24	NCANDS Interface	2,579	Adding AFCARS elements to interface.
25	Templates	4, 320	This is inclusive of all templates impacted by any of the modules listed above, as well as Court Involved Case Plan and Judicial Review.

Conclusion:

In total, the estimated cost for implementing the new federal AFCARS rule in Florida is over **$18,500,000** in state and federal funding over the first four years of implementation. While Florida sees great value in collecting pertinent information on children and families in the child welfare system, we believe the system- including our most vulnerable children and families, may not only not benefit from these requirements, but may be harmed as critical resources are diverted to pay for the necessary changes. This, coupled with concerns about the impact some of these requirements may have on the caseworker's relationship with the children and families they are working to protect, makes Florida a strong advocate for revisiting and rewriting this rule.

Florida appreciates the opportunity to respond to this ANPRM, and is willing to participate on any workgroups or in future meetings related to the development of a revised AFCARS rule.

Sincerely,

JoShonda Guerrier
Assistant Secretary for Child Welfare
Florida Department of Children and Families

As of: September 14, 2020
Received: April 30, 2018
Status: Posted
Posted: May 08, 2018
Tracking No. 1k2-9313-8a9u
Comments Due: June 13, 2018
Submission Type: E-mail

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0006
Iowa Dept. of Human Services AFCARS response

Submitter Information

Name: Janee Harvey
Address: 50319
Organization: Iowa Dept. of Human Services

General Comment

See Attached

Attachments

Iowa Dept. of Human Services

1. Identify the data elements, non-ICWA-related, that are overly burdensome for state and tribal title IV-E agencies and explain why. Please be specific in identifying the data elements and provide a rationale for why collecting and reporting this information is overly burdensome. If possible, provide specific cost and burden estimates related to the following areas:

There are approximately 10,000 children who are in Iowa's foster care system annually. The following non-ICWA related elements are not included in our child welfare information system. It would take approximately 1-hour per child to collect and enter this information (minimum, 10,000 hours of data collection and input, at $50/hour = $500,000). This is not inclusive of the amount of IT staff time that would be dedicated to developing business rules and writing the code necessary to support data collection. Because the actual request has not been submitted to our IT department for a formal cost estimate, the best approximate is that the following elements would take a minimum of 5,000 hours for completion. The hourly rate for the IT programmer is $85/hour, so would cost approximately $425,000. Finally, the amount of time and resources needed to train staff on collecting and entering the non-ICWA related items would take approximately 20 hours for the training development and associated materials (20 hours x $65 = $1300) and direct staff would each receive 2 hours in training (500 staff x 2 hours x $50 hour = $50,000). The total fiscal burden for Iowa for the non-ICWA related items is approximately $976,300.

Child's sexual orientation
Date/Time of Health Assessment
Developmental Delay/Disability
School Enrollment/Education stability/level
Pregnant as of the end of the report period
Ever fathered or bore children
Child and his/her child(ren) placed together at any point during the report period?
Prior adoption date
Prior guardianship date
Siblings in foster care
Siblings in living arrangement
Runaway/whereabouts unkown
Additional categories of abuse and neglect
Living Arrangement and Provider Information
Permanency Planning
General Exit Information
Child's relationship to adoptive parents

2. Previously, we received comments regarding burden and the system changes needed to report the ICWA-related data elements of the 2016 SNPRM. We would like to receive more detailed comments on the specific limitations we should be aware of that states will encounter in reporting the ICWA-related data elements in the final rule. Please be specific in identifying the data elements and provide a rationale for why this information is overly

burdensome. If possible, provide specific cost and burden estimates related to the following areas:

There are approximately 200 children who are in Iowa's foster care system annually who are known to have ICWA status. The ICWA related elements in the new AFCARS rules are not included in our child welfare information system. It would take approximately 1-hour per child to collect and enter this information (minimum, 200 hours of data collection and input, at $50/hour = $10,000). This is not inclusive of the amount of IT staff time that would be dedicated to developing business rules and writing the code necessary to support data collection. Because the actual request has not been submitted to our IT department for a formal cost estimate, the best approximate is that the following elements would take a minimum of 4,500 hours for completion. The hourly rate for the IT programmer is $85/hour, so would cost approximately $382,500. Finally, the amount of time and resources needed to train staff on collecting and entering the ICWA related items would take approximately 20 hours for the training development and associated materials (20 hours x $65 = $1300) and direct staff would each receive 2 hours in training (500 staff x 2 hours x $50 hour = $50,000). The total fiscal burden for Iowa for the ICWA related items is approximately $433,800.

a. Reason to know a child is an "Indian Child" as defined in the Indian Child Welfare Act.
b. Application of ICWA.
c. Court determination that ICWA applies
d. **Removals under ICWA.**
e. **Notification - ICWA**
f. **Voluntary/Involuntary termination/modification of parental rights under ICWA**
g. **First/Second adoptive parent or guardian tribal membership.**
h. **Request to transfer to tribal court - ICWA**
i. Denial of transfer – ICWA

In conclusion, the amount of resources that would be needed to develop our Child Welfare Information system, train staff and apply staff time to data collection does not warrant the benefit of requiring collection of data on these items. Iowa, like many states, is in the process of developing and designing our CCWIS to support our work force and ensure the data we are collecting is of sound quality. The current AFCARS rules being proposed would definitively impeded our ability to move forward with developing our future system. States are also in the process of dedicating resources and time to prepare for major system changes expected due to the Family First Prevention Services Act.

As of: September 14, 2020
Received: May 10, 2018
Status: Posted
Posted: May 15, 2018
Tracking No. 1k2-935v-w98v
Comments Due: June 13, 2018
Submission Type: E-mail

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0007
Ho-Chunk Nation ANPRM comments

Submitter Information

Name: Amanda WhiteEagle
Address: 54615
Organization: Ho-Chunk Nation Department of Justice

General Comment

See Attached

Attachments

Ho-Chunk Nation

Ho-Chunk Nation Department of Justice
Amanda L. WhiteEagle, Attorney General
W9814 Airport Road, P.O. Box 667, Black River Falls, WI 54615
Phone (715) 284-3170 / (800) 501-8039 - FAX (715) 284-7851

May 10, 2018

Attn: Kathleen McHugh
United States Department of Health and Human Services
Administration for Children and Families
Policy Division
330 C Street SW
Washington, DC 20024

Via electronic correspondence at: *CBComments@acf.hhs.gov*

Re: RIN: 0970-AC72 **Adoption and Foster Care Analysis and Reporting System;** Advance Notice of Proposed Rulemaking (3/15/2018)

Dear Madam,

The Department of Justice of the Ho-Chunk Nation submits these comments on the Advanced Notice of Proposed Rulemaking regarding the Adoption and Foster Care Analysis Reporting System (AFCARS) for Title IV-B and Title IV-E as they relate to the Indian Child Welfare Act of 1978 (ICWA). Data points specific to ICWA were incorporated into AFCARS as detailed in the Final Rule published on December 14, 2016.

General Comments:

The data collection requirements of the Final Rule are consistent with ACF's statutory mission.

Section 479 of the Social Security Act mandates Health and Human Services collect national, uniform, and reliable information on children in state care. Section 474(f) of the Act requires HHS to impose penalties for non-compliant AFCARS data. Section 1102 of the Act instructs the Secretary to promulgate regulations necessary for the effective administration of the functions for which HHS is responsible under the Act.

The Final Rule, which ACF promulgated pursuant to these statutory requirements, will ensure the collection of necessary and comprehensive national data on the status of American Indian/Alaska Native (AI/AN) children for whom ICWA applies and historical data on children in foster care. Thus, the Final Rule's data collection elements are necessary to ACF's statutory mission under Section 479 of the Act.

The administration provided all interested parties with ample notice and opportunities to comment on the final rule.

Tribes, tribal organizations, and tribal advocates have long sought the inclusion of

ICWA-related data points in the AFCARS. The initial rules were changed due to comments by these entities and others after reviewing the Administration of Children and Families' February 9, 2015 proposed rule. On April 2, 2015 the Agency issued a Supplemental Notice of Proposed Rulemaking (SNPRM) changing certain data elements. Yet another SNPRM was issued on April 7, 2016. Specifically, the Agency sought comments on the inclusion of the ICWA data points in both the April 2015 Intent to Publish a SNPRM, as well as the April 2016 SNPRM. Ultimately, the Final Rule was published on December 14, 2016 (Final Rule), and included the ICWA data elements.

The Final Rule thoroughly responded to comments on both the benefits and burdens of the proposed regulatory action. Given the multiple opportunities to comment throughout this time period, any additional collection activity is unnecessary. In addition, tribes, tribal organizations, and advocates received notice of all of these opportunities, and with ample time to comment on this vital and important rule change. In fact, our Office provided comments in response to the SNPRM.

States also had ample opportunity to participate. As the Final Rule explains in detail, ACF engaged in robust consultation with states and responded to their concerns, for example, by streamlining many data elements. 81 Fed. Reg. 90524, 90565-66. States had at least six different opportunities to raise their concerns, which the ACF considered and addressed fully. 81 Fed. Reg. at 90566.

States are already in the process of implementing these changes.

Since these regulations have been effective for approximately fifteen months, all states should be in the process of implementing them. We are aware, for example, that California, a state with 109 federally-recognized tribes and the state with our third largest population after Wisconsin (5,443 enrolled members) and Minnesota (492 enrolled members), is already well under way with its implementation efforts, having relied on the final rule. At this stage, any modification of the data collection requirements would be a waste of finite state child welfare resources, which itself is an additional burden.

These regulations are important to tribes, tribal families, and state child welfare systems.

The regulations themselves—in response to the comments from stakeholders across the country—describe the importance of these changes. As stated in the December 2016 Final Rule, 81 Fed. Reg. 90524, 90527:

> Overall, tribes, organizations, states, and private citizens supported our mission to collect additional information related to Indian children as defined in ICWA. Moreover, some states, tribes, national organizations, and federal agencies have stated that ICWA is the ''gold standard'' of child welfare practice and its implementation and associated data collection will likely help to inform efforts to improve outcomes for all children and families in state child welfare systems.
>
> Generally, tribes, organizations representing tribal interests, national child welfare advocacy organizations, and private citizens fully

> support the overall goal and purpose of including ICWA-related data in AFCARS, and the data elements as proposed in the 2016 SNPRM. These commenters believe that collecting ICWA-related data in AFCARS will:
>
> 1. provide data on core ICWA requirements such as ''active efforts'' and placement preferences, as well as assess how the child welfare system is working for Indian children as defined by ICWA, families and communities;
> 2. facilitate access to culturally-appropriate services to extended families and other tribal members who can serve as resources and high-quality placements for tribal children;
> 3. help address and reduce the disproportionality of AI/AN children in foster care; and
> 4. provide avenues for collaboration between states and tribes that are more meaningful, and outcome driven, including improved policy development, technical assistance, training, and resource allocation as a result of having reliable data available.
>
> Overall, tribal commenters and national child welfare advocacy organizations believe that collecting ICWA-related data in AFCARS is a step in the right direction to ensure that Indian families will be kept together when possible, and will help prevent AI/AN children from entering the foster care system. Many of the tribal commenters that supported the 2016 SNPRM also recommended extensive training for title IV–E agencies and court personnel in order to ensure accurate and reliable data.

Other federal reports have demonstrated the need for quality national data to assess states' efforts in implementing ICWA. See Government Accountability Office, *Indian Child Welfare Act: Existing Information on Implementation Issues Could be Used to Target Guidance and Assistance to States*, GAO-05-290 (Apr. 4, 2005) http://www.gao.gov/products/GAO-05-290.

Nothing has changed since ACF made clear in its final rule that data collection is necessary to protect Indian children and families and their tribes. There remains a pressing need for comprehensive national data on ICWA implementation. Congress has not amended the Act's data collection provisions. And there have been no changes in circumstances that would alter the burdens or benefits of the final rule's data collection requirements.

These regulations are important to the Ho-Chunk Nation.

While the data will most certainly be of use for states in increasing their ICWA compliance, the states are not be the only ones to benefit. Tribes likewise have significant limitations in tracking tribal members and their children across the country- which in

turn makes it difficult to begin to understand how best to collaborate with specific states.

Take the Ho-Chunk Nation for example. The Ho-Chunk Nation does not have a "reservation," or a contiguous land base, but instead has pockets of trust lands with the largest concentrations of Ho-Chunk members residing within 15 counties in central Wisconsin and the urban areas of Minneapolis and St. Paul, Minnesota; Madison and Milwaukee, Wisconsin; and Chicago, Illinois. As of March 2017, there were a total of 7,720 tribal members. Of those, 2,277 lived outside of Wisconsin - in every state except Maine and Rhode Island. Our tribal members are extremely transient. As such, national data continues to be urgently needed.

Our October 2016 enrollment data for minors showed that there were 1,835 enrolled minors within the Ho-Chunk Nation. A total of 1,403 Ho-Chunk Nation minors lived in Wisconsin and 432 resided outside of the state. In April of 2018, our Social Services Department was involved in 203 cases, so roughly 17.7% of those 1,403 children were in out-of-home care.

April 2018
Ho-Chunk Nation Tribal Court Case Placements

Type	TOTAL
Relative	34
Non-Relative	22
Runaway	1
Treatment Foster Care	15
Residential/Treatment	3
Other	1
TOTAL	**76**

April 2018
Ho-Chunk Nation ICWA Case Placements

Type	TOTAL
In-Home	**70**
Relative	**16**
Non-Relative	**36**
Runaway	**1**
Treatment Foster Care	**1**
Residential/Treatment	**2**
Other	**1**
TOTAL	**127**

However, we know that there continues to be non-compliance by states in ICWA matters.

We know these numbers do not truly reflect an accurate number of ICWA cases. By mandating data collection of ICWA compliance, it will be one more reminder to the states that ICWA is an important federal statute, accompanied by equally important federal regulations, that must be followed. Thereby, allowing us to intervene in more actions affecting our children.

Tribes have relied on the final rule.

Tribes have long sought data points regarding the implementation of ICWA. This has included advocacy on local, state, and federal levels. With the promulgation of the final rule in December of 2016, tribes largely ceased advocacy efforts to mandate data collection, instead refocusing tribal resources toward working collaboratively with their governmental partners to implement the data elements listed in the final rule. To this end, some tribes have worked to develop and update agreements to reflect the data elements in the final rule and the 2016 BIA ICWA Regulations, since a goal of both is to increase uniformity.

The ANPRM is arbitrary and capricious where it seeks only information on burdens.

This ANPRM arbitrarily focuses on collecting information about the burdens-without considering the benefits. As required by law, the final rule conducted a careful analysis of the benefits and burdens, and appropriately amended the proposed rule to achieve a balanced final rule.

The agency "determined in the final rule that the benefits outweigh the burden associated with collecting and reporting the additional data." 81 Fed. Reg. at 90528. The agency explained how its weighing of the benefits and burdens led it to make certain changes to its proposal. For example: as stated in the final rule at 81 Fed Reg. 90528:

> In response to state and tribal comments suggesting congruence with the BIA's final rule, we revised data elements in this final rule as appropriate to reflect the BIA's regulations including removing requirements that state title IV–E agencies report certain information only from ICWA-specific court orders. These changes should allow the state title IV–E agency more flexibility, alleviate some of the burden and other concerns identified by states, help target technical assistance to increase state title IV–E agency communication and coordination with courts, and improve practice and national data on all children who are in foster care.

There have been no material changes in circumstances justifying the agency's new approach. The executive order is not a sufficient basis for the agency to act, as the executive order itself is arbitrary and unlawful where it provides an insufficient basis for reasonable decision-making relaying solely on an examination the burden of regulations without the required balancing of benefits. Additionally, the executive orders to fail to provide justification to deviate from the statutory requirement for regulations.

The foregoing are responses to the Questions for Comment provided in the ANPRM:

1. Identify the data elements, non-ICWA-related, that are overly burdensome for state and tribal title IV-E agencies and explain why. Please be specific in identifying the data elements and provide a rationale for why collecting and reporting this information is overly burdensome.

No response.

2. Previously, we received comments regarding burden and the system changes needed to report the ICWA-related data elements of the 2016 SNPRM. We would like to receive more detailed comments on the specific limitations we should be aware of that states will encounter in reporting the ICWA-related data elements in the final rule. Please be specific in identifying the data elements and provide a rationale for why this information is overly burdensome.

The ANPRM requests IV-E states and tribes to provide the number of children in foster care who are considered Indian children as defined in ICWA. However, it is specifically due to the lack of a national data reporting requirement, that any number provided in response to this question would be significantly inaccurate. This speaks to the critical importance of the ICWA-related data points – without a data reporting requirement, many states simply do not appropriately track Indian children in their child welfare system, let alone the individual ICWA-related data points.

3. Previously, we received comments that particular data elements did not lend themselves to national statistics and were best assessed with qualitative methods such as case review. Please provide specific recommendations on which data elements in the regulation to retain that are important to understanding and assessing the foster care population at the national level. Also, provide a rationale for your suggestion that may include its relevance to monitor compliance with the title IV-B and IV-E programs or another strong justification for using the data at the national level.

As discussed above, there has been ample opportunity for comment and this additional ANPRM is itself both unlawful as crafted and is a waste of finite resources. Tribes and states properly relied on the final rule in working toward implementation for nearly a year and a half. Any modification to the existing data points frustrate those efforts. This comes at the expense of the health, safety and welfare of not only Indian children, their families, and their tribes, but the child welfare system at-large where a modification of the final rule would cost states additional resources to start anew.

4. Previously we received comments noting concerns with variability in some of the data elements across states and within jurisdictions. Please provide specific suggestions to simplify data elements to facilitate the consistent collection and reporting of AFCARS data. Also, provide a rationale for each suggestion and how the simplification would still yield pertinent data.

In the absence of a national data reporting requirement, it is guaranteed there will be variability with data elements frustrating a stated purpose of the 2016 BIA ICWA Regulations, to establish uniformity of application throughout the nation. **The need to eliminate the data variability is precisely why it is important to have a national data**

collection standard. It will assist HHS/ACF efforts to support states in properly implementing ICWA by having targeted, data-driven identification areas where states need support the most.

5. Previously we received comments questioning the utility, reliability, and purpose of certain data elements at the national level. Provide specific recommendations on which data elements in the regulation to remove because they would not yield reliable national information about children involved with the child welfare system or are not needed for monitoring the title IV-B and IV-E programs. Please be specific in identifying the data elements and provide a rationale for why this information would not be reliable or is not necessary.

Each of the ICWA-related data points are tied to existing federal law and regulation and are necessary to monitor and support title IV-B and IV-E programs. Each of the ICWA-related data points are critical. Further, as discussed above, ICWA is the "gold standard" of child welfare and ensuring compliance with this federal law informs how the existing child welfare system may improve in whole.

For the foregoing reasons, we strongly support each of the ICWA-related data points and believe, as your agency did in publishing the Final Rule in 2016, the benefits of this data collection outweighs any burden.

In closing, the Indian Child Welfare Act is widely considered the "gold standard" of child welfare, and a refinement of family reunification objectives mandated by nearly every state. Any hindrance or stoppage of ICWA data point collection significantly impacts tribal children, families, and county agencies trying to comply. In the interest of protecting our children and families, we respectfully submit these comments.

Sincerely,

Amanda L. WhiteEagle, Attorney General
Ho-Chunk Nation

As of: September 14, 2020
Received: May 18, 2018
Status: Posted
Posted: May 22, 2018
Tracking No. 1k2-937q-1rdl
Comments Due: June 13, 2018
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0008
Comment on FR Doc # 2018-05042

Submitter Information

Name: Summer Voorhies

General Comment

I think this is great, Foster & adopted children may want to know about their biological parents & everybody deserves to know. Thats if they know they are adopted. Which a majority of them do!!! Also, I think the world does need to know how many foster children there are around the United States because there is a lot more than people think.

As of: September 14, 2020
Received: May 22, 2018
Status: Posted
Posted: May 22, 2018
Tracking No. 1k2-93ag-sd03
Comments Due: June 13, 2018
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0009
Pueblo of Pojoaque comments

Submitter Information

Name: Elizabeth Duran
Address: 87506
Email: eduran@pojoaque.org
Organization: Pueblo of Pojoaque

General Comment

See attached file(s)

Attachments

Pueblo of Pojoaque comments

AFCARS DATA ELEMENTS

In reviewing the data elements as recommended for the AFCARS reporting, I find that the data elements provide information to be clear and specific on a child's demographics, child and family history, health and educational history, and child's future needs. Many of the new data elements are essential to fully understand the status and needs of the child in care. The data elements can be used to justify to Congress the need for additional funding to meet the identified needs of children in state care. In general, I like the proposed AFCARS data elements as proposed.

In regards to the Indian Child Welfare Act (ICWA) data elements, it is critical that American Indian tribes support the new AFCARS data elements specific to ICWA. The data elements require state child welfare agencies to collect ICWA data elements that demonstrate how many American Indian children enter into state child welfare custody, how many are transferred to tribal jurisdiction, and how many remain under state custody. It is critical that federally recognized tribes, National Indian Child Welfare Association, National Tribal Chairmen's Association, and the National Congress of American Indians have access to ICWA data to be used in advocating for resources to assist all federally recognized tribes to be able to establish tribal child welfare standards that will enable them to obtain Title IV-E funding directly or through a state-tribal intergovernmental agreement.

The arguments that the Indian Child Welfare Act (ICWA) falls under the Department of Interior, I argue that the Department of Interior and Bureau of Indian Affairs only provide guideline oversight. The Department of Interior does not provide direct funding for child foster care or child support services. All child welfare funding is provided to States to meet the child welfare needs of all children. Few American Indian tribes receive Title IV-E direct funding. Few tribes have entered into State-Tribal Intergovernmental Agreements for a multitude of reasons. Of primary concern is that a vast number of tribes do not have the resources to develop tribal law and order codes, or develop child welfare standards and tribal licensing procedures that are required to qualify for Title IV-E funding. When ICWA was passed by Congress, no financial provisions were made to assist tribes in the development of a child welfare infrastructure that would enable them to either apply directly for Title IV-E funding or to be able to meet the State Title IV-E guidelines to qualify for an intergovernmental agreement.

State child welfare agencies have historically included American Indian population figures in the state's federal request for child welfare funding. Therefore, the states should be held accountable for collecting all ICWA data elements. How else can Congress, Department of Health and Human Services, and the Administration for Children and Families ensure that

state child welfare agencies are in compliance with ICWA guidelines and inclusion of tribes in the ICWA child welfare process in state courts and the service provisions for Indian children?

Although States may argue that ICWA data has no value to the State, we as American Indians are also members of the States in which we reside; therefore the data is essential in determining if the State is in compliance with ICWA guidelines and policy, and to inform tribes as to the number of Indian children in State custody, collaboration with tribes and the status of the Indian children and services provided. We as American Indians need to monitor the data elements to ensure states are making diligent efforts to inform tribes of the Indian children in their custody and efforts made to reunite children with their Indian families or Indian homes. For Indian children who remain in state custody, the data elements provide information on where the Indian child is placed, services provided, and efforts to maintain a cultural connection between the child and the tribe.

Data collection should not be a burden to the states provided an adequate data reporting system is established and staff is trained on the data entry process. The training also needs to be provided for tribes who receive Title IV-E funding as well. A system that permits data to be entered during the process of establishing and updating a child's case file will reduce time efforts. In regards as to the state allegations that this will be a burden to them, please keep in mind they already have to report to AFCARS, the new data elements are a small addition to the invaluable data to be collected.

Respectfully submitted:

Elizabeth S Duran, MSW, MPH
Pueblo of Pojoaque
Director of Family and Children's' Services
Former Governor and Lifetime Tribal Council Member
Member of the NM Indian Child Welfare Consortium

As of: September 14, 2020
Received: May 23, 2018
Status: Posted
Posted: May 29, 2018
Tracking No. 1k2-93b7-35m0
Comments Due: June 13, 2018
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0010
State of Nebraska

Submitter Information

Name: Doug Beran
Organization: Nebraska

General Comment

The State of Nebraska appreciates the opportunity to provide input on the proposed AFCARS changes related to the Indian Children Welfare Act and other data elements, as well as the restructuring of the AFCARS data files.

Nebraska responded to the request for input regarding these changes in March and May of 2015. Since that time, Nebraska has added approximately 55 data elements to our child welfare system in order to comply with state law and Federal regulations/recommendations. The data elements we added are helpful and are indeed assisting Nebraska with our case management actions to ensure Indian children and families receive ICWA identification and culturally appropriate care.

In addition to the data elements now in our information system, we would have to add approximately 88 additional data elements to meet the new AFCARS/ICWA requirements. With absolute certainty ICWA compliance and the welfare of Indian children are of the utmost importance to Nebraska. However, we do not believe the additional data elements will improve our case management and indeed have concerns the additional data elements could adversely impact our ability to provide safety, permanency and well-being for all youth in our care.

In closing, we remain opposed because of the high volume of manual data entry that will be required of our Case Managers and thus the resources being pulled away from family engagement. Additionally, we are in opposition because among the host of recommendations, some of the elements appear to simply be checkboxes that attempt to measure conformance analytically rather than through a qualitative case review. And finally, we remain opposed because of the high cost of computer programming required to move forth with the expansion.

Please see our prior submissions for additional information.

As of: September 14, 2020
Received: May 24, 2018
Status: Posted
Posted: May 30, 2018
Tracking No. 1k2-93fs-nmty
Comments Due: June 13, 2018
Submission Type: E-mail

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0011
Morongo Band of Mission Indians

Submitter Information

Name: Robert Martin
Address: 92220
Organization: Morongo Band of Mission Indians

General Comment

See Attached

Attachments

Morongo Band of Mission Indians

MORONGO BAND OF MISSION INDIANS

A SOVEREIGN NATION

May 22, 2018

Attn: Kathleen McHugh
United States Department of Health and Human Services
Administration for Children and Families
Policy Division
330 C Street SW
Washington, DC 20024

Via electronic correspondence at: *CBComments@acf.hhs.gov*

Re: Morongo Band of Mission Indians Comments on RIN: 0970-AC72 **Adoption and Foster Care Analysis and Reporting System;** Advance Notice of Proposed Rulemaking (3/15/2018)

Dear Sir or Madam,

The Morongo Band of Mission Indians submits these comments on the Advanced Notice of Proposed Rulemaking regarding the Adoption and Foster Care Analysis Reporting System (AFCARS) for Title IV-B and Title IV-E as they relate to the Indian Child Welfare Act of 1978 (ICWA). Data points specific to ICWA were incorporated into AFCARS as detailed in the Final Rule published on December 14, 2016.

General Comments:

The data collection requirements of the Final Rule are consistent with ACF's statutory mission.

Section 479 of the Social Security Act mandates Health and Human Services collect national, uniform, and reliable information on children in state care. Section 474(f) of the Act requires HHS to impose penalties for non-compliant AFCARS data. Section 1102 of the Act instructs the Secretary to promulgate regulations necessary for the effective administration of the functions for which HHS is responsible under the Act.

The Final Rule, which ACF promulgated pursuant to these statutory requirements, will ensure the collection of necessary and comprehensive national data on the status of American Indian/Alaska Native (AI/AN) children for whom ICWA applies and historical data on children in foster care. Thus, the Final Rule's data collection elements are necessary to ACF's statutory mission under Section 479 of the Act.

The administration provided all interested parties with ample notice and opportunities to comment on the final rule.

Tribes, tribal organizations, and tribal advocates have long sought the inclusion of ICWA-related data points in the AFCARS. The initial rules were changed due to comments by

these entities and others after reviewing the Administration of Children and Families' February 9, 2015 proposed rule. On April 2, 2015 the Agency issued a Supplemental Notice of Proposed Rulemaking (SNPRM) changing certain data elements. Yet another SNPRM was issued on April 7, 2016. Specifically, the Agency sought comments on the inclusion of the ICWA data points in both the April 2015 Intent to Publish a SNPRM, as well as the April 2016 SNPRM. Ultimately, the Final Rule was published on December 14, 2016 (Final Rule), and included the ICWA data elements.

The Final Rule thoroughly responded to comments on both the benefits and burdens of the proposed regulatory action. Given the multiple opportunities to comment throughout this time period, any additional collection activity is unnecessary. In addition, tribes, tribal organizations, and advocates received notice of all of these opportunities, and with ample time to comment on this vital and important rule change.

States also had ample opportunity to participate. As the Final Rule explains in detail, ACF engaged in robust consultation with states and responded to their concerns, for example, by streamlining many data elements. 81 Fed. Reg. 90524, 90565-66. States had at least six different opportunities to raise their concerns, which the ACF considered and addressed fully. 81 Fed. Reg. at 90566.

States are already in the process of implementing these changes.

Since these regulations have been effective for approximately fifteen months, all states should be in the process of implementing them. We are aware, for example, that California, a state with 109 federally-recognized tribes, is already well under way with its implementation efforts, having relied on the final rule. At this stage, any modification of the data collection requirements would be a waste of finite state child welfare resources, which itself is an additional burden.

These regulations are important to us, our families, and state child welfare systems.

The regulations themselves—in response to the comments from stakeholders across the country—describe the importance of these changes. As stated in the December 2016 Final Rule, 81 Fed. Reg. 90524, 90527:

> Overall, tribes, organizations, states, and private citizens supported our mission to collect additional information related to Indian children as defined in ICWA. Moreover, some states, tribes, national organizations, and federal agencies have stated that ICWA is the "gold standard" of child welfare practice and its implementation and associated data collection will likely help to inform efforts to improve outcomes for all children and families in state child welfare systems.
>
> Generally, tribes, organizations representing tribal interests, national child welfare advocacy organizations, and private citizens fully support the overall goal and purpose of including ICWA-related data in AFCARS, and the data elements as proposed in the 2016 SNPRM. These commenters believe that collecting ICWA-related data in AFCARS will:
>
> 1. provide data on core ICWA requirements such as "active efforts" and placement preferences, as well as assess how the child welfare system is working for Indian children as defined by ICWA, families and communities;
> 2. facilitate access to culturally-appropriate services to extended families and other tribal members who can serve as resources and high-quality placements for tribal children;

12700 Pumarra Road - Banning, CA 92220 - 951-849-4697 - Fax 951-849-4425

> 3. help address and reduce the disproportionality of AI/AN children in foster care; and
> 4. provide avenues for collaboration between states and tribes that are more meaningful, and outcome driven, including improved policy development, technical assistance, training, and resource allocation as a result of having reliable data available.
> Overall, tribal commenters and national child welfare advocacy organizations believe that collecting ICWA-related data in AFCARS is a step in the right direction to ensure that Indian families will be kept together when possible, and will help prevent AI/AN children from entering the foster care system. Many of the tribal commenters that supported the 2016 SNPRM also recommended extensive training for title IV–E agencies and court personnel in order to ensure accurate and reliable data.

Other federal reports have demonstrated the need for quality national data to assess states' efforts in implementing ICWA. See Government Accountability Office, *Indian Child Welfare Act: Existing Information on Implementation Issues Could be Used to Target Guidance and Assistance to States*, GAO-05-290 (Apr. 4, 2005) http://www.gao.gov/products/GAO-05-290.

Nothing has changed since ACF made clear in its final rule that data collection is necessary to protect Indian children and families and their tribes. There remains a pressing need for comprehensive national data on ICWA implementation. Congress has not amended the Act's data collection provisions. And there have been no changes in circumstances that would alter the burdens or benefits of the final rule's data collection requirements.

Tribes have relied on the final rule.

Tribes have long sought data points regarding the implementation of ICWA. This has included advocacy on local, state, and federal levels. With the promulgation of the final rule in December of 2016, tribes largely ceased advocacy efforts to mandate data collection, instead refocusing tribal resources toward working collaboratively with their governmental partners to implement the data elements listed in the final rule. To this end, some tribes have worked to develop and update agreements to reflect the data elements in the final rule and the 2016 BIA ICWA Regulations, since a goal of both is to increase uniformity.

The ANPRM is arbitrary and capricious where it seeks only information on burdens.

This ANPRM arbitrarily focuses on collecting information about the burdens without considering the benefits. As required by law, the final rule conducted a careful analysis of the benefits and burdens, and appropriately amended the proposed rule to achieve a balanced final rule.

The agency "determined in the final rule that the benefits outweigh the burden associated with collecting and reporting the additional data." 81 Fed. Reg. at 90528. The agency explained how its weighing of the benefits and burdens led it to make certain changes to its proposal. For example: as stated in the final rule at 81 Fed Reg. 90528:

> In response to state and tribal comments suggesting congruence with the BIA's final rule, we revised data elements in this final rule as appropriate to reflect the BIA's regulations including removing requirements that state title IV–E agencies report certain information only from ICWA-specific court orders. These changes should allow the state title IV–E agency more flexibility, alleviate some of the burden and other concerns identified by states, help target technical assistance to increase

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state title IV–E agency communication and coordination with courts, and improve practice and national data on all children who are in foster care.

There have been no material changes in circumstances justifying the agency's new approach. The executive order is not a sufficient basis for the agency to act, as the executive order itself is arbitrary and unlawful where it provides an insufficient basis for reasonable decision-making relaying solely on an examination the burden of regulations without the required balancing of benefits. Additionally, the executive orders to fail to provide justification to deviate from the statutory requirement for regulations.

The foregoing are responses to the Questions for Comment provided in the ANPRM:

1. Identify the data elements, non-ICWA-related, that are overly burdensome for state and tribal title IV-E agencies and explain why. Please be specific in identifying the data elements and provide a rationale for why collecting and reporting this information is overly burdensome.

No response.

2. Previously, we received comments regarding burden and the system changes needed to report the ICWA-related data elements of the 2016 SNPRM. We would like to receive more detailed comments on the specific limitations we should be aware of that states will encounter in reporting the ICWA-related data elements in the final rule. Please be specific in identifying the data elements and provide a rationale for why this information is overly burdensome.

The ANPRM requests IV-E states and tribes to provide the number of children in foster care who are considered Indian children as defined in ICWA. However, it is specifically due to the lack of a national data reporting requirement, that any number provided in response to this question would be significantly inaccurate. This speaks to the critical importance of the ICWA-related data points – without a data reporting requirement, many states simply do not appropriately track Indian children in their child welfare system, let alone the individual ICWA-related data points.

3. Previously, we received comments that particular data elements did not lend themselves to national statistics and were best assessed with qualitative methods such as case review. Please provide specific recommendations on which data elements in the regulation to retain that are important to understanding and assessing the foster care population at the national level. Also, provide a rationale for your suggestion that may include its relevance to monitor compliance with the title IV-B and IV-E programs or another strong justification for using the data at the national level.

As discussed above, there has been ample opportunity for comment and this additional ANPRM is itself both unlawful as crafted and is a waste of finite resources. Tribes and states properly relied on the final rule in working toward implementation for nearly a year and a half. Any modification to the existing data points frustrate those efforts, would require states to begin again collaborating with their tribal partners and ultimately further delay implementation. This comes at the expense of the health, safety and welfare of not only Indian children, their families, and their tribes, but the child welfare system at large where a modification of the final rule would cost resources that are system-wide.

4. Previously we received comments noting concerns with variability in some of the data elements across states and within jurisdictions. Please provide specific suggestions to simplify

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data elements to facilitate the consistent collection and reporting of AFCARS data. Also, provide a rationale for each suggestion and how the simplification would still yield pertinent data.

In the absence of a national data reporting requirement, it is guaranteed there will be variability with data elements frustrating a stated purpose of the 2016 BIA ICWA Regulations, to establish uniformity of application throughout the nation. The need to eliminate the data variability is precisely why it is important to have a national data collection standard. It will assist HHS/ACF efforts to support states in properly implementing ICWA by having targeted, data-driven identification areas where states need support the most.

5. Previously we received comments questioning the utility, reliability, and purpose of certain data elements at the national level. Provide specific recommendations on which data elements in the regulation to remove because they would not yield reliable national information about children involved with the child welfare system or are not needed for monitoring the title IV-B and IV-E programs. Please be specific in identifying the data elements and provide a rationale for why this information would not be reliable or is not necessary.

Each of the ICWA-related data points are tied to existing federal law and regulation and are necessary to monitor and support title IV-B and IV-E programs. Each of the ICWA-related data points are critical.
Further, as discussed above, ICWA is the "gold standard" of child welfare and ensuring compliance with this federal law informs how the existing child welfare system may improve in whole.

For the foregoing reasons, we strongly support each of the ICWA-related data points and believe, as your agency did in publishing the Final Rule in 2016, the benefits of this data collection outweighs any burden.

In closing, the Indian Child Welfare Act is widely considered the "gold standard" of child welfare, and a refinement of family reunification objectives mandated by nearly every state. Any hindrance or stoppage of ICWA data point collection significantly impacts tribal children, families, and county agencies trying to comply. In the interest of protecting our children and families, we respectfully submit these comments.

Sincerely,

Robert Martin
Chairman
Morongo Band of Mission Indians

As of: September 14, 2020
Received: June 01, 2018
Status: Posted
Posted: June 01, 2018
Tracking No. 1k2-93gt-91pl
Comments Due: June 13, 2018
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0012
Comment on FR Doc # 2018-05042

Submitter Information

Name: Sasha O
Address: 33620
Email: smoliver@mail.usf.edu
Organization: usf

General Comment

June 1, 2018

Attn: Kathleen McHugh, Division of Policy, Children's Bureau
via electronic correspondence at: Federal eRulemaking Portal: https://www.regulations.gov.

Re: RIN: 0970-AC72 Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking

Dear Mrs. Kathleen McHugh,

My name is Sasha O, MPA graduate student at the University of South Florida, no current child welfare agency affiliation, submits these comments on the Advanced Notice of Proposed Rulemaking regarding the Adoption and Foster Care Analysis Reporting System (AFCARS)

Coming from a background in child welfare, please consider providing funds that would extend to support for relative caregivers. Extending financial support to allow for an extensive search for extended families would reduce the efforts to seek foster homes, which are often limited in capacity. Funds should also be extended to record keeping of foster children who have exited the system with little to no support as they have not attending school to continue receiving financial support. The following suggestions are based on data elements that have been identified as needing further rationale for reporting information.

Record-keeping hours spent annually: Overtime for most agencies are limited to 10 hours or employees are subject to facing half overtime compensation if exceeding overtime. Some agencies have salaried employees who are not compensated at all for 40-hour work weeks. Record-keeping can be time consuming considering that

systems often times do not work properly. The exact expense on investing in the man hours for record-keeping is unknown but substantial support is needed to account for hours spent unpaid.

Most if not all case management systems are automated This can be problematic for security reason for HIPPA violations if documentation is scanned into the wrong file. Searching data sources and gathering information can be simplified for case management when a system is implemented that works efficiently. For best practice, there should be a system that operates statewide for electronic files to support consistency if and when a child is moved to another state. Often time a delay in reports can impact the childs well being for being enrolled in school or locating a doctor. Normally is also impacted if documents are not received in a timely manner. For this reason, investing in a nationwide or region based system that would house information for case management on an as needed basis would decrease time spent gathering information. This comment is intended to help assess whether and how to potentially reduce burden on title IV-E agencies to report AFCARS data while still adhering to the requirements of section 479 of the Act.

As of now, Section 479 of the Social Security Act requires HHS to regulate a data collection system for national adoption and foster care data that provides comprehensive national information. Data collection should extend to include children who exit foster care who are homeless, incarcerated, or in rehabilitation. Those who exist the foster care system and do not attend school supported by funds received from federal and state funding. Modified procedures and systems to collect, validate, and verify the information and adjusting to existing procedures will meet and exceed AFCARS requirements.

Respectfully submitted,

Sasha O.

As of: September 14, 2020
Received: May 30, 2018
Status: Posted
Posted: June 01, 2018
Tracking No. 1k2-93h0-2hnj
Comments Due: June 13, 2018
Submission Type: E-mail

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0013
Rep. Langevin comments

Submitter Information

Name: Jim Langevin
Organization: House of Representatives

General Comment

See Attached

Attachments

Langevin

JAMES R. LANGEVIN
2ND DISTRICT, RHODE ISLAND

COMMITTEE ON ARMED SERVICES
EMERGING THREATS AND CAPABILITIES (RANKING)
SEAPOWER AND PROJECTION FORCES
TACTICAL AIR AND LAND FORCES

COMMITTEE ON HOMELAND SECURITY
CYBERSECURITY AND INFRASTRUCTURE PROTECTION
EMERGENCY PREPAREDNESS, RESPONSE, AND COMMUNICATIONS

Congress of the United States
House of Representatives
Washington, DC 20515–3902

WASHINGTON OFFICE:
2077 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
TELEPHONE: (202) 225–2735
FAX: (202) 225–5976

DISTRICT OFFICE:
THE SUMMIT SOUTH
300 CENTERVILLE ROAD, SUITE 200
WARWICK, RI 02886
TELEPHONE: (401) 732–9400
FAX: (401) 737–2982

https://langevin.house.gov

May 30, 2018

The Honorable Alex M. Azar II
Secretary of Health & Human Services
U.S. Department of Health & Human Services
200 Independence Ave, S.W.
Washington, D.C. 20201

RE: Comments on the advance notice of proposed rulemaking, RIN: 0970-AC72, Adoption and Foster Care Analysis and Reporting System (AFCARS) data elements.

Dear Secretary Azar,

Thank you for the opportunity to submit comments in response to the Department of Health & Human Services (HHS) Administration for Children and Families' (ACF) March 15, 2018, advance notice of proposed rulemaking regarding the Adoption and Foster Care Analysis and Reporting System (AFCARS) data elements.

I am concerned by the Department's proposal to "streamline" AFCARS data elements, and I urge you to consider the benefits of collecting each element - particularly information related to foster youths' and foster and adoptive parents' sexual orientation - in improving outcomes for youth in care.

Section 479 of the Social Security Act requires HHS to manage a data collection system on children in foster care and those who are adopted with title IV-E agency involvement. The data are extremely valuable; ACF uses AFCARS to conduct trend analysis, distribute federal funding, and target areas for federal research, assistance, and regulatory change. Congress also uses these data to shape policy affecting foster and adoptive youth.

I was pleased that the December 14, 2016, AFCARS final rule included additional data elements for collection. The rule was drafted with the input of a variety of stakeholders at the state and tribal level, and it incorporated comments solicited throughout 2015 and 2016. It requires state and tribal IV-E agencies to report information on a child's sexual orientation, foster or adoptive parents' sexual orientation, and any family conflict related to a child's sexual orientation that led to a removal from the home.

These data will help agencies and professionals better understand the experiences and outcomes of LGBTQ youth. In its final 2016 rule, ACF stated, "We support further understanding of

LGBTQ youth in foster care and their experiences while in foster care. Such information can help agencies improve their supports and services to these young people." While existing research on LGBTQ youth in foster care is limited, studies indicate that they are at a greater risk of childhood abuse and tend to have more negative experiences in foster care than non-LGBTQ youth and poorer outcomes once they have left care. It is clear that these youth need additional support services.

In the final 2016 rule, ACF also stated "Our goal in including this information [on LGBTQ youth and parents] is that the data will assist title IV-E agencies to help meet the needs of LGBTQ youth in foster care." I applaud this goal, in addition to ACF's work thus far to improve experiences and outcomes for foster youth, and I urge you to retain the LGBTQ data elements in order to stay on this path.

Thank you for your consideration of these views. Please contact Kerry McKittrick in my office with any questions.

Sincerely,

James R. Langevin
Member of Congress

As of: September 14, 2020
Received: June 05, 2018
Status: Posted
Posted: June 06, 2018
Tracking No. 1k2-93jo-erl3
Comments Due: June 13, 2018
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0014
Texas Dept. of Family and Protective Services

Submitter Information

Name: Debra Emerson
Address: 78751
Email: debra.emerson@dfps.state.tx.us
Organization: Texas Dept. of Family and Protective Services

General Comment

See attached file(s)

Attachments

Texas

Texas Department of Family and Protective Services

Commissioner
H. L. Whitman, Jr.

May 29, 2018

Kathleen McHugh, Director
Policy Division
United States Department of Health and Human Services,
Administration for Children and Families
330 C Street SW, Washington, DC 20024

Via the Internet: *http://www.regulations.gov/*
Via Regular and Certified Mail

RE: Advanced Notice of Proposed Rulemaking (ANPRM)
Adoption and Foster Care Analysis and Reporting System (AFCARS)
45 CFR Part 1355
Posted on Federal Register Vol. 83, No. 51 / Thursday, March 15, 2018

Dear Ms. McHugh:

The Texas Department of Family and Protective Services (DFPS) respectfully submits this comment letter regarding the Advanced Notice of Proposed Rulemaking (ANPRM) with Comment Period on the *Adoption and Foster Care Analysis and Reporting System* (AFCARS) published in the *Federal Register* (45 CFR Part 1355) on March 15, 2018, for the Administration for Children and Family Services (ACF) of the U.S. Department of Health and Human Services.

Texas is in agreement with the Regulatory Reform Task Force created by Presidential Executive Order 13777 in its identification of the AFCARS regulation as one in which the reporting burden imposes costs that exceed benefits. The AFCARS final rule, published December 14, 2016 (81 FR 90524), requires DFPS to make extensive, costly changes to our Statewide Automated Child Welfare Information System (SACWIS), and also places an arduous burden upon the staff who will be responsible for the gathering, data entry, and technology implementation of these additional elements.

Previously, on April 7, 2015, Texas submitted comments to ACF in response to the Notice of Proposed Rulemaking (NPRM) with Comment Period on AFCARS published in the Federal Register

(80 FR 7132) on February 9, 2015. Texas' position, as clearly stated in the 2015 comment letter, still stands today; however, a more thorough and specific cost and burden estimation has been added to this comment letter herein. For section-by-section comments, including comments on individual data elements, please see the attachment entitled Provisions of the AFCARS Final Rule. DFPS appreciates the opportunity to provide this information for consideration.

Throughout the NPRM dated February 9, 2015, ACF estimated that the costs to states would not be significant. However, given the vast scope of the NPRM—and subsequently the final rule published on December 14, 2016 —ACF insufficiently determined and articulated the cost estimates and burdens on states. Additionally, ACF did not realistically assess the costs that Texas and other states must incur to train staff, nor does ACF realistically assess the costs related to the number of caseworkers and their time needed to collect and enter the extensive data required.

As required by 42 U.S.C. §679(c)(1), any data collection system implemented must avoid unnecessary diversion of resources from agencies responsible for adoption and foster care. Complete implementation of the final rule will certainly continue to divert much needed resources from child protective agencies that would be significantly better spent on direct services to children and families. Thorough compliance with this ANPRM's request (i.e., deep dive into each data element) places a tremendous burden to the State of Texas as it is overly burdensome and cost-prohibitive.

Increased Burden on Caseworkers

Workers continually report significant increases in their workloads associated with case documentation related to federal expectations of data collection. With so many demands already competing for their time, even tenured and experienced caseworkers find they cannot adequately serve children and families with complex and often immediate needs along with having to perform extensive documentation for AFCARS. To fully meet the new data requirements and expectations of the final rule, Texas will need to add an additional number of staff. Some of the new data elements simply require additional time needed to document the information in a collectable format. Other new data elements, however, will add extensive time to individual client interviews due to the nature of the question(s) necessary for collecting the required information. For example, questioning a caregiver or youth about his or her sexual orientation may require additional time spent building rapport, and would likely result in further dialogue, including an explanation of why that question must be asked and why it must be collected.

To analyze the impact of the new data elements upon a caseworker's time, Texas assumed a conservative average of one additional minute per data element needed for the actual collection of data and/or one additional minute for the entry of the data into the SACWIS system. Accounting for the time required to ask a question and receive an answer, staff with the supervisor, and document the information into SACWIS, the agency estimated the need for an additional $32,526,547 for 170 additional staff (caseworkers, supervisors and infrastructure). This information is based on the current number of caseworkers, children being served, and time to complete all current state and federal expectations, including the data collection of AFCAR elements as well as other tasks associated with case management services.

Increased Complexity of Information Technology (IT)

SACWIS, particularly from an IT perspective, is complex; adding a large number of new data collection elements increases the complexity, reliability, and consistency of the system, without consideration of all future SACWIS enhancements, as well. This includes, but is not limited to, system capability to case and person merge, case file print, auditing, and training. Increasing the complexity of Texas' SACWIS system to meet the demands of the final rule places a significant burden on the state's IT resources, requiring more staff resources and more state monetary resources than currently available.

New data elements require vast modifications of Texas' SACWIS system and a complete re-write of the state's AFCARS extraction code. Of the 272 new AFCARS data elements created by the final rule, Texas must implement 139 of them into its SACWIS system. Texas started the process of implementing the 27 data elements related to the Preventing Sex Trafficking and Strengthening Families Act, Public Law (P.L. 113-183), and the total business cost of implementation, training, and maintenance of these elements alone amounted to approximately $8,182,393.00. With 106 remaining elements not currently covered or budgeted through the state legislative process, it is anticipated that it will cost Texas an estimated $30 million to fully cover the implementation, training, and maintenance of these additional data elements.

The insertion of new data fields into Texas' case management system follows a specific process to ensure the changes meet federal requirements, prevent unintended data integrity issues within the system and to other corresponding systems, and meet other program requirements. In addition, once the agency updates the case management system with these changes, IT further updates the AFCARS data extraction. DFPS Program and IT must coordinate the implementation of the SACWIS changes while still remaining mindful of existing project schedules, which often consist of many legislative mandates.

The detailed process to implement changes within Texas' SACWIS system, called IMPACT, is not an easy undertaking. While the final rule outlines the data elements to be collected, it underestimates the time and funds necessary to integrate new data elements. For the State of Texas, when its child welfare program, Child Protective Services (CPS), identifies a need for a new data field, IT initially performs research to see if the data can currently be obtained from the IMPACT system. If the data is already being collected by IMPACT, IT implements changes to the AFCARS Extract Transform Load (ETL) process and deploys the changes to production. If the data field does not yet exist in the system, IT first must gather and document the requirements for the new data field. Next, IT adds and tests the new data field in the IMPACT application and database. After the data field has been successfully tested, IT will implement changes to the AFCARS ETL process. Once the AFCARS ETL process properly includes all of the needed data, the changes will be deployed to production. As outlined, this is a very time consuming, expensive, and tedious process to ensure date quality and integrity.

In closing, Texas supports all efforts to streamline the AFCARS data elements and remove the undue financial burdens placed upon states to collect data that may not improve child welfare practice or outcomes for children and families. Any new requirements should be cost-efficient with respect to the child welfare workforce capacity and SACWIS system requirements.

Thank you for the opportunity to comment on this ANPRM. If you have additional questions, please contact Elizabeth "Liz" Kromrei, Child Protective Services Director of Services, who serves as the DFPS lead on this matter. She can be reached by phone at (512) 438-3291 or by email at ELIZABETH.KROMREI@dfps.state.tx.us.

Sincerely,

Hank L. Whitman, Commissioner
Texas Department of Family and Protective Services

Kristene Blackstone, Associate Commissioner for Child Protective Services
Texas Department of Family and Protective Services

Attachment

Provisions of the AFCARS Final Rule

Note: These comments submitted to ACF by DFPS on April 7, 2015, in response to the NPRM dated February 9, 2015, have been amended and updated to reflect the final rule published December 14, 2016.

Texas strongly supports the position that the Indian Child Welfare Act of 1978 (ICWA), P.L. 95–608 is outside of the scope of AFCARS and specific data on ICWA implementation and compliance cannot be collected through AFCARS. In addition, Texas continues to support a tribal agency setting up its own Title IV-E program, if that is the desire of the tribe.

Section 1355.41: Scope of the Adoption and Foster Care Analysis and Reporting Systems.
Texas DFPS believes the proposed foster care reporting populations will improve consistency across the country.

Section 1355.43: Data Reporting Requirements.
Texas DFPS supports submitting data files on a semi-annual basis, which is a continuation of the current AFCARS rule. Additionally, Texas is fervently in support of maintaining the 45 day reporting period. Texas has solid performance on data integrity and needs to maintain the 45 day period in order to ensure quality data. If the period is shortened, we would need to make significant and costly modifications to our monthly data warehouse population process in order to create and submit the AFCARS data files in a timely fashion.

Section 1355.44(a): Out-of-Home-Care Data File Elements.
Overall, Texas DFPS is extremely concerned with the extensive increase in the required data elements. While longitudinal information relating to foster care episodes and placement events can be valuable, the value of the specificity of such information needs to directly correlate to achieving positive outcomes for the children and families we serve. In addition, the value of the data needs to be carefully weighed against the burdens on caseworkers to collect and enter that data into the SACWIS, as doing so takes away precious time needed for face-to-face interactions with children and families.

Further, states differ in how they define various terms, such as the types of homes or living arrangements, and these differences make it challenging to effectively and accurately gather and analyze data from a national perspective. State differences must be considered in the utility of collecting such types of data that have definitional variances across the country. Any national research that is based on data containing differing definitions will produce skewed results, which could lead to inaccurate conclusions concerning child welfare issues

Data analysis is only as good as the quality of the data collected. From our perspective, data collection projects should perform interrater reliability tests to ensure accuracy of data collection. With the release of the NPRM and subsequent final rule, it is apparent that this important step was overlooked. It must be completed for quality data to be collected uniformly across the states. Finally, much of the new information sought is already collected by Texas DFPS, but it is currently collected

in narrative form and would require extensive caseworker time to transform the child and family information into data files for AFCARS. The narrative form is an important casework tool because it explains the significant *why* and *how* surrounding the unique child and family dynamic. Casework is not data and it is not data entry. If the ultimate focus is truly on positive child and family outcomes, then the data system should be built to help caseworkers and managers accomplish their work, and not to just generate information. If the desire is to have greater detail in foster care information on the federal level for research purposes, policy development, or other appropriate purposes, then additional federal funding needs to be provided to states in order to collect and enter such data without impeding upon crucial caseworker practice.

Texas DFPS offers these comments on the following specific data elements:

Section 1355.44(b)(9)(vii): Race Abandoned.
Abandoned is not a race or ethnicity. If a child is abandoned and too young to self-identify with a race, then, the response selected should be 'Unknown." At a later time when the child is able to self-determine a race, the caseworker would select the appropriate race or races. This same comment applies to all other elements where "Abandoned" is used in this manner, including in the Adoption and Guardianship Assistance Data File. Furthermore, neither the National Youth in Transition Database (NYTD) nor the National Child Abuse and Neglect Data Systems (NCANDS) collect abandoned children as a race category. We recommend consistency between the race and ethnicity responses where possible in all federally required data submissions.

Section 1355.44(b)(12): Timely Health Assessment.
States have different time frames for Early and Periodic Screening, Diagnostic, and Treatment (EPSDT) and health assessment schedules. As a result, gathering this information on a national basis does not provide a qualitative picture on health assessments. Further, the guidance accompanying the NPRM implies that the purpose of this new element is mainly to determine if states are timely meeting the requirement at 42 U.S.C. § 622(b)(15)(A). Rather than adding another element to AFCARS, this information or regulatory assessment would be much better assessed or implemented as part of the CFSR (or another type of qualitative review) that focuses on child well-being outcomes.

Section 1355.44(b)(13): Health, Behavioral or Mental Health Conditions.
There are too many response options for this element. We strongly recommend including only the following options: "Child has a diagnosed condition," "Child does not have a diagnosed condition," and "Unknown." The proposed response option of "Exam or assessment conducted but results not received" should be eliminated, as the caseworker effort required to capture this particular response would be higher than any value achieved from the information, If the date of the health assessment is populated and "Unknown" is the response for this element, then, it is apparent that the results have not yet been received.

Section 1355.44(b)(13)(i)-(xi): List of Conditions with the Responses of "Existing/Previous/Does Not Apply."
Texas DFPS recommends that the list of health, behavioral or mental health conditions have only two response options: "Existing Condition" and "Does Not Apply." Data submissions over time would

create a history of any diagnosed conditions for each child. Thus, the proposed response option of "Previous Condition" is not needed since the previous conditions can be ascertained by comparing the answers to each condition using the history of previous submissions.

Section 1355.44(b)(14) & Section 1355.44(b)(16)-1355.43(b)(16)(vii): School Enrollment and Educational Stability.

School enrollment is redundant if states are also collecting educational level. Texas DFPS proposes deleting the school enrollment element and just reporting the educational level. Additionally, the reasons a child changes schools are far more complex than the listed options offered for the educational stability element. Most importantly, listed options are not reflective of the need to make school changes to ensure positive permanency outcomes for children. Therefore, this information is best assessed in a qualitative review such as the CFSR.

Section 1355.44(b)(19)-1355.44(b)(19)(ii): Prior Adoption(s), Prior Adoption Date(s), and Prior Adoption Intercountry.

Information regarding private adoptions and out-of-state public adoptions can be difficult to collect, as the adoptive parent may be unwilling to disclose such information. If this information is collected, Texas recommends deleting the response option of "Abandoned" and adding response options of "Declines" and "Unknown" for when it cannot be determined. The selection of "Declines" would apply only when the individual refuses to give the information and the state agency cannot otherwise obtain the information. Further, prior adoption date(s) and prior adoption intercountry are discretionary reporting components under 42 U.S.C. § 679(d). Considering the final rule already proposes numerous new elements and because the caseworker effort required to collect this information would be higher than any value achieved, any discretionary reporting elements should be removed.

Section 1355.43(b)(14)-1355.43(b)(14)(iii): Prior Guardianship(s) and Prior Guardianship Date(s).

Information regarding private guardianships and out-of-state guardianships can be difficult to collect, as the guardian may not be willing to disclose such information. If this information is collected, Texas recommends deleting the response option of "Abandoned" and adding response options of "Declines" and "Unknown" for when it cannot be determined. The selection of "Declines" would apply only when the individual refuses to give the information and the state agency cannot otherwise obtain the information. Further, prior guardianship date(s) is a discretionary reporting components under 42 U.S.C. § 679(d). Considering the final rule already proposes numerous new elements and because the caseworker effort required to collect this information would be higher than any value achieved, any discretionary reporting elements should be removed.

Section 1355.44(f)(6)-(7): Caseworker Visit Dates and Location.

The guidance accompanying the final rule indicates that these elements are included mainly as a regulatory compliance tool for 42 U.S.C. § 624(f). Requiring caseworkers to enter all face-to-face visit dates and locations creates unwanted emphasis on caseworkers engaging in data collection rather than on the important clinical case work. Clinical case work is where the true problem-solving occurs and where safety, permanency, and well-being issues are resolved—emphasis should be

placed accordingly. Thus, this type of information is best reviewed in a qualitative review such as the CFSR, and Texas highly recommends that this data not be collected in AFCARS.

LGBTQ Data:

Section 1355.44(b)(2)(ii): Child's Sexual Orientation.
There are important concerns with including this information in AFCARS: (1) LGBTQ youth do not always feel comfortable enough to disclose their sexual orientation to their caseworkers, and nor should they be made to; and (2) many youth in the AFCARS population are still struggling with sexual identity issues. Therefore, collecting LGBTQ data will yield a serious undercount and an undercount will not serve this population well. Discounting the number of youth in the LGBTQ population will drive resources away from this group and their specific issues. Consequently, Texas DFPS strongly recommends not including this element in the AFCARS file. Rather, ACF should consider including LGBTQ information in the NTYD survey. NYTD would be the more appropriate database for the following reasons: (a) the participants are at least 17 years of age and may be more sure of their identities; (b) in follow-up surveys, there are participants that are no longer associated with the child protective agency and may feel more comfortable being open about such issues; and (c) the survey is voluntary so the information is more likely to be useful in learning about LGBTQ experiences in foster care.

Section 1355.44(e)(19) and (e)(25) and Section 1355.44(h)(8) and (h)(14): Sexual Orientation of First and Second Foster Parents and of First and Second Adoptive Parents or Legal Guardians.
As noted in Section 1355.44(b)(2)(ii): Child's Sexual Orientation, collecting LGBTQ data will yield a serious undercount and an undercount regarding foster and/or adoptive parents and legal guardians. To include information in the file for individuals who identify as lesbian, gay, bisexual, transgender, and questioning (LGBTQ) is best suited in case narrative and home assessments.

Compliance and Penalties:

Section 1355.46: Compliance.
Texas DFPS firmly agrees with maintaining the 45 day data submission timeline as opposed to shortening the timeline to 30 days. Having 15 more days to ensure data quality is crucial, not only for states but for any entity that uses the information in AFCARS to conduct research.

Further, Texas DFPS strongly recommends that the new requirements proposed by the final rule be delayed to allow Texas the opportunity to succeed. Texas provided comments on the NPRM Adoption and Foster Care Analysis and Reporting System (AFCARS) 45 CFR Part 1355 that posted on Federal Register/Vol.83, No.51/Thursday, March 15, 2018. The code extractions to report the required data elements are extremely complex and play a significant role in compliance. The complexity of code extractions coupled with an undefined file format makes it challenging, if not impossible, to accurately project the cost or staffing levels necessary to implement these proposed changes.

In addition, Texas DFPS strongly supports the expressed intent to close out all current AFCARS Improvement Plans without penalties in order to allow state staff to focus on the changes needed for compliance with the final rule, which would also allow ACF staff to spend their time providing consultation and support to states during the implementation process.

Section 1355.47: Penalties.

Given the extensive new requirements, Texas strongly recommends that any penalties not be imposed until states have been given a meaningful and realistic amount of time to make the required changes and implement the new requirements. Furthermore, additional funding will be required to comply with this mandate, and this funding will need to be requested and appropriated from our state legislature, which meets every other year

As of: September 14, 2020
Received: June 05, 2018
Status: Posted
Posted: June 06, 2018
Tracking No. 1k2-93jp-7xzr
Comments Due: June 13, 2018
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0015
Michigan Department of Health and Human Services

Submitter Information

Name: Theresa Keyes
Organization: Michigan Department of Health and Human Services

General Comment

See attached file(s)

Attachments

Michigan

Michigan Comment: Supplemental Notice of Proposed Rulemaking AFCARS Regulations to Collect and Report Data Elements Related to the Indian Child Welfare Act of 1978

June 13, 2018

The State of Michigan supports additional changes in the AFCARS data elements to improve reporting and provide a comprehensive national reporting system to track compliance with the Indian Child Welfare Act (ICWA). Through increased collection of ICWA-related data, ACF and Michigan may be able to enhance culturally-appropriate services for tribal children in foster care or who are adopted; assess relevant trends for American Indian/Alaska Native (AI/AN) families and improve child welfare training and technical assistance to local county offices, tribes, and private agency foster care providers.

Michigan Data Collection

The Michigan Department of Health and Human Services (MDHHS) maintains a Statewide Automated Child Welfare Information System (MiSACWIS) which includes the majority of AFCARS ICWA details for foster care and adoption case management; enhancements must enable AFCARS ICWA reporting.

Modification to accommodate Adoption and Foster Care Analysis and Reporting System (AFCARS) 2022 reporting impacts 291 elements across all functional areas of the Michigan Statewide Automated Child Welfare Information System (MiSACWIS) and its related data warehouse reporting system. Approximately 42% of the additional data elements are related to new ICWA reporting requirements that would require new screen changes and additional training to child welfare staff. Training will need to be provided to users of the system regarding how to collect and enter the information.

The estimated cost for these modifications is $1,200,000. The estimated time to implement the changes is considerable at more than 10,000 hours.

As of: September 14, 2020
Received: June 05, 2018
Status: Posted
Posted: June 06, 2018
Tracking No. 1k2-93jx-dvus
Comments Due: June 13, 2018
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0016
California Department of Social Services

Submitter Information

Name: Gregory Rose
Organization: California Department of Social Services

General Comment

See attached letter from the California Department of Social Services.

Attachments

California Department of Social Services

CDSS
WILL LIGHTBOURNE
DIRECTOR

STATE OF CALIFORNIA—HEALTH AND HUMAN SERVICES AGENCY
DEPARTMENT OF SOCIAL SERVICES
744 P Street • Sacramento, CA 95814 • *www.cdss.ca.gov*

EDMUND G. BROWN JR.
GOVERNOR

June 5, 2018

Kathleen McHugh
Division of Policy, Children's Bureau
Administration for Children and Families
330 C Street SW
Washington, D.C. 20024

SUBJECT: ADVANCE NOTICE OF PROPOSED RULEMAKING (ANPRM), ADOPTION AND FOSTER CARE ANALYSIS AND REPORTING SYSTEM (AFCARS) – RIN 0970-AC72

Dear Ms. McHugh:

The California Department of Social Services (CDSS) is pleased to have the opportunity to submit comments in response to the Advance Notice of Proposed Rulemaking seeking suggestions for streamlining the Adoption and Foster Care Analysis and Reporting System (AFCARS) data elements and removing any undue burden related to reporting AFCARS.

The CDSS Children and Family Services Division (CFSD) has the state oversight responsibility for child welfare. More specifically, the development and implementation of policies, guidance, training and technical assistance to counties and tribes with whom the state has an IV-E Agreement regarding administration of title IV-B/title IV-E programs in California. On behalf of CDSS, CFSD submits the following comments which, consistent with the ANPRM instructions, are set forth below by topic, data element, or issue.

Data Elements included in the AFCARS final rule reflect data necessary to facilitate child welfare practice, inform policy decisions and maximize utilization of resources.

As indicated in response to the June 30, 2017 Administration for Children and Families (ACF) Notice of Proposed Information Collection Activity; Comment Request for the Adoption and Foster Care Analysis and Reporting System for title IV-B and title IV-E, as well as the Notice of Proposed Rulemaking to revise the implementation dates in 45 CFR section 1355.40 (published on March 15, 2018 and 83 FR 11450), the CDSS fully appreciates that the December 2016 final rule incorporates many new data elements, including numerous data elements relating to our most vulnerable populations, Indian

children subject to the Indian Child Welfare Act (ICWA) and lesbian, gay, bisexual, transgender and questioning (LGBTQ) youth.

This letter is submitted to once again reiterate California's steadfast and unequivocal support for the data collection set forth in the final rule, including the proposed collection of ICWA and LGBTQ information as necessary for the proper performance of the functions of the agency. We wholeheartedly believe that this information will have practical utility in facilitating child welfare practice and in informing policy decisions and program management. Further, it is essential in maximizing utilization of limited resources and in achieving beneficial outcomes for children and families.

The final rule repeatedly references the established ACF practice of issuing guidance and providing technical assistance. We are confident in this practice as a mechanism to guide implementation of AFCARS data collection in a manner that will facilitate and enhance data collection and quality on a national basis.

ACF has authority and responsibility to collect ICWA data.

Section 479 of the Social Security Act mandates U.S. Department of Health and Human Services (HHS) collect national, uniform, and reliable information on children in state care. Section 474(f) of the Act requires HHS to impose penalties for non-compliant AFCARS data. Section 1102 of the Act instructs the Secretary to promulgate regulations necessary for the effective administration of the functions for which HHS is responsible under the Act.

Relative to authority, CDSS concurs with the ACF position as discussed at length in the AFCARS supplemental notice of proposed rulemaking (81 FR 20283, issued April 7, 2016) and succinctly summarized as follows:

> "Collecting data on Indian children, including ICWA-related data, is within the authority of section 479 because it is in line with the statutory goal of assessing the status of children in foster care. ACF is exercising its authority to . . . [impose] a limited new set of ICWA-related data because section 479(a) authorizes "the collection of data with respect to adoption and foster care in the United States" and Indian children are children living within the United States and are those intended to benefit from both ICWA and titles IV-B and IV-E. The . . . data relevant to AI/AN children . . . supports ACF in assessing the current state of the well-being of Indian children as well as state implementation of title IV-E and IV-B. ACF proposes to use the collected data to make data-informed assessments; and to develop future policies concerning tribal-state consultation, ICWA implementation, and training and technical assistance to support states in the implementation of title IV-B and title IV-E programs." (81 FR 20287)

Relative to responsibility, it should be noted that in 2005, the Government Accountability Office (GAO) issued a report titled "*Indian Child Welfare Act: Existing Information on Implementation Issues Could Be Used to Target Guidance and Assistance to States*" GAO-05-290 (Apr. 4, 2005) http://www.gao.gov/products/GAO-05-290. In addition to noting that no national data on children subject to ICWA was available, GAO asserts that the extent to which states and tribes work together to implement ICWA and title IV-E/IV-B requirements affects outcomes for Indian children in state foster care systems.

The CDSS agrees no national data on children subject to ICWA is available and that child welfare programs will be enhanced by data on both ICWA compliance and tribe/state interactions. Impressively, the ICWA data elements incorporated in the AFCARS final rule respond judiciously to both of these important considerations. Collection of this data is not only necessary and appropriate, but an ACF responsibility. As stated in the ACF discussion of *Use of AFCARS Data* in the Supplemental notice of proposed rulemaking (81 FR 20284):

> "Improving AFCARS to inform ACF and other federal agencies is consistent with ACF's implementation of government-to-government principles of engagement with AI/AN tribes and respect for our trust responsibilities. (81 FR 20286; citing both the HHS and ACF Tribal Consultation Policies)
>
> "AFCARS is designed to collect uniform, reliable information from title IV-B and title IV-E agencies on children who are under the agencies' responsibility for placement, care, or supervision. . . there is no comprehensive national data on the status of AI/AN children for whom ICWA applies at any stage in the adoption or foster care system. AFCARS data can bridge this gap." (81 FR 20284)

The ACF issued the Comprehensive Child Welfare Information System (CCWIS) final rule imposing major changes to federal data collection requirements (published June 2, 2016 and 81 FR 35450). The required data collection includes "for states, data to support specific measures taken to comply with the requirements in section 422(b)(9) of the Act regarding the state's compliance with the Indian Child Welfare Act." Section 422 is codified at 42 U.S.C. §622 and imposes a tribal consultation mandate. As documented at length throughout the final rule, Indian tribes consistently and vigorously support the AFCARS ICWA data elements, with AFCARS identified by the HHS Secretary's Tribal Advisory Committee as the vehicle for ICWA data elements. (81 FR 20285)

The AFCARS final rule represents a much needed and important outcome of an inter-agency collaborative effort that has established the framework for ongoing efficient, effective and economical ICWA implementation efforts.

ACF participated in a much needed inter-agency collaborative effort based on the facts that there is a federal trust responsibility to tribes that extends across agencies and AFCARS data on the wellbeing of American Indians/Alaska Natives children will help multiple federal agencies identify needs and gaps, expand best practices, and shape new policy and technical assistance. The HHS, Department of Justice (DOJ), and Department of Interior (DOI), federal departments with a strong interest in collecting data elements related to ICWA, participated in an inter-agency ICWA working group (81 FR 20286). This work group contributed to both new DOI ICWA regulations (81 FR 38785) and the ICWA AFCARS. It also resulted in a *Memorandum of Understanding on Interagency Collaboration Regarding the Indian Child Welfare Act* (MOU) among the three agencies. The purpose of the MOU is to (1) establish the Partners' commitment to ICWA implementation, (2) formally establish the ICWA Interagency Workgroup, (3) promote communication and collaborative efforts on Federal activities, and (4) to establish processes to ensure effective and efficient Workgroup operations. https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc1-033719.pdf

The Department of Interior, Bureau of Indian Affairs (BIA) issued final ICWA regulations on June 14, 2016, because it found:

> ". . . implementation and interpretation of the Act has been inconsistent across States and sometimes can vary greatly even within a State. This has led to significant variation in applying ICWA statutory terms and protections . . .
>
> "The need for consistent minimum Federal standards to protect Indian children, families, and Tribes still exists today. The special relationship between the United States and the Indian Tribes and their members upon which Congress based the statute continues in full force, as does the United States' direct interest, as trustee, in protecting Indian children . . .
>
> "[The Final Rule] promotes nationwide uniformity and provides clarity to the minimum Federal standards established by the statute." (81 FR 38779 and 6/14/16)

The final rule updates definitions and notice provisions and provides a new subpart I to 25 CFR part 23 to address ICWA implementation by states.

Through the workgroup initiative, the partner agencies had the opportunity to collaborate on not only the BIA ICWA regulations, but on development of corresponding AFCARS ICWA data elements to further promote nationwide uniformity and clarity to the minimum federal standards established by ICWA. These complimentary regulations lay the foundation for effective, efficient and economical ICWA implementation efforts

across agencies. To the extent there is potential for varied agency interpretations, the MOU provides a mechanism to assure resolution and consistency as federal agencies strive to meet their joint trust obligations to Indian tribes and children. California applauds this effort and urges its continuation.

The administration provided all interested parties with ample notice and opportunity to comment on the final rule, carefully considered all comments and correctly determined that the benefit outweighs the burden of the specified data.

The AFCARS ANPRM specifically solicits comments on the data elements and their associated burden asserting they "received too few estimates to reference for calculating the cost and burden associated with this final rule." (83 FR 11450) The CDSS believes, given the unfortunate but well established absence of data on Indian children, the final rule contains an appropriately supported burden estimate that was developed after extensive opportunity for both state and tribal comment and consultation. (81 FR 240). Subsequently, on June 30, 2017, ACF published a *Notice of Proposed Information Collection Activity; Comment Request for the Adoption and Foster Care Analysis and Reporting System for Title IV-B and Title IV-E,* again seeking information and comment on the ICWA AFCARS. This was followed by additional published requests. Notwithstanding, in the ACF webinar on the ANPRM, ACF indicated that rather than translating no comment as consent, the agency decided once again to seek additional information in the form of the ANPRM.

First, as indicated, CDSS fully supports and consents to collection of the data elements contained in the AFCARS final rule. Second, in efforts to assess burdens imposing costs exceeding benefits, we believe AFCARS must be viewed in context. Both child welfare data collection and ICWA are the focus of major recent federal regulatory changes, such that irrespective of corresponding AFCARS data elements, states are obligated to modify their data system as well as to modify policies and procedures, undertake development work, training, etc. For this reason, it may not be appropriate to assess this activity as an AFCARS burden and it is the reason CDSS is not doing so. To the contrary, improved data as identified in the AFCARS data elements holds the promise of maximizing resources and across agencies alleviating burdens associated with implementation of child welfare programs.

Implementing state and federal law, including preparation for implementing the AFCARS, we have and continue to update many policies, practices and curricula to incorporate both ICWA standards and a framework that reflects sexual orientation and gender identity expression. Prompted by the CCWIS we are making exciting strides in improving our data collection processes, both as to data that we will collect directly as well as data accessed via interfaces that we are negotiating with partner agencies such as courts. While ACF has expressed concern that the AFCARS increases requirements

for reporting court findings, our experience is that any burden of such reporting is outweighed by the benefit. This information is central to child welfare practice but is presently inefficiently collected in narrative or other formats that do not allow extraction of data. Reporting is currently required on some court determinations, as with respect to findings and orders impacting IV-E eligibility determinations. The increased emphasis placed on court findings and orders in the new AFCARS is accelerating interoperability initiatives. We have and continue to develop technical and functional processes for court interfaces and at this juncture are actively engaged with three software vendors that have the largest presence in California Courts. These are groundbreaking developments that hold much promise for improving adherence to laws protecting children and to maximizing provision of services and beneficial outcomes.

We look forward to continuing to work with ACF to implement the very important data requirements.

For further information, you may contact me at (916) 657-2614.

Sincerely,

GREGORY E. ROSE
Deputy Director
Children and Family Services Division

As of: September 14, 2020
Received: June 05, 2018
Status: Posted
Posted: June 06, 2018
Tracking No. 1k2-93ke-fqdw
Comments Due: June 13, 2018
Submission Type: E-mail

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0017
Swinomish Indian Tribal Community

Submitter Information

Name: M. Brian Cladoosby
Address: 98257
Organization: Swinomish Indian Tribal Community

General Comment

See Attached

Attachments

Swinomish Indian Tribal Community

Main Office: 360.466.3163
Facsimile: 360.466.5309

Swinomish Indian Tribal Community

A Federally Recognized Indian Tribe Organized Pursuant to 25 U.S.C. § 476
* 11404 Moorage Way * La Conner, Washington 98257 *

June 5, 2018

Attn: Kathleen McHugh
United States Department of Health and Human Services
Administration for Children and Families
Policy Division
330 C Street SW
Washington, DC 20024

Via electronic correspondence at: *CBComments@acf.hhs.gov*

Re: RIN: 0970-AC72 **Adoption and Foster Care Analysis and Reporting System;** Advance Notice of Proposed Rulemaking (3/15/2018)

Dear Sir or Madam,

The Swinomish Indian Tribal Community submits these comments on the Advanced Notice of Proposed Rulemaking (ANPRM) regarding the Adoption and Foster Care Analysis Reporting System (AFCARS) for Title IV-B and Title IV-E as they relate to the Indian Child Welfare Act of 1978 (ICWA). Data points specific to ICWA were incorporated into AFCARS as detailed in the Final Rule published on December 14, 2016. The Swinomish Indian Tribal Community opposes any diminishment or termination of this important ICWA data point collection.

Compliance with the Indian Child Welfare Act is vital to the protection of the children of the Swinomish Indian Tribal Community, as we, like many other tribes, must work closely with state social services and court systems to ensure the best outcome for tribal children who are in the state foster care system. As has been noted in the December 2016 Final Rule, 81 Fed. Reg. 90524, 90527, many states, tribes and child welfare organizations recognize that the Indian Child Welfare Act is the "gold standard" of child welfare practices, emphasizing placement with family and within the tribal community wherever possible, and requiring active efforts to keep the family together.

Despite the fact that ICWA has been law for 40 years, there has been no federal oversight and thus, little in-depth data exists on actual child outcomes in ICWA cases. The Final Rule was celebrated in the January 2017 edition of the ABA's Child Law Practice Journal (Vol. 36, No. 1, 22, 23) as providing "the first opportunity to really examine case outcomes on a national level....The changes to AFCARS are huge for the field and will be critical to move

understanding of ICWA cases forward in a meaningful way." Such data is important to furthering the cooperation between states and tribes to help ensure the best outcome for American Indian/Native Alaska children – and because ICWA is the gold standard, it may assist in developing better outcomes for all children.

Collecting this data falls squarely within the statutory mission of the Administration for Children and Families (ACF)'s data collection responsibilities, as Section 479(3) of the Social Security Act requires ACF to, among other things, provide reliable national data on "the status of the foster care population (including the number of children in foster care, length of placement, type of placement, availability for adoption, and goals for ending or continuing foster care)," and "the extent and nature of assistance provided by Federal, State, and local adoption and foster care programs and the characteristics of the children with respect to whom such assistance is provided."

The Indian Child Welfare Act reaches into every aspect of a dependency action or an adoption to which it applies: active efforts before a case is filed to keep a family together, placement priorities, and burdens of proof at both the placement into foster care and termination of parental rights levels. Notice to and the intervention of tribes helps ensure that tribal resources can be added to possible services for families. It is, therefore, impossible to have a comprehensive picture of American Indian/Native Alaskan children in foster care without including ICWA data points.

ACF has already made an extensive analysis of the benefits of collecting the additional data points versus the burdens. A Notice of proposed updates to AFCARS to include ICWA data points was published on April 2, 2015, inviting comments. Additional notice occurred on April 7, 2016. The Final Rule was published on December 14, 2016 and thoroughly responded to comments on both the benefits and burdens of including the ICWA data elements. Given the multiple opportunities to comment throughout this time period, any additional rulemaking or comment collection is unnecessary. In addition, tribes, tribal organizations, and advocates received notice of all of these opportunities, and were provided ample time to comment on this vital and important rule change. In fact, this Tribe provided comments to ACF at that time, as reflected in the attached copy.

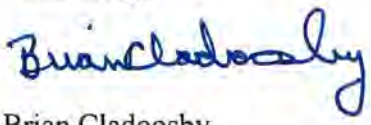
States also had ample opportunity to participate in the rulemaking. As the Final Rule explains in detail, ACF engaged in robust consultation with states and responded to their concerns, for example, by streamlining many data elements. 81 Fed. Reg. 90524, 90565-66. States had at least six different opportunities to raise their concerns, which ACF considered and addressed fully. 81 Fed. Reg. at 90566.

Since these regulations have been effective for approximately fifteen months, all states should be in the process of implementing them. We are aware of several trainings that Washington State has initiated to assist state and tribal programs with Title IV-E funding to implement the Final Rule. At this stage, any modification of the data collection requirements would be a waste of finite state and tribal child welfare resources, which itself is an additional burden.

Conclusion

For the foregoing reasons, we strongly support each of the ICWA-related data points and believe, as your agency did in publishing the Final Rule in 2016, that the benefit of this data collection outweighs any burden. Any hindrance or stoppage of ICWA data point collection significantly impacts tribal children, families, and county agencies which are working to implement data collection. In the interest of protecting our Swinomish Indian Tribal Community children and families, we respectfully submit these comments.

Sincerely,



M. Brian Cladoosby
Chairman, Swinomish Indian Senate

Main Office: 360.466.3163
Facsimile: 360.466.5309

Swinomish Indian Tribal Community

A Federally Recognized Indian Tribe Organized Pursuant to 25 U.S.C. § 476
* 11404 Moorage Way * La Conner, Washington 98257 *

April 9, 2015

Ms. Kathleen McHugh, Director
Division of Policy, Children's Bureau
Administration on Children, Youth and Families
Administration for Children and Families
1250 Maryland Avenue, SW, 8th Floor
Washington, DC 20024

Re: Comments on Notice of Public Rulemaking (NPRM), proposed changes to the Adoption and Foster Care Automated Reporting System (AFCARS), published in the *Federal Register* on February 9, 2015, pages 7132–7221

Dear Ms. McHugh:

The Swinomish Indian Tribal Community, a federally recognized Tribe in Washington state, is pleased to provide comments on the Notice of Public Rulemaking (NPRM) regarding proposed changes to the Adoption and Foster Care Automated Reporting System (AFCARS) published in the Federal Register on February 9, 2015, pages 7132–7221, regarding the need to include new data elements related to children who are in out-of-home placements under state custody and subject to the requirements of the Indian Child Welfare Act (ICWA).

Currently, there are few data collection efforts at the state and federal level that can provide meaningful data on the status of American Indian and Alaska Native children who are under the custody of state child welfare authorities. Despite the protections of the ICWA, this population is overrepresented within state foster care systems nationally. However, without more detailed, case-level data at the federal level, it is impossible to know how many American Indian and Alaska Native children are receiving ICWA protections.

The proposed regulations state that ICWA information was omitted because of the Administration for Children and Families' belief that it does not have specific enforcement authority over ICWA. However, section 479 of the Social Security Act requires that the Administration collect information regarding the number and characteristics of children in the

foster care and adoption systems. Whether a child is a member of a federally recognized tribe is a characteristic which dramatically affects how that child is treated in the foster care and adoption systems. This characteristic is going to affect placement preferences, efforts to reunite families, burdens of proof, transfer options to Tribal Court and various additional resources provided by Tribal communities. The proposed regulations state they include "[r]evised data elements that enhance our understanding of permanency planning for children in foster care, including new data elements that identify why a child's permanency plan changes, the child's concurrent permanency plans and the child's transition plan," among many other elements. Understanding the permanency plan for a child requires knowledge of whether ICWA applies.

Further, the Administration for Children and Families is incorrect in stating that ICWA is outside its purview. Section 422(b)(9) of the Social Security Act requires that Title IV-B state plans "contain a description, developed after consultation with tribal organizations…in the State, of the specific measures taken by the State to comply with the Indian Child Welfare Act." The Administration has specific authority and oversight over the Title IV-B programs.

Specifically, we recommend adding the following data elements:

Identification of American Indian/Alaska Native children

- Is the child American Indian or Alaska Native (allow for self-identification and those who are members or eligible for membership in a federally recognized tribe)?
- Does ICWA apply to this child (must be a member or eligible for membership of a federally recognized tribe)?
- What is the child's tribal membership or eligibility (name all tribes)?
- Date of verification of ICWA status

Tribal notification

- Date of notice to tribes, parents, or Indian custodian of report of child abuse or neglect, or other state intervention?
- Who was notified (name all tribes and federal agency, if applicable)?

Tribal intervention in a state case

- Did the tribe intervene? On what date?
- Was the case transferred to tribal court?
- Date of transfer to tribal court jurisdiction

Caretaker Family Structure (home from which child was removed)

- Add Indian custodian (currently AFCARS only asks about marital status, but this is important to understanding ICWA applicability)

Relationship of the foster parents and other care providers to the child

- Add member of child's tribe (reflects the fact that shared tribal membership can be the basis for a relationship between the foster parents and child that exceeds that of other relationships)
- Add member of an Indian Tribe other than that of child's Tribe (reflects the fact that shared tribal membership even with a different tribe can be the basis for a relationship between the foster parents and child that exceeds other relationships)

Decision to place out-of-home

- Did the court find that active efforts had been provided to prevent removal?
- Did court find by clear and convincing evidence that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child?
- What services are being or were provided to prevent removal?
- Was placement out of the home approved by the tribe?
- Was qualified expert witness testimony provided at the court hearing? Who provided the testimony (tribal witness, state employee witness, AI/AN consultant/expert, non-Indian consultant/expert)?

Licensing of out-of-home placements

- Was the child's living arrangement licensed or approved by the state? By a tribe?
- For children living in an institution, was the institution licensed or approved by a tribe?

Foster placement preference (placement type)

- Child's extended family
- Foster home approved, licensed, or specified by the child's tribe
- AI/AN foster home licensed or approved by an authorized non-Indian licensing authority
- Institutional placement approved by a tribe or operated by an Indian organization
- Other foster home
- Other institutional placement

Termination of parental rights—involuntary

- Did the court find that active efforts were provided to reunify and avoid termination?
- Did the court find beyond a reasonable doubt that continued custody by the parent or Indian custodian is likely to result in serious emotional and physical damage to the child?
- Was qualified expert witness testimony provided at the court hearing? Who provided the testimony (tribal witness, state employee witness, AI/AN consultant/expert, non-Indian consultant/expert)?

Consent to voluntary foster care placement or termination of parental rights (TPR)

- Was the consent to foster care placement or TPR done in writing, recorded in the presence of a judge, and with a certification that the parent fully understood the meaning of the consent?

Consent to voluntary adoptive placement

- Was the consent to adoptive placement done in writing, recorded in the presence of a judge, and with a certification that the parent fully understood the meaning of the consent?
- Was consent to adoptive placement given 10 days after birth of the child?

Adoption placement preference (placement type)

- Child's extended family
- Members of child's tribe
- Other AI/AN families
- Other

Title IV-E agency involvement (adoption)

- Was a tribal child welfare agency involved in placement?

The Swinomish Indian Tribal Community is hopeful that the Administration for Children and Families will reconsider its previous position on its authority to include new ICWA data elements in AFCARS. AFCARS cannot adequately provide information regarding the characteristics of all foster children if it does not include information about the political status of American Indian and Alaska Native children in the system and how that political status affects their cases.

If you have any questions, please don't hesitate to contact Ann Reading (reading.ann@gmail.com) and thank you in advance for consideration of our comments and recommendations.

Sincerely,

Brian Cladoosby

M. Brian Cladoosby
Chair, Swinomish Indian Senate

As of: September 14, 2020
Received: June 06, 2018
Status: Posted
Posted: June 07, 2018
Tracking No. 1k2-93l4-g9pt
Comments Due: June 13, 2018
Submission Type: E-mail

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0018
Nottawaseppi Huron Band of the Potawatomi

Submitter Information

Address: 49052
Organization: Nottawaseppi Huron Band of the Potawatomi

General Comment

See Attached

Attachments

Nottawaseppi Huron Band of the Potawatomi

NOTTAWASEPPI HURON
BAND OF THE POTAWATOMI
A FEDERALLY RECOGNIZED TRIBAL GOVERNMENT

June 6, 2018

Attn: Kathleen McHugh
United States Department of Health and Human Services
Administration for Children and Families
Policy Division
330 C Street SW
Washington, DC 20024

Via electronic correspondence at: *CBComments@acf.hhs.gov*

Re: RIN: 0970-AC72 **Adoption and Foster Care Analysis and Reporting System;** Advance Notice of Proposed Rulemaking (3/15/2018)

Dear Sir or Madam,

The Nottawaseppi Huron Band of the Potawatomi submits these comments on the Advanced Notice of Proposed Rulemaking regarding the Adoption and Foster Care Analysis Reporting System (AFCARS) for Title IV-B and Title IV-E as they relate to the Indian Child Welfare Act of 1978 (ICWA). Data points specific to ICWA were incorporated into AFCARS as detailed in the Final Rule published on December 14, 2016.

General Comments:

The data collection requirements of the Final Rule are consistent with HHS's, ACF's and the Children's Bureau's statutory missions.

The Children's Bureau was created in 1912 to "investigate and report… upon **all matters** [emphasis added] pertaining to the welfare of children and child life among **all classes** [emphasis added] of our people…," tasked specifically with investigating… "**legislation affecting children in the several States** [emphasis added] and Territories." While the creation and evolution of the Department of Health and Human Services (HHS) is somewhat complex and convoluted, its mission is simple enough; "The mission of the U.S. Department of Health and Human Services (HHS) is to enhance the health and well-being of all Americans, by providing for effective health and human services and by fostering sound, sustained advances in the sciences underlying medicine, public health, and social services." The Administration of Children and Families (ACF) was created in 1991 by HHS Secretary Louis W. Sullivan, M.D., for the purpose of bringing together the

PINE CREEK INDIAN RESERVATION
1485 MNO-BMADZEWEN WAY • FULTON, MI 49052

many federal child and family programs which Congress has created. The Children's Bureau was one of the programs that was brought under the ACF. Given the respective histories and the missions of the HHS, ACF, and the Children's Bureau, it makes sense that the HHS Secretary's mandate to collect national, uniform, and reliable information on children in state care pursuant to Section 479 of the (the Act) is carried out by the Children's Bureau.

When Congress enacted ICWA in 1978, it was acting to protect Indian children from often unwarranted removals and placement in non-Indian foster and adoptive homes and institutions by states that were exercising jurisdiction in ways that often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families. The passage of ICWA created minimum standards for the removal and placement of Indian children. ICWA is legislation that affects children in the several states. ICWA instructs not only states, but also executive agencies as to the minimum standards for the placement of Indian child into foster care or adoptive homes. The HHS, ACF, and Children's Bureau are bound by the Congressional directives enumerated within the ICWA, 42 USC § 192, and the Social Security Act. In addition, the entirety of the federal government has to act within the special, political relationship between tribes and the federal government. It is not solely the purview of the Department of Interior to enforce ICWA. Rather, it is the responsibility of all government agencies to act within the trust responsibility. Ensuring AI/AN children are properly identified and protected within state social service systems is without question a function of the trust responsibility. For HHS to declaim any authority or jurisdiction in this area is a fundamental misunderstanding of the relationship between tribes and the federal government. Indeed, the failure to collect data elements concerning the placement standards of Indian children in foster care is both a failure to follow the rule of law and to protect children from identified and preventable harm.

Section 1102 of the Act instructs the Secretary to promulgate regulations necessary for the effective administration of the functions for which HHS is responsible under the Act. The Final Rule, which the ACF promulgated pursuant to these statutory requirements, will ensure the collection of necessary and comprehensive national data on the status of American Indian/Alaska Native (AI/AN) children for whom ICWA applies and historical data on children in foster care. Thus, the Final Rule's data collection elements are necessary to HHS's statutory mission under Section 479 of the Act.

The administration provided all interested parties with ample notice and opportunities to comment on the final rule.

Tribes, tribal organizations, and tribal advocates have long sought the inclusion of ICWA-related data points in the AFCARS. The initial rules were changed due to comments by these entities and others after reviewing the Administration of Children

and Families' February 9, 2015 proposed rule. On April 2, 2015 the Agency issued a Supplemental Notice of Proposed Rulemaking (SNPRM) changing certain data elements. Yet another SNPRM was issued on April 7, 2016. Specifically, the Agency sought comments on the inclusion of the ICWA data points in both the April 2015 Intent to Publish a SNPRM, as well as the April 2016 SNPRM. Ultimately, the Final Rule was published on December 14, 2016 (Final Rule), and included the ICWA data elements.

The Final Rule thoroughly responded to comments on both the benefits and burdens of the proposed regulatory action. Given the multiple opportunities to comment throughout this time period, any additional collection activity is unnecessary. In addition, tribes, tribal organizations, and advocates received notice of all of these opportunities, and with ample time to comment on this vital and important rule change.

States also had ample opportunity to participate. As the Final Rule explains in detail, ACF engaged in robust consultation with states and responded to their concerns, for example, by streamlining many data elements. 81 Fed. Reg. 90524, 90565-66. States had at least six different opportunities to raise their concerns, which the ACF considered and addressed fully. 81 Fed. Reg. at 90566.

States are already in the process of implementing these changes.

Since these regulations have been effective for approximately fifteen months, all states should be in the process of implementing them. We are aware, for example, that California, a state with 109 federally-recognized tribes, is already well under way with its implementation efforts, having relied on the final rule. At this stage, any modification of the data collection requirements would be a waste of finite state child welfare resources, which itself is an additional burden.

These regulations are important to us, our families, and state child welfare systems.

The regulations themselves—in response to the comments from stakeholders across the country—describe the importance of these changes. As stated in the December 2016 Final Rule, 81 Fed. Reg. 90524, 90527:

> Overall, tribes, organizations, states, and private citizens supported our mission to collect additional information related to Indian children as defined in ICWA. Moreover, some states, tribes, national organizations, and federal agencies have stated that ICWA is the "gold standard" of child welfare practice and its implementation and associated data collection will likely help to inform efforts to improve outcomes for all children and families in state child welfare systems.

> Generally, tribes, organizations representing tribal interests, national child welfare advocacy organizations, and private citizens fully support the overall goal and purpose of including ICWA-related data in AFCARS, and the data elements as proposed in the 2016 SNPRM. These commenters believe that collecting ICWA-related data in AFCARS will:
>
> 1. provide data on core ICWA requirements such as "active efforts" and placement preferences, as well as assess how the child welfare system is working for Indian children as defined by ICWA, families and communities;
>
> 2. facilitate access to culturally-appropriate services to extended families and other tribal members who can serve as resources and high-quality placements for tribal children;
>
> 3. help address and reduce the disproportionality of AI/AN children in foster care; and
>
> 4. provide avenues for collaboration between states and tribes that are more meaningful, and outcome driven, including improved policy development, technical assistance, training, and resource allocation as a result of having reliable data available.
>
> Overall, tribal commenters and national child welfare advocacy organizations believe that collecting ICWA-related data in AFCARS is a necessary step to ensure that Indian families will be kept together when possible, and will help prevent AI/AN children from entering the foster care system. Many of the tribal commenters that supported the 2016 SNPRM also recommended extensive training for title IV-E agencies and court personnel in order to ensure accurate and reliable data.

Other federal reports have demonstrated the need for quality national data to assess states' efforts in implementing ICWA. See Government Accountability Office, *Indian Child Welfare Act: Existing Information on Implementation Issues Could be Used to Target Guidance and Assistance to States*, GAO-05-290 (Apr. 4, 2005) http://www.gao.gov/products/GAO-05-290.

Nothing has changed since ACF made clear in its final rule that data collection is necessary to protect Indian children and families and their tribes. There remains a pressing need for comprehensive national data on ICWA implementation. Congress has not amended the Act's data collection provisions. And there have been no changes in

circumstances that would alter the burdens or benefits of the final rule's data collection requirements.

Tribes have relied on the final rule.

Tribes have long sought data points regarding the implementation of ICWA. This has included advocacy on local, state, and federal levels. With the promulgation of the final rule in December of 2016, tribes largely ceased advocacy efforts to mandate data collection, instead refocusing tribal resources toward working collaboratively with their governmental partners to implement the data elements listed in the final rule. To this end, some tribes have worked to develop and update agreements to reflect the data elements in the final rule and the 2016 BIA ICWA Regulations, since a goal of both is to increase uniformity.

The ANPRM is arbitrary and capricious where it seeks only information on burdens.

This ANPRM arbitrarily focuses on collecting information about the burdens of the Final Rule without considering the benefits. As required by law, the Final Rule provided a careful analysis of the benefits and burdens, and appropriately amended the proposed rule to achieve a balanced final rule.

The agency "determined in the final rule that the benefits outweigh the burden associated with collecting and reporting the additional data." 81 Fed. Reg. at 90528. The agency explained how its weighing of the benefits and burdens led it to make certain changes to its proposal. For example: as stated in the final rule at 81 Fed Reg. 90528:

> In response to state and tribal comments suggesting congruence with the BIA's final rule, we revised data elements in this final rule as appropriate to reflect the BIA's regulations including removing requirements that state title IV-E agencies report certain information only from ICWA-specific court orders. These changes should allow the state title IV-E agency more flexibility, alleviate some of the burden and other concerns identified by states, help target technical assistance to increase state title IV-E agency communication and coordination with courts, and improve practice and national data on all children who are in foster care.

There have been no material changes in circumstances justifying the agency's new approach. The executive order is not a sufficient basis for the agency to act, as the executive order itself is arbitrary and unlawful where it provides an insufficient basis for reasonable decision-making relaying solely on an examination the burden of regulations without the required balancing of benefits. Additionally, the executive

order fails to provide justification to deviate from the statutory requirement for regulations.

The foregoing are responses to the Questions for Comment provided in the ANPRM:

1. Identify the data elements, non-ICWA-related, that are overly burdensome for state and tribal title IV-E agencies and explain why. Please be specific in identifying the data elements and provide a rationale for why collecting and reporting this information is overly burdensome.

No response.

2. Previously, we received comments regarding burden and the system changes needed to report the ICWA-related data elements of the 2016 SNPRM. We would like to receive more detailed comments on the specific limitations we should be aware of that states will encounter in reporting the ICWA-related data elements in the final rule. Please be specific in identifying the data elements and provide a rationale for why this information is overly burdensome.

The ANPRM requests IV-E states and tribes to provide the number of children in foster care who are considered Indian children as defined in ICWA. However, it is specifically due to the lack of a national data reporting requirement, that any number provided in response to this question would be significantly inaccurate. This speaks to the critical importance of the ICWA-related data points – without a data reporting requirement, many states simply do not appropriately track Indian children in their child welfare system, let alone the individual ICWA-related data points.

Some commenters, current and past, estimated that collecting the data necessary to report on the ICWA data elements would cause significant burden. These arguments are the precise reason that it's essential to require the collection of all of the ICWA data elements. The ICWA data elements within the final rule correspond directly with the information that has to be collected for compliance with ICWA. Any commenter who estimates an increase in burden hours associated with the collection of, or training for the collection of, ICWA data is admitting a failure to apply the **minimum** standards established for the safety and wellbeing of AI/AN children. Even the data elements that are associated with court findings pertain to information that caseworkers and agencies have to track and monitor as the petitioners of a case; it may be the judge's responsibility to make the necessary findings, but the legality of the agency's continued custody of AI/AN children is reliant on those findings. The collection of ICWA information is already a requirement under the ICWA. Any burdens associated with reporting the information that agencies have an existing obligation to know and collect is dwarfed when compared to the benefits of protecting abused and neglected AI/AN children from a child welfare system known to disproportionately impact AI/AN children.

3. Previously, we received comments that particular data elements did not lend themselves to national statistics and were best assessed with qualitative methods such as case review. Please provide specific recommendations on which data elements in the regulation to retain that are important to understanding and assessing the foster care population at the national level. Also, provide a rationale for your suggestion that may include its relevance to monitor compliance with the title IV-B and IV-E programs or another strong justification for using the data at the national level.

As discussed above, there has been ample opportunity for comment and this additional ANPRM is itself both unlawful as crafted and is a waste of finite resources. Tribes and states properly relied on the final rule in working toward implementation for nearly a year and a half. Any modification to the existing data points frustrate those efforts, would require states to begin again collaborating with their tribal partners and ultimately further delay implementation. This comes at the expense of the health, safety and welfare of not only Indian children, their families, and their tribes, but the child welfare system at large where a modification of the final rule would cost resources that are system-wide.

4. Previously we received comments noting concerns with variability in some of the data elements across states and within jurisdictions. Please provide specific suggestions to simplify data elements to facilitate the consistent collection and reporting of AFCARS data. Also, provide a rationale for each suggestion and how the simplification would still yield pertinent data.

In the absence of a national data reporting requirement, it is guaranteed there will be variability with data elements which would frustrate a stated purpose of the 2016 BIA ICWA Regulations: to establish uniformity of application throughout the nation. The need to eliminate the data variability is precisely why it is important to have a national data collection standard. It will assist HHS/ACF efforts to support states in properly implementing ICWA by having targeted, data-driven identification areas where states need support the most.

5. Previously we received comments questioning the utility, reliability, and purpose of certain data elements at the national level. Provide specific recommendations on which data elements in the regulation to remove because they would not yield reliable national information about children involved with the child welfare system or are not needed for monitoring the title IV-B and IV-E programs. Please be specific in identifying the data elements and provide a rationale for why this information would not be reliable or is not necessary.

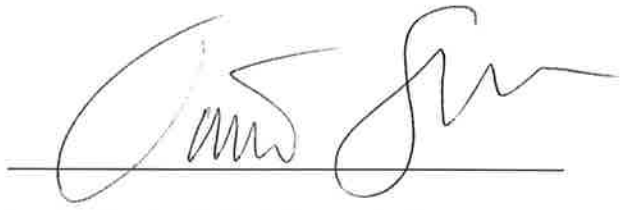
Each of the ICWA-related data points are tied to existing federal law and regulation and are necessary to monitor and support title IV-B and IV-E programs. Each of the ICWA-related data points are critical.

Further, as discussed above, ICWA is the "gold standard" of child welfare and ensuring compliance with this federal law informs how the existing child welfare system may improve in whole.

For the foregoing reasons, we strongly support each of the ICWA-related data points and believe, as your agency did in publishing the Final Rule in 2016, the benefits of this data collection outweighs any burden.

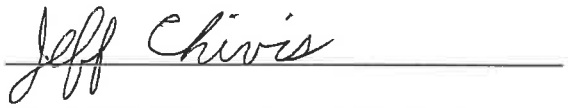
Any hindrance or streamlining of ICWA data point collection significantly impacts tribal children, families, and county agencies trying to comply with the AFCARS final rule and ICWA. The Social Security Act requires the Secretary of the HHS to collect national, uniform, and reliable information on children in state care. Furthermore, the Secretary of the HHS has an obligation to promulgate final regulations concerning data systems that collect information relating to adoption and foster care in the United States. ICWA's standards require state court judges to ensure minimum standards for the placement for AI/AN children. HHS should be using AFCARS to report to Congress whether or not states are meeting ICWA's minimum standards and HHS should be holding the states accountable when they are not. In the interest of protecting our children and families, we respectfully submit these comments and ask HHS, ACF, and the Children's Bureau to implement the 2016 AFCARS final rule, as previously approved, without delay.

Sincerely,



Jamie Stuck, Tribal Council Chair

Dorie Rios, Tribal Council Vice-Chair and Tribal Secretary Pro Tem



Dr. Jeff Chivis, Tribal Council Treasurer

Homer A. Mandoka, Tribal Council Sergeant-At-Arms

As of: September 14, 2020
Received: June 06, 2018
Status: Posted
Posted: June 07, 2018
Tracking No. 1k2-93l5-urbz
Comments Due: June 13, 2018
Submission Type: E-mail

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0019
Alaska Dept of Human Services

Submitter Information

Name: Tracy Spartz
Email: 99811
Organization: Alaska Dept of Human Services

General Comment

See Attached

Attachments

Alaska Dept of Human Services

THE STATE of ALASKA
GOVERNOR BILL WALKER

Department of Health and Social Services
OFFICE OF CHILDREN'S SERVICES
Director's Office
P.O. Box 110630
Juneau, Alaska 99811-0630
Main: 907.465.3170
Fax: 907.465.3397

June 6, 2018

Kathleen McHugh
US Department of Health and Human Services
Administration for Children and Families
Director
Policy Division
330 C Street, SW
Washington, DC 20004

RE: Advanced Notice of Proposed Rulemaking for Adoption and Foster Care Analysis Reporting System

Dear Ms. McHugh:

The State of Alaska welcomes the opportunity to respond to the Advanced Notice of Proposed Rulemaking as it relates to the Adoption and Foster Care Analysis and Reporting System (AFCARS). Alaska is facing a substantial effort to supply the data required by the 2016 Final Rule for AFCARS. Alaska's SACWIS case management system, does not currently collect or store data needed for 126 of the data elements, which will require Alaska to create data reporting points and interfaces to collect and store this data. New policies and business processes must be designed, and either new staff must be hired to implement the new processes, or existing staff resources must be diverted. When the 2016 rule was in effect and states were expected to begin collecting 2.0 data on 10/1/2019, Alaska estimated one full year for planning and execution for just activities related to case management system enhancements, with work originally scheduled to begin on 10/1/2018.

Alaska is supportive of the prospect of a two-year delay while the 2016 rule is reviewed. In Alaska, caseloads are at an all-time high and Alaska's 2017 Children and Family Services Review (CFSR) found that Alaska is not in substantial conformity with all seven outcomes and six of the seven systemic factors. Concerns noted in the CFSR were related to risk and safety assessment, safety provision and safety planning; poor engagement with children and families and infrequent or insufficient caseworker visitation; the lack of comprehensive assessment of needs; and disparity with safety between foster care and in-home cases. In order to meet the 2016 Final Rule requirements timely, Alaska will likely need to divert caseworkers from activities related to their core mission and improvements related to the CFSR,

in order to collect and document required data. In some instances the new elements outlined in the 2016 Final Rule will add substantial and significant burden to caseworkers as these elements:

- Cannot be collected in the course of normal casework;
- Are not typically collected in the course of normal casework, but they could be introduced for the sake of the AFCARS report. Which in turn, creates new workflows for caseworkers and supervisors, resulting in time taken away from critical activities;
- Are collected in the course of normal casework, but the act of documenting the event(s) introduces an additional task, especially if that documentation must occur each reporting period, for each child, for each event;
- Create an undue burden where caseworkers have to document that something did *not* happen each reporting period. Alaska anticipates that states will then be required to add effective dates to account for subsequent reporting periods and resubmissions.

In addition to increasing the burden to frontline staff, we have the following concerns that some of the new data element(s):

- Will negatively impact the caseworker's relationship with the children and families;
- Will negatively impact the relationship between licensing workers and providers;
- May discourage individuals from becoming foster parents;
- Do not have a universal application across states;
- Are qualitative in nature and will require a time consuming case review to answer if the data is to be valid;
- Are not overtly relevant to child welfare practice so the practical utility of collecting and reporting the data is questionable;
- Attributes are such that consistent accuracy cannot reasonably be validated. Failure to provide complete and accurate data will then cause the state to be in non-compliance and face a financial penalty for the noncompliance period and any subsequent period of noncompliance.

Below is a specific response for particular data elements that are of concern for Alaska:

- Element 7 – Child's Sexual orientation.
    - Alaska is unclear on what this data will be useful for and fears being the catalyst of family conflict related to elicitation of the child's sexual orientation, gender identity, or gender expression. The response option 'something else' to cover the myriad of sexual orientations besides those specified would suggest the data is not needed as it would not be valid. Alaska is unclear on how the data validity will be evaluated.
- The following elements represent the need for States to demonstrate compliance with revised regulations related to the Indian Child Welfare Act, as adopted through the Bureau of Indian Affairs in 2016. Alaska has previously submitted strong support for the revised ICWA regulations, and the addition of some of the data elements related to ICWA standards in AFCARS. However, Alaska does have concern that some of these elements will be a challenge

to consistently and reliably collect accurate data to support this effort. In addition, the new Comprehensive Child Welfare Information System (CCWIS) regulations will require, to the extent practicable, for a State's case management system to exchange data with the systems operated by the courts. The CCWIS regulations recognize that challenges such as lack of infrastructure and resources means that building a data exchange is not feasible. The CB may consider such an approach with states where this AFCARS data is collected via a data exchange to the extent practicable. Alaska has identified that the accurate reporting on the following ICWA data elements will be challenging without an existing interface with the courts:

- Elements 21-23, related to Notification of child custody proceedings;
- Elements 96- 100 and 103-105 related to State Court findings, Court orders, court hearing attendees and evidence presented;
- Elements 166- 171 related to Basis for Good cause under ICWA to deviate from placement preference;
- Elements 267-272 related to Basis for Good cause under ICWA to deviate from adoption or guardianship placement preference;

- Element 34 Race Unknown/Abandoned/Declined.
  - The working assumption behind valid data is that parents are the data source to deem their child's race. It's unlikely that users will internalize the rule that when a child is abandoned, the federal requirement does not consider any other source of information for the child's race valid. This value could be derived from 'abandonment' indicated at a removal episode, and the user selection ignored. However, Alaska expects that the CB will not accept a derived value, even though Alaska is stating in advance that the data will not be valid unless it is derived.
  - It's unclear what the difference is between 'unknown' and 'not known due to being abandoned';
  - Alaska expects that 'unknown' will eventually not be a satisfactory answer;
  - Alaska expects that 'declined' will eventually not be a satisfactory answer.
- Element 37 Child's Hispanic or Latino ethnicity. (Same as for element 34)
- Element 63 Child is pregnant at the end of the report period.
  - A precise date of pregnancy is difficult to target, and this element appears fraught with complications regarding when the information was discovered and when it was documented, thus ensuring the need for re-submissions;
  - It is not clear how this information is relevant to child welfare practice so the practical utility of collecting/reporting the data is questionable;
  - Though this information may be learned during the normal course of casework, requiring documentation of *the lack* of this event will cause a burden as it means that the question will have to be asked of all children, and documented YES/NO for all children for each reporting period.
- Element 64 Child has ever fathered or bore a child:
  - It is not clear how this information is relevant to child welfare practice so the practical utility of collecting and reporting the data is questionable;
  - Though this information may be learned during the normal course of casework, requiring documentation of the lack of this event will cause a burden as it means that the question will have to be asked of all children, and documented YES/NO for all children for each reporting period.

- Element 94 - Termination/modification of parental rights petition – Alaska questions why this element is relevant? If Time to Permanency in not achieved then root cause analysis belongs elsewhere.
- Element 160 – 164 related to available ICWA foster care and pre-adoptive placement preferences. It is unclear how this would be accurately assessed. It would be a significant burden for the worker to document the availability or *absence* of alternative placement preferences each time a child changes placements.
- Element 185 and 197, First and Second Foster Parent Sexual Orientation, and 244 and 256, First and Second Adoptive parent, guardian, or other member of couple sexual orientation. Alaska is unclear on what this data will be useful for and fears that expecting potential foster parents to divulge this private information will discourage potential licensees. The response option 'something else' to cover the myriad of sexual orientations besides those specified would suggest the data is not needed as it would not be valid. Alaska is unclear on how the data validity will be evaluated.
- Elements 207 - 219 related to Active Efforts:
    - All data elements in this set are qualitative in nature and will require a time consuming case review to answer if the data is to be valid. For example, states must report whether or not 'appropriate services' and 'necessary resources' were identified and whether the state 'offer[ed] all available and culturally appropriate…strategies' or took steps to keep siblings together 'whenever possible';
    - It is unclear when this should be assessed and for what time period. Assessing this information every reporting period would be unmanageable.

Alaska has worked diligently to come into compliance with the 2016 Final Rule, but it is also recognized that there are many areas which simply cannot be in compliance at this time and the necessary interfaces, such as those with the court systems, are simply not in place. Funding to establish these interfaces is not available in Alaska as we are facing clearly austere financial times. Thus, many of the data elements required will be unmet in AFCARS should the 2016 Final Rule be implemented as planned. Alaska is supportive of the delay by 2 years of the implementation of the 2016 Final Rule, if such a delay can better define and clarify the qualitative data elements for which there is concern.

Thank you for the opportunity to address the Advanced Notice of Proposed Rulemaking regarding the AFCARS elements. We look forward to further direction from the Children's Bureau on this important matter.

Respectfully,

Tracy Spartz Campbell

Tracy Spartz Campbell,
Deputy Director

cc: Christy Lawton, Director
Paula Bentz, Children's Bureau, Region X

As of: September 14, 2020
Received: June 06, 2018
Status: Posted
Posted: June 07, 2018
Tracking No. 1k2-93l5-lcq0
Comments Due: June 13, 2018
Submission Type: E-mail

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0020
University of New Hampshire

Submitter Information

Name: Vernon Brooks
Organization: University of New Hampshire

General Comment

See Attached

Attachments

University of New Hampshire

University of New Hampshire

College of Health and Human Services
Department of Social Work

Pettee Hall
55 College Road
Durham, NH 03824-3599

V: 603.862.1799
F: 603.862.4374
TTY: 7.1.1 (Relay NH)

www.chhs.unh.edu/sw

University of New Hampshire
Department of Social Work

June 13, 2018

Attn: Kathleen McHugh
United States Department of Health and Human Services
Administration for Children and Families
Policy Division
330 C Street SW
Washington, DC 20024

Submitted via electronic correspondence at: CBcomments@acf.hhs.gov

Re: RIN: 0970-AC72 **Adoption and Foster Care Analysis and Reporting System;** Advance Notice of Proposed Rulemaking (3/15/2018)

Dear Ms. McHugh:

The University of New Hampshire's Department of Social Work submits these comments regarding the Advance Notice of Proposed Rulemaking published in the *Federal Register* on March 15, 2018 (Volume 83, No. 51, page 11449). Our comments pertain to data elements specific to American Indian and Alaska Native (AI/AN) children contained within the 2016 Adoption and Foster Care Analysis Reporting System (AFCARS) Final Rule published on December 14, 2016. The data elements we are commenting on address a number of relevant federal law requirements pertaining to the Indian Child Welfare Act (ICWA). We oppose any streamlining, modification, or elimination of these critical AFCARS data elements for AI/AN children.

It has been almost 25 years since the establishment of the AFCARS data collection system and 40 years since the enactment of ICWA. AI/AN children are still waiting to have basic data collected that describes their conditions, how relevant federal law under Title IV-B, Title IV-E, and ICWA is being implemented with respect to AI/AN children, and the identification of critical data that can inform local and national interventions to eliminate well-documented and long term foster care disproportionality and service disparities that AI/AN children face. Each year that data is not collected is another year AI/AN children will not see significant improvements to their well-being and policymakers and other government officials will not have the data they need to make smart, effective changes that can address these very serious, long-term problems; this is an untenable situation. We also note that nothing has changed since the publication of the 2016 Final Rule that would change the need for this critical data for AI/AN children. Instead, Congress has made it clear with the passage of the Family First Prevention Services Act (Division E of the Bipartisan Budget Agreement Act of H.R. 1892) that they intend for Title IV-E to be expanded to focus on additional services and efforts, not just a narrow band of placement activities.

General Comments

The 2016 Final Rule is within ACF's Statutory Authority and Mission. Section 479 of the Social Security Act mandates the Department of Health and Human Services (DHHS) collect national, uniform, and reliable information on children in state foster care and adoptive care. The statutory language is expansive and suggests a broad collection of data for children under state care who are in foster care or adoption that includes their demographics, characteristics, and status while in care. Section 1102 of the act instructs the Secretary of DHHS to develop regulations necessary to carry out the functions for which DHHS is responsible under the act.

In addition, Section 422 of the Social Security Act requires DHHS to collect descriptions from states of a state's efforts to consult with tribes on the specific measures taken by a state to comply with ICWA. This provision has been in federal law since 1994 and DHHS has responded by asking states to provide this information, along with additional information related to ICWA implementation in state Annual Progress and Services Reports. DHHS also has a long history of collecting information, although limited, on ICWA implementation through their Child and Family Services Review process with states. These reports and reviews are authorized under the broad discretionary authority provided to DHHS under Titles IV-B and IV-E of the Social Security Act to collect data from states and review their progress against different federal child welfare requirements.

The Final Rule, which ACF developed under the statute, ensures the collection of necessary and comprehensive national data on the status of American Indian/Alaska Native (AI/AN) children to whom ICWA applies, and historical data on children in foster care. Thus, the Final Rule's data collection elements are necessary to ACF's statutory mission under the Social Security Act. In addition, there is no statutory requirement that all data elements must be specifically tied to Title IV-E or Title IV-B requirements only.

ACF provided ample notice and opportunities to comment on the 2016 Final Rule. On April 2, 2015, ACF issued a Supplemental Notice of Proposed Rulemaking (SNPRM) proposing changes to AFCARS data elements. A year later on April 7, 2016, ACF published another SNPRM proposing the addition of new AFCARS data elements related specifically to data concerning American Indian and Alaska Native (AI/AN) children and families. The proposed data was related to federal law requirements specific to ICWA and placements of AI/AN children. The Final Rule was published eight months later on December 14, 2016, and included the ICWA data elements.

The 2016 Final Rule was the product of a thorough and well-reasoned process that included opportunities for states, tribes, and other interested parties to comment. Issues related to the benefits for AI/AN

children and families and burdens upon states to collect and report the data were thoroughly addressed in the Final Rule. While there was almost unanimous support provided to including the new data elements for AI/ANs, there was also very little concern expressed by states submitting comments specific to the addition of new data elements for AI/AN children and families. The few state comments that were received that expressed concern with the ICWA data elements were generally vague and expressed general concern regarding the burden of collecting new data of any type. Furthermore, as evidenced in the 2016 Final Rule discussion, ACF engaged in several discussions with states (6) regarding their perspectives on the proposed changes and as a result streamlined many of the data elements proposed in the SNPRM. The very thorough and well-thought out regulatory process used in developing the 2016 Final Rule evidences that no additional collection of information is necessary.

The data in the 2016 Final Rule is vital to the federal government, Congress, states, and tribes to effectively address the needs of AI/AN children and families. AI/AN children have been overrepresented in state foster care systems for over two decades, going back to the initial implementation of the AFCARS system. Prior to the 2016 Final Rule AFCARS only asked questions related to whether a child in state care and custody was self-identified as AI/AN. This self-identification does not provide necessary information to understand whether a child has a political relationship with a federally recognized tribe as a citizen of that tribe and whether other federal law requirements under ICWA are being implemented, especially those related to the placement of the child in substitute care and whether the child's tribe was engaged in supporting the child and family. As a result, AFCARS data has provided little help in understanding how to address chronic and persistent issues, such as foster care disproportionality, that are barriers to the well-being of AI/AN children and families—issues that not only affect the well-being of children, but also cost states and tribes considerable amounts of their finite resources.

Another practical implication for not implementing the data elements for AI/AN children in the Final Rule is it sends a message to states and tribes that the federal government does not consider data collection on this population a priority issue, which also disincentivize state and tribal efforts to address these issues at the federal and local level. As an example of how insufficient data collection can frustrate efforts to improve outcomes for AI/AN children, in the 2005 General Accountability Office (GAO) report on ICWA implementation (GAO-05-290) GAO indicated that they were hindered in their task to fully research and understand the questions submitted by a group of bi-partisan members of Congress because of insufficient data available from both state and federal data collection systems. At the local level, while states and tribes are increasingly partnering to improve ICWA implementation and improve outcomes for AI/AN children, data collection is a consistent concern and hampers efforts by states and tribes to demonstrate the need for additional policies and resources with state legislators. Since the publication of the Final Rule in December of 2016 a number of states have already begun work with tribes in their state on data system improvements and begun discussions of how the data would be supported and shared among state and tribal governments. Unfortunately, this Advanced Notice of Proposed Rule Making (ANPRM) has caused these efforts to be called into question and further delay the ability to seek real, meaningful answers to issues that frustrate AI/AN children's well-being on a daily basis.

The regulations themselves, in response to the comments from tribes and states, describe the importance of the 2016 Final Rule changes. As stated in the December 2016 Final Rule, 81 Fed. Reg. 90524, 90527:

> Overall, tribes, organizations, states, and private citizens supported our mission to collect additional information related to Indian children as defined in ICWA. Moreover, some states, tribes, national organizations, and federal agencies have stated that ICWA is the ''gold standard'' of child welfare practice and its implementation and associated data collection will likely help to inform efforts to improve outcomes for all children and families in state child welfare systems.

In light of these comments and the recent passage of the Family First Prevention Services Act by Congress in February of 2018 (Division E of the Bipartisan Budget Agreement Act, H.R. 1892) where Congress is clearly expanding the purposes of the Title IV-E program to include not only placement activities, but also prevention services to families, we see even more relevance and need for the data elements for AI/AN children and families included in the 2016 Final Rule.

Some of the expected benefits from implementing the full set of data elements for AI/AN children contained in the 2016 Final Rule include, but are not limited to, the following:

1. provide data on core ICWA requirements such as ''active efforts'' to prevent removals of AI/AN children and success in securing appropriate placements, especially kinship care placements, that have been demonstrated to improve AI/AN children's connection to their family, culture, and tribal supports they need to succeed;

2. facilitate access to culturally appropriate services to AI/AN children and families to avoid out-of-home placement, keep children safe, and avoid unnecessary trauma to AI/AN children;

3. identify effective strategies to securing extended family and other tribal families who can serve as resources to AI/AN children and help address the shortage of AI/AN family placements for AI/AN children;

4. identify when tribes are being engaged to help support AI/AN children and families and trends related to how that engagement impacts outcomes for this population; and

5. provide avenues for collaboration between states and tribes that are more meaningful, and outcome driven, including improved policy development, technical assistance, training, and resource allocation as a result of having reliable data available.

The ANPRM is arbitrary and capricious where it seeks only information on burdens. This ANPRM arbitrarily focuses on collecting information about the burdens without considering the benefits. As

required by law, the Final Rule conducted a careful analysis of the benefits and burdens, and appropriately amended the SNPRM to achieve a balanced Final Rule.

The Agency "determined in the final rule that the benefits outweigh the burden associated with collecting and reporting the additional data." 81 Fed. Reg. at 90528. The Agency explained how weighing of the benefits and burdens led it to make certain changes to its proposal. For example: as stated in the Final Rule at 81 Fed Reg. 90528:

> In response to state and tribal comments suggesting congruence with the BIA's final rule, we revised data elements in this final rule as appropriate to reflect the BIA's regulations including removing requirements that state title IV-E agencies report certain information only from ICWA-specific court orders. These changes should allow the state title IV-E agency more flexibility, alleviate some of the burden and other concerns identified by states, help target technical assistance to increase state title IV-E agency communication and coordination with courts, and improve practice and national data on all children who are in foster care.

There have been no significant changes justifying ACF's proposal to reexamine the 2016 Final Rule. ACF seems to rely upon the President's Executive Order (13777) for all federal agencies to identify regulations that are perceived as burdensome or unnecessary, but this is not a sufficient basis for ACF to act, as the Executive Order itself is arbitrary and unlawful where it provides an insufficient basis for reasonable decision-making relaying solely on an examination of the burden of regulations without the required balancing of benefits. Additionally, the Executive Order fails to provide justification to deviate from the statutory requirement for regulations.

Responses to the Questions for Comment provided in the ANPRM:

1. Identify the data elements, non-ICWA-related, that are overly burdensome for state and tribal title IV-E agencies and explain why. Please be specific in identifying the data elements and provide a rationale for why collecting and reporting this information is overly burdensome.

We believe that the new data elements provided in the 2016 Final Rule that address health assessments, educational achievement, siblings, mental health services, sex trafficking, sexual orientation, permanency planning, adoption, guardianship, and housing are important for AI/AN children and youth as well. Burdens to collecting this data for tribes and states are relatively small considering the benefits to improving outcomes for AI/AN children and families, especially given many of the data elements are correlated to some of the most vulnerable populations in child welfare systems and identification of risks associated to their well-being.

2. Previously, we received comments regarding burden and the system changes needed to report the ICWA-related data elements of the 2016 SNPRM. We would like to receive more detailed comments on the specific limitations that states will encounter in reporting the ICWA-related data elements in the final rule. Please be specific in identifying the data elements and provide a rationale for why this information is overly burdensome.

The 2016 Final Rule requests title IV-E states provide the number of children in foster care who are considered Indian children as defined in ICWA. This is data that is currently not collected or reported in any national child welfare data system and is the key to understanding other important issues that are unique to AI/AN children and federal law requirements under ICWA. The current data in AFCARS only identifies AI/AN children through self-identification, which provides inaccurate and unreliable data. Relevant data measures in ICWA related to placement, engagement with the child's tribe, and efforts to avoid placement are not collected leaving federal agency, states, Congress, and tribes with little information to address pernicious issues impacting this population like foster care disproportionality. The 2016 Final Rule only requires states to collect the data elements in the 2016 Final Rule for AI/AN children that are ICWA eligible. Regardless of whether AFCARS data is collected all states are required by law to examine whether a child is ICWA eligible, so this effort is already required outside of AFCARS requirements. The 2016 Final Rule data specific to AI/AN children is not required to be collected for other non-Indian children so while there will be additional data collection for AI/AN children that are ICWA eligible, given the small number of AI/AN children in the vast majority of states this will not require a significant burden.

3. Previously, we received comments that particular data elements did not lend themselves to national statistics and were best assessed with qualitative methods such as case review. Please provide specific recommendations on which data elements in the regulation to retain that are important to understanding and assessing the foster care population at the national level. Also, provide a rationale for your suggestion that may include its relevance to monitor compliance with the title IV-B and IV-E programs or another strong justification for using the data at the national level.

All of the data elements for AI/AN children in the 2016 Final Rule are appropriate for a national data system like AFCARS. The activities related to the data are required by federal law, such as ICWA, and should be documented in any child welfare case file. The vast majority of the data would come from state agency activities with a few data elements coming in the form of state court orders, which should also be included in any well documented case file. To assume that some data may not be retrievable if it comes from judicial determinations is essentially saying that case files do not need to contain court orders, which would be out of alignment with nationally recognized standards in child welfare case management. In addition, not having this information in a case file poses risk that court orders are not being properly implemented and places children in jeopardy of not receiving the benefits of court oversight in child welfare.

Capturing AI/AN data through case file reviews or other qualitative methods would not provide the data that Congress, states, and tribes need on an ongoing basis to make necessary changes in policy, practice, and resource allocation to address the serious problems that have been impacting AI/AN children for over two decades. Existing qualitative methods, like case file reviews under the Child and Family Services Reviews, have demonstrated the limitations of this data for informing Congress on how best to address critical concerns for AI/AN children. Case file reviews in many states include only a handful of cases involving AI/AN children and the data retrieved does not lend itself to adequately informing local efforts to address serious concerns related to outcomes for this population, much less issues of national concern. AFCARS is much better suited to collecting the type of data required for AI/AN children and efforts to shift data collection to other less comprehensive data systems with less regular data collection and reporting will have a negligible effect on improving data for this population.

4. Previously we received comments noting concerns with variability in some of the data elements across states and within jurisdictions. Please provide specific suggestions to simplify data elements to facilitate the consistent collection and reporting of AFCARS data. Also, provide a rationale for each suggestion and how the simplification would still yield pertinent data.

In the absence of a national data reporting requirement, it is guaranteed the current variability in state data collection and reporting will continue as evidenced by only a few states collecting any data specific to AI/AN children, and the current AFCARS data questions that use self-identification as a determinant of whether a child is AI/AN, rather than the appropriate questions related to their citizenship in a tribal government. Even with appropriate questions related to whether an AI/AN child or their family are eligible for ICWA protections, linkages to other AFCARS data cannot be assumed to be sufficiently correlated for informing policymakers and child welfare agencies without the other data elements for AI/AN children in the 2016 Final Rule also being implemented. ACF as much as any stakeholder should have a strong interest in improving the availability of accurate and reliable data for this population, which they have dedicated significant amounts of their resources to in the form of technical assistance and training.

5. Previously we received comments questioning the utility, reliability, and purpose of certain data elements at the national level. Provide specific recommendations on which data elements in the regulation to remove because they would not yield reliable national information about children involved with the child welfare system or are not needed for monitoring the title IV-B and IV-E programs. Please be specific in identifying the data elements and provide a rationale for why this information would not be reliable or is not necessary.

Each of the ICWA-related data points are tied to existing federal law and regulation and are necessary to monitor and support title IV-B and IV-E programs. Each of the ICWA-related data points is critical. The Title IV-B plan requirement for states that requires that states consult with tribal governments on their

plans to implement ICWA has so far relied primarily on anecdotal information that is not collected or tracked uniformly by ACF leading to uneven responses to concerns about poor outcomes for AI/AN children in different states. The data elements contained in the 2016 Final Rule are linked in terms of being able to provide a complete picture of how AI/AN children are doing, and by eliminating or streamlining some of these data elements ACF would be compromising the integrity of the data to confidently inform policymakers and other stakeholders as to the important data trends and explanations for these trends.

In addition, as was stated earlier in our general comments, ICWA has been viewed as the "gold standard" in child welfare practice by leading national child welfare organizations and now with the passage of the Family First Prevention Services Act we can see there is increased support and interest in capturing more information on how states and tribes can improve outcomes for children and families beyond just improving the placement experience. The 2016 Final Rule data elements specific to AI/AN children are aligned with these acknowledgements and will be significantly helpful to all stakeholders involved in improving services and outcomes for AI/AN children.

Conclusion

The experience of having little to no data collected for AI/AN children through AFCARS over the last two decades has resulted in not meaningful improvements in the safety and well-being for AI/AN children and could be argued as having contributed to the worsening conditions for this population. We know of no other federal child welfare law that does not have some form of basic data collection and certainly not one that is 40 years old as ICWA is. The AFCARS data elements for AI/AN children in the 2016 Final Rule have incredible potential to improve outcomes for this population, but only if the data elements are not heavily modified or eliminated. While there are burdens for states to collect this data, for the past 40 years it has primarily AI/AN children, their families, and tribal communities that have born the burden while little to no reliable data has been collected and the crisis of foster care disproportionality has worsened. The time has come to move forward with this critically important data collection for AI/AN children and families and end the delays for not collecting the data that is necessary to support and promote healing for this population.

Best,

Vernon Brooks Carter, MSW, PhD
Associate Professor
Associate Chair, Department of Social Work
119D Pettee Hall
University of New Hampshire
Durham, NH 03824603-862-0199

vernon.carter@unh.edu

As of: September 14, 2020
Received: June 06, 2018
Status: Posted
Posted: June 07, 2018
Tracking No. 1k2-93l5-vdd3
Comments Due: June 13, 2018
Submission Type: E-mail

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0021
Confederated Tribes of Siletz Indians of Oregon

Submitter Information

Name: Craig Dorsay
Address: 97211
Organization: Confederated Tribes of Siletz Indians of Oregon

General Comment

See Attached

Attachments

Confederated Tribes of Siletz Indians of Oregon

DORSAY & EASTON, LLP
ATTORNEYS AT LAW
1737 NE ALBERTA ST
SUITE 208
PORTLAND, OREGON 97211-5890

Craig J. Dorsay
Lea Ann Easton
Brett V. Kenney

Susan K. Driver
Of Counsel

June 6, 2018

Via electronic correspondence at: CBComments@acf.hhs.gov

Attn: Kathleen McHugh
United States Department of Health and Human Services
Administration for Children and Families
Policy Division
330 C Street SW
Washington, DC 20024

Re: RIN: 0970-AC72 **Adoption and Foster Care Analysis and Reporting System**; Advance Notice of Proposed Rulemaking (3/15/2018)

Dear Sir or Madam,

On behalf of the Confederated Tribes of Siletz Indians of Oregon, I submit these comments on the Advanced Notice of Proposed Rulemaking regarding the Adoption and Foster Care Analysis Reporting System (AFCARS) for Title IV-B and Title IV-E as they relate to the Indian Child Welfare Act of 1978 (ICWA). Data points specific to ICWA were incorporated into AFCARS as detailed in the Final Rule published on December 14, 2016.

General Comments:
The data collection requirements of the Final Rule are consistent with ACF's statutory mission.

Section 479 of the Social Security Act mandates Health and Human Services collect national, uniform, and reliable information on children in state care. Section 474(f) of the Act requires HHS to impose penalties for non-compliant AFCARS data. Section 1102 of the Act instructs the Secretary to promulgate regulations necessary for the effective administration of the functions for which HHS is responsible under the Act.

The Final Rule, which ACF promulgated pursuant to these statutory requirements, will ensure the collection of necessary and comprehensive national data on the status of American Indian/Alaska Native (AI/AN) children for whom ICWA applies and historical data on children in foster care. Thus, the Final Rule's data collection elements are necessary to ACF's statutory mission under Section 479 of the Act.

The administration provided all interested parties with ample notice and opportunities to comment on the final rule.

Tribes, tribal organizations, and tribal advocates have long sought the inclusion of ICWA-related data points in the AFCARS. The initial rules were changed due to comments by these entities

and others after reviewing the Administration of Children and Families' February 9, 2015 proposed rule. On April 2, 2015 the Agency issued a Supplemental Notice of Proposed Rulemaking (SNPRM) changing certain data elements. Yet another SNPRM was issued on April 7, 2016. Specifically, the Agency sought comments on the inclusion of the ICWA data points in both the April 2015 Intent to Publish a SNPRM, as well as the April 2016 SNPRM. Ultimately, the Final Rule was published on December 14, 2016 (Final Rule) and included the ICWA data elements.

The Final Rule thoroughly responded to comments on both the benefits and burdens of the proposed regulatory action. Given the multiple opportunities to comment throughout this time period, any additional collection activity is unnecessary. In addition, tribes, tribal organizations, and advocates received notice of all of these opportunities, and with ample time to comment on this vital and important rule change. The Siletz Tribe has been following the development of the Rule for the last several years and fully supports the Rule adopted in 2016. It does not support the proposed revision of the Rule.

States also had ample opportunity to participate. As the Final Rule explains in detail, ACF engaged in robust consultation with states and responded to their concerns, for example, by streamlining many data elements. 81 Fed. Reg. 90524, 90565-66. States had at least six different opportunities to raise their concerns, which the ACF considered and addressed fully. 81 Fed. Reg. at 90566.

States are already in the process of implementing these changes.

Since these regulations have been effective for approximately fifteen months, all states should be in the process of implementing them. We are aware, for example, that California, a state with 109 federally-recognized tribes, is already well under way with its implementation efforts, having relied on the final rule. At this stage, any modification of the data collection requirements would be a waste of finite state child welfare resources, which itself is an additional burden.

These regulations are important to us, our families, and state child welfare systems.

The regulations themselves—in response to the comments from stakeholders across the country—describe the importance of these changes. As stated in the December 2016 Final Rule, 81 Fed. Reg. 90524, 90527:

Overall, tribes, organizations, states, and private citizens supported our mission to collect additional information related to Indian children as defined in ICWA. Moreover, some states, tribes, national organizations, and federal agencies have stated that ICWA is the ''gold standard'' of child welfare practice and its implementation and associated data collection will likely help to inform efforts to improve outcomes for all children and families in state child welfare systems.

Generally, tribes, organizations representing tribal interests, national child welfare advocacy organizations, and private citizens fully support the overall goal and purpose of including ICWA-related data in AFCARS, and the data elements as proposed in the 2016 SNPRM. These commenters believe that collecting ICWA-related data in AFCARS will:

1. provide data on core ICWA requirements such as ''active efforts'' and placement preferences, as well as assess how the child welfare system is working for Indian children as defined by ICWA, families and communities;
2. facilitate access to culturally-appropriate services to extended families and other tribal members who can serve as resources and high-quality placements for tribal children;
3. help address and reduce the disproportionality of AI/AN children in foster care; and
4. provide avenues for collaboration between states and tribes that are more meaningful, and outcome driven, including improved policy development, technical assistance, training, and resource allocation as a result of having reliable data available.

Overall, tribal commenters and national child welfare advocacy organizations believe that collecting ICWA-related data in AFCARS is a step in the right direction to ensure that Indian families will be kept together when possible and will help prevent AI/AN children from entering the foster care system. Many of the tribal commenters that supported the 2016 SNPRM also recommended extensive training for title IV–E agencies and court personnel in order to ensure accurate and reliable data.

Other federal reports have demonstrated the need for quality national data to assess states' efforts in implementing ICWA. See Government Accountability Office, Indian Child Welfare Act: Existing Information on Implementation Issues Could be Used to Target Guidance and Assistance to States, GAO-05-290 (Apr. 4, 2005) http://www.gao.gov/products/GAO-05-290.

Nothing has changed since ACF made clear in its final rule that data collection is necessary to protect Indian children and families and their tribes. There remains a pressing need for comprehensive national data on ICWA implementation. Congress has not amended the Act's data collection provisions. And there have been no changes in circumstances that would alter the burdens or benefits of the final rule's data collection requirements. The Siletz Tribe, whose members were dispersed after termination of the Tribe in 1954 and who have been working towards returning members to the tribal homeland, has been particularly impacting by ICWA implementation because its members live throughout the State of Oregon.

Tribes have relied on the final rule.

Tribes have long sought data points regarding the implementation of ICWA. This has included advocacy on local, state, and federal levels. With the promulgation of the final rule in December of 2016, tribes largely ceased advocacy efforts to mandate data collection, instead refocusing

tribal resources toward working collaboratively with their governmental partners to implement the data elements listed in the final rule. To this end, some tribes have worked to develop and update agreements to reflect the data elements in the final rule and the 2016 BIA ICWA Regulations, since a goal of both is to increase uniformity. This is necessary, since without a uniform reporting requirement data is usually only available by contacting each individual county within a state, an exception burden for both the tribe and the applicable county.

The ANPRM is arbitrary and capricious where it seeks only information on burdens.

This ANPRM arbitrarily focuses on collecting information about the burdens without considering the benefits. As required by law, the final rule conducted a careful analysis of the benefits and burdens, and appropriately amended the proposed rule to achieve a balanced final rule.

The agency "determined in the final rule that the benefits outweigh the burden associated with collecting and reporting the additional data." 81 Fed. Reg. at 90528. The agency explained how its weighing of the benefits and burdens led it to make certain changes to its proposal. For example: as stated in the final rule at 81 Fed Reg. 90528:

> In response to state and tribal comments suggesting congruence with the BIA's final rule, we revised data elements in this final rule as appropriate to reflect the BIA's regulations including removing requirements that state title IV–E agencies report certain information only from ICWA-specific court orders. These changes should allow the state title IV–E agency more flexibility, alleviate some of the burden and other concerns identified by states, help target technical assistance to increase state title IV–E agency communication and coordination with courts, and improve practice and national data on all children who are in foster care.

There have been no material changes in circumstances justifying the agency's new approach. The executive order is not a sufficient basis for the agency to act, as the executive order itself is arbitrary and unlawful where it provides an insufficient basis for reasonable decision-making relaying solely on an examination the burden of regulations without the required balancing of benefits. Additionally, the executive orders fail to provide justification to deviate from the statutory requirement for regulations.

<u>The foregoing are responses to the Questions for Comment provided in the ANPRM</u>:

1. *Identify the data elements, non-ICWA-related, that are overly burdensome for state and tribal title IV-E agencies and explain why. Please be specific in identifying the data elements and provide a rationale for why collecting and reporting this information is overly burdensome.*

No response.

2. *Previously, we received comments regarding burden and the system changes needed to report the ICWA-related data elements of the 2016 SNPRM. We would like to receive more detailed comments on the specific limitations we should be aware of that states will encounter in reporting the ICWA-related data elements in the final rule. Please be specific in identifying the data elements and provide a rationale for why this information is overly burdensome*.

The ANPRM requests IV-E states and tribes to provides the number of children in foster care who are considered Indian children as defined in ICWA. However, it is specifically due to the lack of a national data reporting requirement, that any number provided in response to this question would be significantly inaccurate. This speaks to the critical importance of the ICWA-related data points – without a data reporting requirement, many states simply do not appropriately track Indian children in their child welfare system, let alone the individual ICWA-related data points.

3. *Previously, we received comments that particular data elements did not lend themselves to national statistics and were best assessed with qualitative methods such as case review. Please provide specific recommendations on which data elements in the regulation to retain that are important to understanding and assessing the foster care population at the national level. Also, provide a rationale for your suggestion that may include its relevance to monitor compliance with the title IV-B and IV-E programs or another strong justification for using the data at the national level*.

As discussed above, there has been ample opportunity for comment and this additional ANPRM is itself both unlawful as crafted and is a waste of finite resources. Tribes and states properly relied on the final rule in working toward implementation for nearly a year and a half. Many of these reporting systems are already in place, so there is no additional burden. Any modification to the existing data points frustrate those efforts, would require states to begin again collaborating with their tribal partners and ultimately further delay implementation. This comes at the expense of the health, safety and welfare of not only Indian children, their families, and their tribes, but the child welfare system at large where a modification of the final rule would cost resources that are system-wide.

4. *Previously we received comments noting concerns with variability in some of the data elements across states and within jurisdictions. Please provide specific suggestions to simplify data elements to facilitate the consistent collection and reporting of AFCARS data. Also, provide a rationale for each suggestion and how the simplification would still yield pertinent data*.

In the absence of a national data reporting requirement, it is guaranteed there will be variability with data elements frustrating a stated purpose of the 2016 BIA ICWA Regulations, to establish uniformity of application throughout the nation. Without a uniform reporting system, data is often available only at the county level, increasing data variability. The need to eliminate the data variability is precisely why it is important to have a national data collection standard. It will assist HHS/ACF efforts to support states in properly implementing ICWA by having targeted, data-driven identification areas where states need support the most.

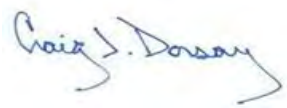
5. *Previously we received comments questioning the utility, reliability, and purpose of certain data elements at the national level. Provide specific recommendations on which data elements in the regulation to remove because they would not yield reliable national information about children involved with the child welfare system or are not needed for monitoring the title IV-B and IV-E programs. Please be specific in identifying the data elements and provide a rationale for why this information would not be reliable or is not necessary*.

Each of the ICWA-related data points are tied to existing federal law and regulation and are necessary to monitor and support title IV-B and IV-E programs. Each of the ICWA-related data points are critical. Further, as discussed above, ICWA is the "gold standard" of child welfare and ensuring compliance with this federal law informs how the existing child welfare system may improve in whole.

For the foregoing reasons, we strongly support each of the ICWA-related data points and believe, as your agency did in publishing the Final Rule in 2016, the benefits of this data collection outweighs any burden.

In closing, the Indian Child Welfare Act is widely considered the "gold standard" of child welfare, and a refinement of family reunification objectives mandated by nearly every state. Any hindrance or stoppage of ICWA data point collection significantly impacts tribal children, families, and county agencies trying to comply. In the interest of protecting our children and families, we respectfully submit these comments.

Sincerely,



Craig J. Dorsay, Tribal Attorney
Confederated Tribes of Siletz Indians of Oregon

As of: September 14, 2020
Received: June 06, 2018
Status: Posted
Posted: June 07, 2018
Tracking No. 1k2-93l5-umh8
Comments Due: June 13, 2018
Submission Type: E-mail

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0022
Samish Indian Nation

Submitter Information

Name: Craig Dorsay
Address: 97211
Organization: Samish Indian Nation

General Comment

See Attached

Attachments

Samish Indian Nation

DORSAY & EASTON, LLP
ATTORNEYS AT LAW
1737 NE ALBERTA ST
SUITE 208
PORTLAND, OREGON 97211-5890

Craig J. Dorsay
Lea Ann Easton
Brett V. Kenney

Susan K. Driver
Of Counsel

June 6, 2018

Via electronic correspondence at: CBComments@acf.hhs.gov

Attn: Kathleen McHugh
United States Department of Health and Human Services
Administration for Children and Families
Policy Division
330 C Street SW
Washington, DC 20024

Re: RIN: 0970-AC72 **Adoption and Foster Care Analysis and Reporting System**; Advance Notice of Proposed Rulemaking (3/15/2018)

Dear Sir or Madam,

On behalf of the Samish Indian Nation, I submit these comments on the Advanced Notice of Proposed Rulemaking regarding the Adoption and Foster Care Analysis Reporting System (AFCARS) for Title IV-B and Title IV-E as they relate to the Indian Child Welfare Act of 1978 (ICWA). Data points specific to ICWA were incorporated into AFCARS as detailed in the Final Rule published on December 14, 2016.

General Comments:

The data collection requirements of the Final Rule are consistent with ACF's statutory mission.

Section 479 of the Social Security Act mandates Health and Human Services collect national, uniform, and reliable information on children in state care. Section 474(f) of the Act requires HHS to impose penalties for non-compliant AFCARS data. Section 1102 of the Act instructs the Secretary to promulgate regulations necessary for the effective administration of the functions for which HHS is responsible under the Act.

The Final Rule, which ACF promulgated pursuant to these statutory requirements, will ensure the collection of necessary and comprehensive national data on the status of American Indian/Alaska Native (AI/AN) children for whom ICWA applies and historical data on children in foster care. Thus, the Final Rule's data collection elements are necessary to ACF's statutory mission under Section 479 of the Act.

The administration provided all interested parties with ample notice and opportunities to comment on the final rule.

Tribes, tribal organizations, and tribal advocates have long sought the inclusion of ICWA-related data points in the AFCARS. The initial rules were changed due to comments by these entities

and others after reviewing the Administration of Children and Families' February 9, 2015 proposed rule. On April 2, 2015 the Agency issued a Supplemental Notice of Proposed Rulemaking (SNPRM) changing certain data elements. Yet another SNPRM was issued on April 7, 2016. Specifically, the Agency sought comments on the inclusion of the ICWA data points in both the April 2015 Intent to Publish a SNPRM, as well as the April 2016 SNPRM. Ultimately, the Final Rule was published on December 14, 2016 (Final Rule) and included the ICWA data elements.

The Final Rule thoroughly responded to comments on both the benefits and burdens of the proposed regulatory action. Given the multiple opportunities to comment throughout this time period, any additional collection activity is unnecessary. In addition, tribes, tribal organizations, and advocates received notice of all of these opportunities, and with ample time to comment on this vital and important rule change. The Samish Tribe has been following the development of the Rule for the last several years and fully supports the Rule adopted in 2016. It does not support the proposed revision of the Rule.

States also had ample opportunity to participate. As the Final Rule explains in detail, ACF engaged in robust consultation with states and responded to their concerns, for example, by streamlining many data elements. 81 Fed. Reg. 90524, 90565-66. States had at least six different opportunities to raise their concerns, which the ACF considered and addressed fully. 81 Fed. Reg. at 90566.

States are already in the process of implementing these changes.

Since these regulations have been effective for approximately fifteen months, all states should be in the process of implementing them. We are aware, for example, that California, a state with 109 federally-recognized tribes, is already well under way with its implementation efforts, having relied on the final rule. At this stage, any modification of the data collection requirements would be a waste of finite state child welfare resources, which itself is an additional burden.

These regulations are important to us, our families, and state child welfare systems.

The regulations themselves—in response to the comments from stakeholders across the country—describe the importance of these changes. As stated in the December 2016 Final Rule, 81 Fed. Reg. 90524, 90527:

Overall, tribes, organizations, states, and private citizens supported our mission to collect additional information related to Indian children as defined in ICWA. Moreover, some states, tribes, national organizations, and federal agencies have stated that ICWA is the ''gold standard'' of child welfare practice and its implementation and associated data collection will likely help to inform efforts to improve outcomes for all children and families in state child welfare systems.

Generally, tribes, organizations representing tribal interests, national child welfare advocacy organizations, and private citizens fully support the overall goal and purpose of including ICWA-related data in AFCARS, and the data elements as proposed in the 2016 SNPRM. These commenters believe that collecting ICWA-related data in AFCARS will:

1. provide data on core ICWA requirements such as ''active efforts'' and placement preferences, as well as assess how the child welfare system is working for Indian children as defined by ICWA, families and communities;
2. facilitate access to culturally-appropriate services to extended families and other tribal members who can serve as resources and high-quality placements for tribal children;
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4. provide avenues for collaboration between states and tribes that are more meaningful, and outcome driven, including improved policy development, technical assistance, training, and resource allocation as a result of having reliable data available.

Overall, tribal commenters and national child welfare advocacy organizations believe that collecting ICWA-related data in AFCARS is a step in the right direction to ensure that Indian families will be kept together when possible and will help prevent AI/AN children from entering the foster care system. Many of the tribal commenters that supported the 2016 SNPRM also recommended extensive training for title IV–E agencies and court personnel in order to ensure accurate and reliable data.

Other federal reports have demonstrated the need for quality national data to assess states' efforts in implementing ICWA. See Government Accountability Office, Indian Child Welfare Act: Existing Information on Implementation Issues Could be Used to Target Guidance and Assistance to States, GAO-05-290 (Apr. 4, 2005) http://www.gao.gov/products/GAO-05-290.

Nothing has changed since ACF made clear in its final rule that data collection is necessary to protect Indian children and families and their tribes. There remains a pressing need for comprehensive national data on ICWA implementation. Congress has not amended the Act's data collection provisions. And there have been no changes in circumstances that would alter the burdens or benefits of the final rule's data collection requirements. The Samish Indian Nation, whose members did not move to the reservations established under the Treaty of Point Elliott in 1855 and instead remained in their traditional homelands, became dispersed throughout the State of Washington as the federal government failed to recognize their continued legal status and stopped providing services to the Tribe and its members. As a result, Samish members are located throughout the State of Washington and have suffered from inconsistent application of the ICWA in the different counties and regions of the State.

Tribes have relied on the final rule.

Tribes have long sought data points regarding the implementation of ICWA. This has included advocacy on local, state, and federal levels. With the promulgation of the final rule in December of 2016, tribes largely ceased advocacy efforts to mandate data collection, instead refocusing

tribal resources toward working collaboratively with their governmental partners to implement the data elements listed in the final rule. To this end, some tribes have worked to develop and update agreements to reflect the data elements in the final rule and the 2016 BIA ICWA Regulations, since a goal of both is to increase uniformity. This is necessary, since without a uniform reporting requirement data is usually only available by contacting each individual county within a state, an exception burden for both the tribe and the applicable county.

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There have been no material changes in circumstances justifying the agency's new approach. The executive order is not a sufficient basis for the agency to act, as the executive order itself is arbitrary and unlawful where it provides an insufficient basis for reasonable decision-making relaying solely on an examination the burden of regulations without the required balancing of benefits. Additionally, the executive orders fail to provide justification to deviate from the statutory requirement for regulations.

<u>The foregoing are responses to the Questions for Comment provided in the ANPRM</u>:

1. *Identify the data elements, non-ICWA-related, that are overly burdensome for state and tribal title IV-E agencies and explain why. Please be specific in identifying the data elements and provide a rationale for why collecting and reporting this information is overly burdensome.*

No response.

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3. *Previously, we received comments that particular data elements did not lend themselves to national statistics and were best assessed with qualitative methods such as case review. Please provide specific recommendations on which data elements in the regulation to retain that are important to understanding and assessing the foster care population at the national level. Also, provide a rationale for your suggestion that may include its relevance to monitor compliance with the title IV-B and IV-E programs or another strong justification for using the data at the national level*.

As discussed above, there has been ample opportunity for comment and this additional ANPRM is itself both unlawful as crafted and is a waste of finite resources. Tribes and states properly relied on the final rule in working toward implementation for nearly a year and a half. Many of these reporting systems are already in place, so there is no additional burden. Any modification to the existing data points frustrate those efforts, would require states to begin again collaborating with their tribal partners and ultimately further delay implementation. This comes at the expense of the health, safety and welfare of not only Indian children, their families, and their tribes, but the child welfare system at large where a modification of the final rule would cost resources that are system-wide.

4. *Previously we received comments noting concerns with variability in some of the data elements across states and within jurisdictions. Please provide specific suggestions to simplify data elements to facilitate the consistent collection and reporting of AFCARS data. Also, provide a rationale for each suggestion and how the simplification would still yield pertinent data*.

In the absence of a national data reporting requirement, it is guaranteed there will be variability with data elements frustrating a stated purpose of the 2016 BIA ICWA Regulations, to establish uniformity of application throughout the nation. Without a uniform reporting system, data is often available only at the county level, increasing data variability. The need to eliminate the data variability is precisely why it is important to have a national data collection standard. It will assist HHS/ACF efforts to support states in properly implementing ICWA by having targeted, data-driven identification areas where states need support the most.

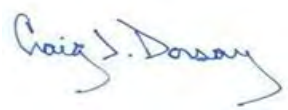
5. *Previously we received comments questioning the utility, reliability, and purpose of certain data elements at the national level. Provide specific recommendations on which data elements in the regulation to remove because they would not yield reliable national information about children involved with the child welfare system or are not needed for monitoring the title IV-B and IV-E programs. Please be specific in identifying the data elements and provide a rationale for why this information would not be reliable or is not necessary*.

Each of the ICWA-related data points are tied to existing federal law and regulation and are necessary to monitor and support title IV-B and IV-E programs. Each of the ICWA-related data points are critical. Further, as discussed above, ICWA is the "gold standard" of child welfare and ensuring compliance with this federal law informs how the existing child welfare system may improve in whole.

For the foregoing reasons, we strongly support each of the ICWA-related data points and believe, as your agency did in publishing the Final Rule in 2016, the benefits of this data collection outweighs any burden.

In closing, the Indian Child Welfare Act is widely considered the "gold standard" of child welfare, and a refinement of family reunification objectives mandated by nearly every state. Any hindrance or stoppage of ICWA data point collection significantly impacts tribal children, families, and county agencies trying to comply. In the interest of protecting our children and families, we respectfully submit these comments.

Sincerely,



Craig J. Dorsay, Tribal Attorney
Samish Indian Nation

As of: September 14, 2020
Received: June 06, 2018
Status: Posted
Posted: June 07, 2018
Tracking No. 1k2-93l5-12nk
Comments Due: June 13, 2018
Submission Type: E-mail

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0023
Hoh Indian Tribe

Submitter Information

Name: Craig Dorsay
Address: 97211
Organization: Hoh Indian Tribe

General Comment

See Attached

Attachments

Hoh Indian Tribe

DORSAY & EASTON, LLP
ATTORNEYS AT LAW
1737 NE ALBERTA ST
SUITE 208
PORTLAND, OREGON 97211-5890

Craig J. Dorsay
Lea Ann Easton
Brett V. Kenney

Susan K. Driver
Of Counsel

June 6, 2018

Via electronic correspondence at: CBComments@acf.hhs.gov

Attn: Kathleen McHugh
United States Department of Health and Human Services
Administration for Children and Families
Policy Division
330 C Street SW
Washington, DC 20024

Re: RIN: 0970-AC72 **Adoption and Foster Care Analysis and Reporting System**; Advance Notice of Proposed Rulemaking (3/15/2018)

Dear Sir or Madam,

On behalf of the Hoh Indian Tribe, I submit these comments on the Advanced Notice of Proposed Rulemaking regarding the Adoption and Foster Care Analysis Reporting System (AFCARS) for Title IV-B and Title IV-E as they relate to the Indian Child Welfare Act of 1978 (ICWA). Data points specific to ICWA were incorporated into AFCARS as detailed in the Final Rule published on December 14, 2016.

General Comments:
The data collection requirements of the Final Rule are consistent with ACF's statutory mission.

Section 479 of the Social Security Act mandates Health and Human Services collect national, uniform, and reliable information on children in state care. Section 474(f) of the Act requires HHS to impose penalties for non-compliant AFCARS data. Section 1102 of the Act instructs the Secretary to promulgate regulations necessary for the effective administration of the functions for which HHS is responsible under the Act.

The Final Rule, which ACF promulgated pursuant to these statutory requirements, will ensure the collection of necessary and comprehensive national data on the status of American Indian/Alaska Native (AI/AN) children for whom ICWA applies and historical data on children in foster care. Thus, the Final Rule's data collection elements are necessary to ACF's statutory mission under Section 479 of the Act.

The administration provided all interested parties with ample notice and opportunities to comment on the final rule.

Tribes, tribal organizations, and tribal advocates have long sought the inclusion of ICWA-related data points in the AFCARS. The initial rules were changed due to comments by these entities

and others after reviewing the Administration of Children and Families' February 9, 2015 proposed rule. On April 2, 2015 the Agency issued a Supplemental Notice of Proposed Rulemaking (SNPRM) changing certain data elements. Yet another SNPRM was issued on April 7, 2016. Specifically, the Agency sought comments on the inclusion of the ICWA data points in both the April 2015 Intent to Publish a SNPRM, as well as the April 2016 SNPRM. Ultimately, the Final Rule was published on December 14, 2016 (Final Rule), and included the ICWA data elements.

The Final Rule thoroughly responded to comments on both the benefits and burdens of the proposed regulatory action. Given the multiple opportunities to comment throughout this time period, any additional collection activity is unnecessary. In addition, tribes, tribal organizations, and advocates received notice of all of these opportunities, and with ample time to comment on this vital and important rule change. The Hoh Tribe has been following the development of the Rule for the last several years and fully supports the Rule adopted in 2016. It does not support the proposed revision of the Rule.

States also had ample opportunity to participate. As the Final Rule explains in detail, ACF engaged in robust consultation with states and responded to their concerns, for example, by streamlining many data elements. 81 Fed. Reg. 90524, 90565-66. States had at least six different opportunities to raise their concerns, which the ACF considered and addressed fully. 81 Fed. Reg. at 90566.

States are already in the process of implementing these changes.

Since these regulations have been effective for approximately fifteen months, all states should be in the process of implementing them. We are aware, for example, that California, a state with 109 federally-recognized tribes, is already well under way with its implementation efforts, having relied on the final rule. At this stage, any modification of the data collection requirements would be a waste of finite state child welfare resources, which itself is an additional burden.

These regulations are important to us, our families, and state child welfare systems.

The regulations themselves—in response to the comments from stakeholders across the country—describe the importance of these changes. As stated in the December 2016 Final Rule, 81 Fed. Reg. 90524, 90527:

Overall, tribes, organizations, states, and private citizens supported our mission to collect additional information related to Indian children as defined in ICWA. Moreover, some states, tribes, national organizations, and federal agencies have stated that ICWA is the ''gold standard'' of child welfare practice and its implementation and associated data collection will likely help to inform efforts to improve outcomes for all children and families in state child welfare systems.

Generally, tribes, organizations representing tribal interests, national child welfare advocacy organizations, and private citizens fully support the overall goal and purpose of including ICWA-related data in AFCARS, and the data elements as proposed in the 2016 SNPRM. These commenters believe that collecting ICWA-related data in AFCARS will:

1. provide data on core ICWA requirements such as ‘‘active efforts’’ and placement preferences, as well as assess how the child welfare system is working for Indian children as defined by ICWA, families and communities;
2. facilitate access to culturally-appropriate services to extended families and other tribal members who can serve as resources and high-quality placements for tribal children;
3. help address and reduce the disproportionality of AI/AN children in foster care; and
4. provide avenues for collaboration between states and tribes that are more meaningful, and outcome driven, including improved policy development, technical assistance, training, and resource allocation as a result of having reliable data available.

Overall, tribal commenters and national child welfare advocacy organizations believe that collecting ICWA-related data in AFCARS is a step in the right direction to ensure that Indian families will be kept together when possible and will help prevent AI/AN children from entering the foster care system. Many of the tribal commenters that supported the 2016 SNPRM also recommended extensive training for title IV–E agencies and court personnel in order to ensure accurate and reliable data.

Other federal reports have demonstrated the need for quality national data to assess states' efforts in implementing ICWA. See Government Accountability Office, Indian Child Welfare Act: Existing Information on Implementation Issues Could be Used to Target Guidance and Assistance to States, GAO-05-290 (Apr. 4, 2005) http://www.gao.gov/products/GAO-05-290.

Nothing has changed since ACF made clear in its final rule that data collection is necessary to protect Indian children and families and their tribes. There remains a pressing need for comprehensive national data on ICWA implementation. Congress has not amended the Act's data collection provisions. And there have been no changes in circumstances that would alter the burdens or benefits of the final rule's data collection requirements. The Hoh Tribe has struggled with implementation of the ICWA in the State of Washington because of its remote location, small tribal membership, and limited tribal government budget and resources which provides very little funding for social services and ICW casework. As a result, the Tribe has to rely on the State of Washington for social work and services to its members more than most tribes, and so successful implementation of the ICWA by the State is of particular importance to the Tribe.

Tribes have relied on the final rule.

Tribes have long sought data points regarding the implementation of ICWA. This has included advocacy on local, state, and federal levels. With the promulgation of the final rule in December of 2016, tribes largely ceased advocacy efforts to mandate data collection, instead refocusing tribal resources toward working collaboratively with their governmental partners to implement

the data elements listed in the final rule. To this end, some tribes have worked to develop and update agreements to reflect the data elements in the final rule and the 2016 BIA ICWA Regulations, since a goal of both is to increase uniformity. This is necessary, since without a uniform reporting requirement data is usually only available by contacting each individual county within a state, an exception burden for both the tribe and the applicable county.

The ANPRM is arbitrary and capricious where it seeks only information on burdens.

This ANPRM arbitrarily focuses on collecting information about the burdens without considering the benefits. As required by law, the final rule conducted a careful analysis of the benefits and burdens, and appropriately amended the proposed rule to achieve a balanced final rule.

The agency "determined in the final rule that the benefits outweigh the burden associated with collecting and reporting the additional data." 81 Fed. Reg. at 90528. The agency explained how its weighing of the benefits and burdens led it to make certain changes to its proposal. For example: as stated in the final rule at 81 Fed Reg. 90528:

> In response to state and tribal comments suggesting congruence with the BIA's final rule, we revised data elements in this final rule as appropriate to reflect the BIA's regulations including removing requirements that state title IV–E agencies report certain information only from ICWA-specific court orders. These changes should allow the state title IV–E agency more flexibility, alleviate some of the burden and other concerns identified by states, help target technical assistance to increase state title IV–E agency communication and coordination with courts, and improve practice and national data on all children who are in foster care.

There have been no material changes in circumstances justifying the agency's new approach. The executive order is not a sufficient basis for the agency to act, as the executive order itself is arbitrary and unlawful where it provides an insufficient basis for reasonable decision-making relaying solely on an examination the burden of regulations without the required balancing of benefits. Additionally, the executive orders fail to provide justification to deviate from the statutory requirement for regulations.

The foregoing are responses to the Questions for Comment provided in the ANPRM:

1. *Identify the data elements, non-ICWA-related, that are overly burdensome for state and tribal title IV-E agencies and explain why. Please be specific in identifying the data elements and provide a rationale for why collecting and reporting this information is overly burdensome.*

No response.

2. *Previously, we received comments regarding burden and the system changes needed to report the ICWA-related data elements of the 2016 SNPRM. We would like to receive more detailed*

comments on the specific limitations we should be aware of that states will encounter in reporting the ICWA-related data elements in the final rule. Please be specific in identifying the data elements and provide a rationale for why this information is overly burdensome.

The ANPRM requests IV-E states and tribes to provides the number of children in foster care who are considered Indian children as defined in ICWA. However, it is specifically due to the lack of a national data reporting requirement, that any number provided in response to this question would be significantly inaccurate. This speaks to the critical importance of the ICWA-related data points – without a data reporting requirement, many states simply do not appropriately track Indian children in their child welfare system, let alone the individual ICWA-related data points.

3. *Previously, we received comments that particular data elements did not lend themselves to national statistics and were best assessed with qualitative methods such as case review. Please provide specific recommendations on which data elements in the regulation to retain that are important to understanding and assessing the foster care population at the national level. Also, provide a rationale for your suggestion that may include its relevance to monitor compliance with the title IV-B and IV-E programs or another strong justification for using the data at the national level*.

As discussed above, there has been ample opportunity for comment and this additional ANPRM is itself both unlawful as crafted and is a waste of finite resources. Tribes and states properly relied on the final rule in working toward implementation for nearly a year and a half. Many of these reporting systems are already in place, so there is no additional burden. Any modification to the existing data points frustrate those efforts, would require states to begin again collaborating with their tribal partners and ultimately further delay implementation. This comes at the expense of the health, safety and welfare of not only Indian children, their families, and their tribes, but the child welfare system at large where a modification of the final rule would cost resources that are system-wide.

4. *Previously we received comments noting concerns with variability in some of the data elements across states and within jurisdictions. Please provide specific suggestions to simplify data elements to facilitate the consistent collection and reporting of AFCARS data. Also, provide a rationale for each suggestion and how the simplification would still yield pertinent data*.

In the absence of a national data reporting requirement, it is guaranteed there will be variability with data elements frustrating a stated purpose of the 2016 BIA ICWA Regulations, to establish uniformity of application throughout the nation. Without a uniform reporting system, data is often available only at the county level, increasing data variability. The need to eliminate the data variability is precisely why it is important to have a national data collection standard. It will assist HHS/ACF efforts to support states in properly implementing ICWA by having targeted, data-driven identification areas where states need support the most.

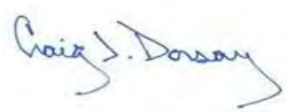
5. *Previously we received comments questioning the utility, reliability, and purpose of certain data elements at the national level. Provide specific recommendations on which data elements in the regulation to remove because they would not yield reliable national information about children involved with the child welfare system or are not needed for monitoring the title IV-B and IV-E programs. Please be specific in identifying the data elements and provide a rationale for why this information would not be reliable or is not necessary*.

Each of the ICWA-related data points are tied to existing federal law and regulation and are necessary to monitor and support title IV-B and IV-E programs. Each of the ICWA-related data points are critical. Further, as discussed above, ICWA is the "gold standard" of child welfare and ensuring compliance with this federal law informs how the existing child welfare system may improve in whole.

For the foregoing reasons, we strongly support each of the ICWA-related data points and believe, as your agency did in publishing the Final Rule in 2016, the benefits of this data collection outweighs any burden.

In closing, the Indian Child Welfare Act is widely considered the "gold standard" of child welfare, and a refinement of family reunification objectives mandated by nearly every state. Any hindrance or stoppage of ICWA data point collection significantly impacts tribal children, families, and county agencies trying to comply. In the interest of protecting our children and families, we respectfully submit these comments.

Sincerely,



Craig J. Dorsay, Tribal Attorney
Hoh Indian Tribe

As of: September 14, 2020
Received: June 06, 2018
Status: Posted
Posted: June 07, 2018
Tracking No. 1k2-93l5-5bfj
Comments Due: June 13, 2018
Submission Type: E-mail

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0024
Elizabeth Blue Consulting

Submitter Information

Name: Elizabeth Blue
Address: 55803
Organization: Elizabeth Blue Consulting

General Comment

See Attached

Attachments

Elizabeth Blue Consulting

Elizabeth Blue Consulting
1731 Woodland Avenue
Duluth, Minnesota 55803

June 6, 2018

Attn: Kathleen McHugh
United States Department of Health and Human Services
Administration for Children and Families
Policy Division
330 C Street SW
Washington, DC 20024

Submitted via electronic correspondence at: CBcomments@acf.hhs.gov

Re: RIN: 0970-AC72 **Adoption and Foster Care Analysis and Reporting System;** Advance Notice of Proposed Rulemaking (3/15/2018)

Dear Ms. McHugh:

I am submitting these comments regarding the Advance Notice of Proposed Rulemaking published in the *Federal Register* on March 15, 2018 (Volume 83, No. 51, page 11449). My comments pertain to data elements specific to American Indian and Alaska Native (AI/AN) children contained within the 2016 Adoption and Foster Care Analysis Reporting System (AFCARS) Final Rule published on December 14, 2016. The data elements I am commenting on address a number of relevant federal law requirements pertaining to the Indian Child Welfare Act (ICWA). I oppose any streamlining, modification, or elimination of these critical AFCARS data elements for AI/AN children.

Even though it has been almost 25 years since the establishment of the AFCARS data collection system and 40 years since the enactment of ICWA, American Indian/Alaska Native children are still waiting:

- To have basic data collected that describes their conditions,
- To see that data as relevant to federal law under Title IV-B, Title IV-E, and
- To see how ICWA is being implemented with respect to their circumstance.

The identification of critical data can inform local and national interventions to eliminate well-documented and long term foster care disproportionality and service disparities that AI/AN children face.

Each year that data is not collected is another year AI/AN children will not see significant improvements to their well-being. Policymakers and other government officials will also not have the data they need to make smart, effective changes to address these very serious, long-term problems. This is an untenable situation.

In addition, nothing has changed since the publication of the 2016 Final Rule that would change the need for this critical data regarding AI/AN children. Instead, Congress made it clear with the passage of the Family First Prevention Services Act (Division E of the Bipartisan Budget Agreement Act of H.R. 1892), that they intend to expand Title IV-E to focus on additional services and efforts, not upon just a narrow band of placement activities.

General Comments

I. The 2016 Final Rule is within ACF's Statutory Authority and Mission.

- Section 479 of the Social Security Act mandates the Department of Health and Human Services (DHHS) collect national, uniform, and reliable information on children in state foster care and adoptive care.

- The statutory language is expansive and suggests a broad collection of data for children under state care who are in foster care or adoption that includes their demographics, characteristics, and status while in care.
- Section 1102 of the act instructs the Secretary of DHHS to develop regulations necessary to carry out the functions for which DHHS is responsible under the act.

In addition, Section 422 of the Social Security Act requires DHHS to collect descriptions from states of a state's efforts to consult with tribes on the specific measures taken by a state to comply with ICWA.

- This provision has been in federal law since 1994 and DHHS has responded by asking states to provide this information, along with additional information related to ICWA implementation in state Annual Progress and Services Reports.
- DHHS also has a long history of collecting information, although limited, on ICWA implementation through their Child and Family Services Review process with states.
- These reports and reviews are authorized under the broad discretionary authority provided to DHHS under Titles IV-B and IV-E of the Social Security Act to collect data from states and review their progress against different federal child welfare requirements.

The Final Rule, which ACF developed under the statute, ensures the collection of necessary and comprehensive national data on the status of American Indian/Alaska Native (AI/AN) children to whom ICWA applies, and historical data on children in foster care. ***Thus, the Final Rule's data collection elements are necessary to ACF's statutory mission under the Social Security Act***. In addition, there is no statutory requirement that all data elements must be specifically tied to Title IV-E or Title IV-B requirements only.

II. ACF provided ample notice and opportunities to comment on the 2016 Final Rule.

On April 2, 2015, ACF issued a Supplemental Notice of Proposed Rulemaking (SNPRM) proposing changes to AFCARS data elements. A year later on April 7, 2016, ACF published another SNPRM proposing the addition of new AFCARS data elements related specifically to data concerning American Indian and Alaska Native (AI/AN) children and families. The proposed data was related to federal law requirements specific to ICWA and placements of AI/AN children. The Final Rule was published eight months later on December 14, 2016, and included the ICWA data elements.

The 2016 Final Rule was the product of a thorough and well-reasoned process that included opportunities for states, tribes, and other interested parties to comment. Issues related to the benefits for AI/AN children and families and burdens upon states to collect and report the data were thoroughly addressed in the Final Rule. While there was almost unanimous support provided to including the new data elements for AI/ANs, there was also very little concern expressed by states submitting comments specific to the addition of new data elements for AI/AN children and families. The few state comments that were received that expressed concern with the ICWA data elements were generally vague and expressed general concern regarding the burden of collecting new data of any type. Furthermore, as evidenced in the 2016 Final Rule discussion, ACF engaged in several discussions with states (6) regarding their perspectives on the proposed changes and as a result streamlined many of the data elements proposed in the SNPRM. ***The very thorough and well-thought out regulatory process used in developing the 2016 Final Rule evidences that no additional collection of information is necessary.***

III, The data in the 2016 Final Rule is vital to the federal government, Congress, states, and tribes to effectively address the needs of AI/AN children and families.

AI/AN children have been overrepresented in state foster care systems for over two decades, going back to the initial implementation of the AFCARS system. Prior to the 2016 Final Rule AFCARS only asked questions related to whether a child in state care and custody was self-identified as AI/AN. This self-identification does not provide necessary information to understand whether a child has a political relationship with a federally recognized tribe as a citizen of that tribe and whether other federal law requirements under ICWA are being implemented, especially those related to the placement of the child in substitute care and whether the child's tribe was engaged in supporting the child and family. As a result, AFCARS data has provided little help in understanding how to address chronic and persistent issues, such as foster care disproportionality, that are barriers to the well-being of AI/AN children and families—issues that not only affect the well-being of children, but also cost states and tribes considerable amounts of their finite resources.

Another practical implication for not implementing the data elements for AI/AN children in the Final Rule is it sends a message to states and tribes that the federal government does not consider data collection on this population a priority issue, which also disincentivize state and tribal efforts to address these issues at the federal and local level. As an example of how insufficient data collection can frustrate efforts to improve outcomes for AI/AN children, in the 2005 General Accountability Office (GAO) report on ICWA implementation (GAO-05-290) GAO indicated that they were hindered in their task to fully research and understand the questions submitted by a group of bi-partisan members of Congress because of insufficient data available from both state and federal data collection systems. At the local level, while states and tribes are increasingly partnering to improve ICWA implementation and improve outcomes for AI/AN children, data collection is a consistent concern and hampers efforts by states and tribes to demonstrate the need for additional policies and resources with state legislators. Since the publication of the Final Rule in December of 2016 a number of states have already begun work with tribes in their state on data system improvements and begun discussions of how the data would be supported and shared among state and tribal governments. Unfortunately, this Advanced Notice of Proposed Rule Making (ANPRM) has caused these efforts to be called into question and further delay the ability to seek real, meaningful answers to issues that frustrate AI/AN children's well-being on a daily basis.

The regulations themselves, in response to the comments from tribes and states, describe the importance of the 2016 Final Rule changes. As stated in the December 2016 Final Rule, 81 Fed. Reg. 90524, 90527:

> Overall, tribes, organizations, states, and private citizens supported our mission to collect additional information related to Indian children as defined in ICWA. Moreover, some states, tribes, national organizations, and federal agencies have stated that ICWA is the ''gold standard'' of child welfare practice and its implementation and associated data collection will likely help to inform efforts to improve outcomes for all children and families in state child welfare systems.

In light of these comments and the recent passage of the Family First Prevention Services Act by Congress in February of 2018 (Division E of the Bipartisan Budget Agreement Act, H.R. 1892) where Congress is clearly expanding the purposes of the Title IV-E program to include not only placement activities, but also prevention services to families, we see even more relevance and need for the data elements for AI/AN children and families included in the 2016 Final Rule.

Some of the expected benefits from implementing the full set of data elements for AI/AN children contained in the 2016 Final Rule include, but are not limited to, the following:

1. Provide data on core ICWA requirements such as ''active efforts'' to prevent removals of AI/AN children and success in securing appropriate placements, especially kinship care

placements, that have been demonstrated to improve AI/AN children's connection to their family, culture, and tribal supports they need to succeed;

2. Facilitate access to culturally appropriate services to AI/AN children and families to avoid out-of-home placement, keep children safe, and avoid unnecessary trauma to AI/AN children;

3. Identify effective strategies to securing extended family and other tribal families who can serve as resources to AI/AN children and help address the shortage of AI/AN family placements for AI/AN children;

4. Identify when tribes are being engaged to help support AI/AN children and families and trends related to how that engagement impacts outcomes for this population; and

5. Provide avenues for collaboration between states and tribes that are more meaningful, and outcome driven, including improved policy development, technical assistance, training, and resource allocation as a result of having reliable data available.

IV> The ANPRM is arbitrary and capricious where it seeks only information on burdens.

This ANPRM arbitrarily focuses on collecting information about the burdens without considering the benefits. As required by law, the Final Rule conducted a careful analysis of the benefits and burdens, and appropriately amended the SNPRM to achieve a balanced Final Rule.

The Agency "determined in the final rule that the benefits outweigh the burden associated with collecting and reporting the additional data." 81 Fed. Reg. at 90528. The Agency explained how weighing of the benefits and burdens led it to make certain changes to its proposal. For example: as stated in the Final Rule at 81 Fed Reg. 90528:

In response to state and tribal comments suggesting congruence with the BIA's final rule, we revised data elements in this final rule as appropriate to reflect the BIA's regulations including removing requirements that state title IV-E agencies report certain information only from ICWA-specific court orders. These changes should allow the state title IV-E agency more flexibility, alleviate some of the burden and other concerns identified by states, help target technical assistance to increase state title IV-E agency communication and coordination with courts, and improve practice and national data on all children who are in foster care.

There have been no significant changes justifying ACF's proposal to reexamine the 2016 Final ***Rule. ACF seems to rely upon the President's Executive Order (13777) for all federal agencies to identify regulations that are perceived as burdensome or unnecessary, but this is not a sufficient basis for ACF to act, as the Executive Order itself is arbitrary and unlawful where it provides an insufficient basis for reasonable decision-making relaying solely on an examination of the burden of regulations without the required balancing of benefits***. Additionally, the Executive Order fails to provide justification to deviate from the statutory requirement for regulations.

Responses to the Questions for Comment provided in the ANPRM:

1. Identify the data elements, non-ICWA-related, that are overly burdensome for state and tribal title IV-E agencies and explain why. Please be specific in identifying the data elements and provide a rationale for why collecting and reporting this information is overly burdensome.

We believe that the new data elements provided in the 2016 Final Rule that address health assessments, educational achievement, siblings, mental health services, sex trafficking, sexual orientation, permanency planning, adoption, guardianship, and housing are important for AI/AN children and youth as well. Burdens to collecting this data for tribes and states are relatively small considering the benefits to improving outcomes for AI/AN children and families, especially given many of the data elements are

correlated to some of the most vulnerable populations in child welfare systems and identification of risks associated to their well-being.

2. *Previously, we received comments regarding burden and the system changes needed to report the ICWA-related data elements of the 2016 SNPRM. We would like to receive more detailed comments on the specific limitations that states will encounter in reporting the ICWA-related data elements in the final rule. Please be specific in identifying the data elements and provide a rationale for why this information is overly burdensome.*

The 2016 Final Rule requests title IV-E states provide the number of children in foster care who are considered Indian children as defined in ICWA. This is data that is currently not collected or reported in any national child welfare data system and is the key to understanding other important issues that are unique to AI/AN children and federal law requirements under ICWA. The current data in AFCARS only identifies AI/AN children through self-identification, which provides inaccurate and unreliable data. Relevant data measures in ICWA related to placement, engagement with the child's tribe, and efforts to avoid placement are not collected leaving federal agency, states, Congress, and tribes with little information to address pernicious issues impacting this population like foster care disproportionality. The 2016 Final Rule only requires states to collect the data elements in the 2016 Final Rule for AI/AN children that are ICWA eligible. Regardless of whether AFCARS data is collected all states are required by law to examine whether a child is ICWA eligible, so this effort is already required outside of AFCARS requirements. The 2016 Final Rule data specific to AI/AN children is not required to be collected for other non-Indian children so while there will be additional data collection for AI/AN children that are ICWA eligible, given the small number of AI/AN children in the vast majority of states this will not require a significant burden.

3. *Previously, we received comments that particular data elements did not lend themselves to national statistics and were best assessed with qualitative methods such as case review. Please provide specific recommendations on which data elements in the regulation to retain that are important to understanding and assessing the foster care population at the national level. Also, provide a rationale for your suggestion that may include its relevance to monitor compliance with the title IV-B and IV-E programs or another strong justification for using the data at the national level.*

All of the data elements for AI/AN children in the 2016 Final Rule are appropriate for a national data system like AFCARS. The activities related to the data are required by federal law, such as ICWA, and should be documented in any child welfare case file. The vast majority of the data would come from state agency activities with a few data elements coming in the form of state court orders, which should also be included in any well documented case file. To assume that some data may not be retrievable if it comes from judicial determinations is essentially saying that case files do not need to contain court orders, which would be out of alignment with nationally recognized standards in child welfare case management. In addition, not having this information in a case file poses risk that court orders are not being properly implemented and places children in jeopardy of not receiving the benefits of court oversight in child welfare.

Capturing AI/AN data through case file reviews or other qualitative methods would not provide the data that Congress, states, and tribes need on an ongoing basis to make necessary changes in policy, practice, and resource allocation to address the serious problems that have been impacting AI/AN children for over two decades. Existing qualitative methods, like case file reviews under the Child and Family Services Reviews, have demonstrated the limitations of this data for informing Congress on how best to address critical concerns for AI/AN children. Case file reviews in many states include only a handful of cases involving AI/AN children and the data retrieved does not lend itself to adequately informing local efforts to address serious concerns related to outcomes for this population, much less issues of national concern. AFCARS is much better suited to collecting the type of data required for AI/AN children and efforts to shift data collection to other less comprehensive data systems with less regular data collection and reporting will have a negligible effect on improving data for this population.

4. Previously we received comments noting concerns with variability in some of the data elements across states and within jurisdictions. Please provide specific suggestions to simplify data elements to facilitate the consistent collection and reporting of AFCARS data. Also, provide a rationale for each suggestion and how the simplification would still yield pertinent data.

In the absence of a national data reporting requirement, it is guaranteed the current variability in state data collection and reporting will continue as evidenced by only a few states collecting any data specific to AI/AN children, and the current AFCARS data questions that use self-identification as a determinant of whether a child is AI/AN, rather than the appropriate questions related to their citizenship in a tribal government. Even with appropriate questions related to whether an AI/AN child or their family are eligible for ICWA protections, linkages to other AFCARS data cannot be assumed to be sufficiently correlated for informing policymakers and child welfare agencies without the other data elements for AI/AN children in the 2016 Final Rule also being implemented. ACF as much as any stakeholder should have a strong interest in improving the availability of accurate and reliable data for this population, which they have dedicated significant amounts of their resources to in the form of technical assistance and training.

5. Previously we received comments questioning the utility, reliability, and purpose of certain data elements at the national level. Provide specific recommendations on which data elements in the regulation to remove because they would not yield reliable national information about children involved with the child welfare system or are not needed for monitoring the title IV-B and IV-E programs. Please be specific in identifying the data elements and provide a rationale for why this information would not be reliable or is not necessary.

Each of the ICWA-related data points are tied to existing federal law and regulation and are necessary to monitor and support title IV-B and IV-E programs. Each of the ICWA-related data points is critical. The Title IV-B plan requirement for states that requires that states consult with tribal governments on their plans to implement ICWA has so far relied primarily on anecdotal information that is not collected or tracked uniformly by ACF leading to uneven responses to concerns about poor outcomes for AI/AN children in different states. The data elements contained in the 2016 Final Rule are linked in terms of being able to provide a complete picture of how AI/AN children are doing, and by eliminating or streamlining some of these data elements ACF would be compromising the integrity of the data to confidently inform policymakers and other stakeholders as to the important data trends and explanations for these trends.

In addition, as was stated earlier in our general comments, ICWA has been viewed as the "gold standard" in child welfare practice by leading national child welfare organizations and now with the passage of the Family First Prevention Services Act we can see there is increased support and interest in capturing more information on how states and tribes can improve outcomes for children and families beyond just improving the placement experience. The 2016 Final Rule data elements specific to AI/AN children are aligned with these acknowledgements and will be significantly helpful to all stakeholders involved in improving services and outcomes for AI/AN children.

Conclusion

The experience of having little to no data collected for AI/AN children through AFCARS over the last two decades has not resulted in meaningful improvements in the safety and well-being for AI/AN children, and it could be argued that it has contributed to the worsening conditions for this population. We know of no other federal child welfare law that does not have some form of basic data collection and certainly not one that is 40 years old as ICWA is. The AFCARS data elements for AI/AN children in the 2016 Final Rule have incredible potential to improve outcomes for this population, but only if the data elements are not heavily modified or eliminated. While there are burdens for states to collect this data, for the past 40 years it has primarily AI/AN children, their families, and tribal communities that have born the burden while little to no reliable data has been collected and the crisis of foster care disproportionality has worsened. The time has come to move forward with this critically important data collection for AI/AN

children and families and end the delays for not collecting the data that is necessary to support and promote healing for this population.

Sincerely,

Elizabeth Twining Blue

Elizabeth Twining Blue, MSW, LISW, CISW
Elizabeth Blue Consulting

As of: September 14, 2020
Received: June 06, 2018
Status: Posted
Posted: June 07, 2018
Tracking No. 1k2-93l5-5o4j
Comments Due: June 13, 2018
Submission Type: E-mail

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0025
National Indian Justice Center

Submitter Information

Name: Joseph Meyers
Address: 95403
Organization: National Indian Justice Center

General Comment

See Attached

Attachments

National Indian Justice Center

NATIONAL INDIAN JUSTICE CENTER
5250 Aero Drive
Santa Rosa, California 95403
A non-profit corporation

Phone: (707) 579-5507
Fax: (707) 579-9019
E-mail: nijc@aol.com
Web: www.nijc.org

Joseph A. Myers, Executive Director

June 6, 2018

Ms. Kathleen McHugh
United States Department of Health and Human Services
Administration for Children and Families
Policy Division
330 C Street SW
Washington, DC 20024
Cbcomments@acf.hhs.gov

Re: RIN: 0970-AC72 Adoption and Foster Care Analysis and Reporting System; Advance Notice of Proposed Rulemaking (3/15/2018)

Dear Ms. McHugh:

The National Indian Justice Center (NIJC) submits the following comments regarding the Advance Notice of Proposed Rulemaking published in the Federal Register on March 15, 2018 (Volume 83, No. 51, page 11449). Our comments address the need for data elements specific to American Indian and Alaska Native (AI/AN) children contained within the 2016 Adoption and Foster Care Analysis Reporting System (AFCARS) Final Rule published on December 14, 2016. The data elements we are commenting on address a number of relevant federal law requirements pertaining to the Indian Child Welfare Act (ICWA). NIJC opposes any streamlining, modification, or elimination of these critical AFCARS data elements for AI/AN children.

ICWA was passed in 1978 and it has been almost 25 years since the establishment of the AFCARS data collection system. AI/AN children are still waiting to have basic data collected that describes their conditions, how relevant federal law under Title IV-B, Title IV-E, and ICWA is being implemented with respect to AI/AN children, and the identification of critical data that can inform tribal, local, state and national interventions to eliminate well-documented and long term foster care disproportionality and service disparities that AI/AN children face. This data is essential for policymakers and agency personnel to meaningfully address and to improve conditions facing AI/AN children. Conditions have not changed since the publication of the 2016 Final Rule that reduces the need for this critical data for AI/AN children. Congress has made it clear with the passage of the Family First Prevention Services Act (Division E of the Bipartisan Budget Agreement Act of H.R. 1892) that they intend for Title IV-E to be expanded to focus on additional services and efforts, not just a narrow band of placement activities.

General Comments

The 2016 Final Rule is within ACF's Statutory Authority and Mission. Section 479 of the Social Security Act mandates the Department of Health and Human Services (DHHS) collect national, uniform, and reliable information on children in state foster care and adoptive care. The statutory language is expansive and suggests a broad collection of data for children under state care who are in foster care or adoption that includes their demographics, characteristics, and status while in care. Section 1102 of the act instructs the Secretary of DHHS to develop regulations necessary to carry out the functions for which DHHS is responsible under the act.

In addition, Section 422 of the Social Security Act requires DHHS to collect descriptions from states of a state's efforts to consult with tribes on the specific measures taken by a state to comply with ICWA. This provision has been in federal law since 1994 and DHHS has responded by asking states to provide this information, along with additional information related to ICWA implementation in state Annual Progress and Services Reports. DHHS also

has a long history of collecting information, although limited, on ICWA implementation through their Child and Family Services Review process with states. These reports and reviews are authorized under the broad discretionary authority provided to DHHS under Titles IV-B and IV-E of the Social Security Act to collect data from states and review their progress against different federal child welfare requirements.

The Final Rule, which ACF developed under the statute, ensures the collection of necessary and comprehensive national data on the status of American Indian/Alaska Native (AI/AN) children to whom ICWA applies, and historical data on children in foster care. Thus, the Final Rule's data collection elements are necessary to ACF's statutory mission under the Social Security Act. In addition, there is no statutory requirement that all data elements must be specifically tied to Title IV-E or Title IV-B requirements only.

ACF provided ample notice and opportunities to comment on the 2016 Final Rule. On April 2, 2015, ACF issued a Supplemental Notice of Proposed Rulemaking (SNPRM) proposing changes to AFCARS data elements. A year later on April 7, 2016, ACF published another SNPRM proposing the addition of new AFCARS data elements related specifically to data concerning American Indian and Alaska Native (AI/AN) children and families. The proposed data was related to federal law requirements specific to ICWA and placements of AI/AN children. The Final Rule was published eight months later on December 14, 2016, and included the ICWA data elements.

The 2016 Final Rule was the product of a thorough and well-reasoned process that included opportunities for states, tribes, and other interested parties to comment. Issues related to the benefits for AI/AN children and families and burdens upon states to collect and report the data were thoroughly addressed in the Final Rule. While there was almost unanimous support provided to including the new data elements for AI/ANs, there was also very little concern expressed by states submitting comments specific to the addition of new data elements for AI/AN children and families. The few state comments that were received that expressed concern with the ICWA data elements were generally vague and expressed general concern regarding the burden of collecting new data of any type. Furthermore, as evidenced in the 2016 Final Rule discussion, ACF engaged in several discussions with states (6) regarding their perspectives on the proposed changes and as a result streamlined many of the data elements proposed in the SNPRM. The very thorough and well-thought out regulatory process used in developing the 2016 Final Rule evidences that no additional collection of information is necessary.

The data in the 2016 Final Rule is vital to the federal government, Congress, states, and tribes to effectively address the needs of AI/AN children and families. AI/AN children have been overrepresented in state foster care systems for over two decades, going back to the initial implementation of the AFCARS system. Prior to the 2016 Final Rule AFCARS only asked questions related to whether a child in state care and custody was self-identified as AI/AN. This self-identification does not provide necessary information to understand whether a child has a political relationship with a federally recognized tribe as a citizen of that tribe and whether other federal law requirements under ICWA are being implemented, especially those related to the placement of the child in substitute care and whether the child's tribe was engaged in supporting the child and family. As a result, AFCARS data has provided little help in understanding how to address chronic and persistent issues, such as foster care disproportionality, that are barriers to the well-being of AI/AN children and families-issues that not only affect the well-being of children, but also cost states and tribes considerable amounts of their finite resources.
Another practical implication for not implementing the data elements for AI/AN children in the Final Rule is it sends a message to states and tribes that the federal government does not consider data collection on this population a priority issue, which also disincentivize state and tribal efforts to address these issues at the federal and local level. As an example of how insufficient data collection can frustrate efforts to improve outcomes for AI/AN children, in the 2005 General Accountability Office (GAO) report on ICWA implementation (GAO-05-290) GAO indicated that they were hindered in their task to fully research and understand the questions submitted by a group of bi-partisan members of Congress because of insufficient data available from both state and federal data collection systems. At the local level, while states and tribes are increasingly partnering to improve ICWA implementation and improve outcomes for AI/AN children, data collection is a consistent concern and hampers efforts by states and tribes to demonstrate the need for additional policies and resources with state legislators. Since the publication of the Final Rule in December of 2016 a number of states have already begun work with tribes in their state on data system improvements and begun discussions of how the data would be supported and shared among state and tribal

governments. Unfortunately, this Advanced Notice of Proposed Rule Making (ANPRM) has caused these efforts to be called into question and further delay the ability to seek real, meaningful answers to issues that frustrate AI/AN children's well-being on a daily basis.

The regulations themselves, in response to the comments from tribes and states, describe the importance of the 2016 Final Rule changes. As stated in the December 2016 Final Rule, 81 Fed. Reg. 90524, 90527:

Overall, tribes, organizations, states, and private citizens supported our mission to collect additional information related to Indian children as defined in ICWA. Moreover, some states, tribes, national organizations, and federal agencies have stated that ICWA is the "gold standard" of child welfare practice and its implementation and associated data collection will likely help to inform efforts to improve outcomes for all children and families in state child welfare systems.

In light of these comments and the recent passage of the Family First Prevention Services Act by Congress in February of 2018 (Division E of the Bipartisan Budget Agreement Act, H.R. 1892) where Congress is clearly expanding the purposes of the Title IV-E program to include not only placement activities, but also prevention services to families, we see even more relevance and need for the data elements for AI/AN children and families included in the 2016 Final Rule.

Some of the expected benefits from implementing the full set of data elements for AI/AN children contained in the 2016 Final Rule include, but are not limited to, the following:

1. provide data on core ICWA requirements such as "active efforts" to prevent removals of AI/AN children and success in securing appropriate placements, especially kinship care placements, that have been demonstrated to improve AI/AN children's connection to their family, culture, and tribal supports they need to succeed;

2. facilitate access to culturally appropriate services to AI/AN children and families to avoid out-of-home placement, keep children safe, and avoid unnecessary trauma to AI/AN children;

3. identify effective strategies to securing extended family and other tribal families who can serve as resources to AI/AN children and help address the shortage of AI/AN family placements for AI/AN children;

4. identify when tribes are being engaged to help support AI/AN children and families and trends related to how that engagement impacts outcomes for this population; and

5. provide avenues for collaboration between states and tribes that are more meaningful, and outcome driven, including improved policy development, technical assistance, training, and resource allocation as a result of having reliable data available.

The ANPRM is arbitrary and capricious where it seeks only information on burdens. This ANPRM arbitrarily focuses on collecting information about the burdens without considering the benefits. As required by law, the Final Rule conducted a careful analysis of the benefits and burdens, and appropriately amended the SNPRM to achieve a balanced Final Rule.

The Agency "determined in the final rule that the benefits outweigh the burden associated with collecting and reporting the additional data." 81 Fed. Reg. at 90528. The Agency explained how weighing of the benefits and burdens led it to make certain changes to its proposal. For example: as stated in the Final Rule at 81 Fed Reg. 90528:

In response to state and tribal comments suggesting congruence with the BIA's final rule, we revised data elements in this final rule as appropriate to reflect the BIA's regulations including removing requirements that state title IV-E agencies report certain information only from ICWA-specific court orders. These changes should allow the state title IV-E agency more flexibility, alleviate some of the burden and other concerns identified by states, help target technical assistance to increase state title IV-E agency communication and coordination with courts, and improve

practice and national data on all children who are in foster care.

There have been no significant changes justifying ACF's proposal to reexamine the 2016 Final Rule. ACF seems to rely upon the President's Executive Order (13777) for all federal agencies to identify regulations that are perceived as burdensome or unnecessary, but this is not a sufficient basis for ACF to act, as the Executive Order itself is arbitrary and unlawful where it provides an insufficient basis for reasonable decision-making relaying solely on an examination of the burden of regulations without the required balancing of benefits. Additionally, the Executive Order fails to provide justification to deviate from the statutory requirement for regulations.

Responses to the Questions for Comment provided in the ANPRM:

1. Identify the data elements, non-ICWA-related, that are overly burdensome for state and tribal title IV-E agencies and explain why. Please be specific in identifying the data elements and provide a rationale for why collecting and reporting this information is overly burdensome.

We believe that the new data elements provided in the 2016 Final Rule that address health assessments, educational achievement, siblings, mental health services, sex trafficking, sexual orientation, permanency planning, adoption, guardianship, and housing are important for AI/AN children and youth as well. Burdens to collecting this data for tribes and states are relatively small considering the benefits to improving outcomes for AI/AN children and families, especially given many of the data elements are correlated to some of the most vulnerable populations in child welfare systems and identification of risks associated to their well-being.

2. Previously, we received comments regarding burden and the system changes needed to report the ICWA-related data elements of the 2016 SNPRM. We would like to receive more detailed comments on the specific limitations that states will encounter in reporting the ICWA-related data elements in the final rule. Please be specific in identifying the data elements and provide a rationale for why this information is overly burdensome.

The 2016 Final Rule requests title IV-E states provide the number of children in foster care who are considered Indian children as defined in ICWA. This is data that is currently not collected or reported in any national child welfare data system and is the key to understanding other important issues that are unique to AI/AN children and federal law requirements under ICWA. The current data in AFCARS only identifies AI/AN children through self-identification, which provides inaccurate and unreliable data. Relevant data measures in ICWA related to placement, engagement with the child's tribe, and efforts to avoid placement are not collected leaving federal agency, states, Congress, and tribes with little information to address pernicious issues impacting this population like foster care disproportionality. The 2016 Final Rule only requires states to collect the data elements in the 2016 Final Rule for AI/AN children that are ICWA eligible. Regardless of whether AFCARS data is collected all states are required by law to examine whether a child is ICWA eligible, so this effort is already required outside of AFCARS requirements. The 2016 Final Rule data specific to AI/AN children is not required to be collected for other non-Indian children so while there will be additional data collection for AI/AN children that are ICWA eligible, given the small number of AI/AN children in the vast majority of states this will not require a significant burden.

3. Previously, we received comments that particular data elements did not lend themselves to national statistics and were best assessed with qualitative methods such as case review. Please provide specific recommendations on which data elements in the regulation to retain that are important to understanding and assessing the foster care population at the national level. Also, provide a rationale for your suggestion that may include its relevance to monitor compliance with the title IV-B and IV-E programs or another strong justification for using the data at the national level.

All of the data elements for AI/AN children in the 2016 Final Rule are appropriate for a national data system like AFCARS. The activities related to the data are required by federal law, such as ICWA, and should be documented in any child welfare case file. The vast majority of the data would come from state agency activities with a few data elements coming in the form of state court orders, which should also be included in any well documented case file. To assume that some data may not be retrievable if it comes from judicial determinations is essentially saying that

case files do not need to contain court orders, which would be out of alignment with nationally recognized standards in child welfare case management. In addition, not having this information in a case file poses risk that court orders are not being properly implemented and places children in jeopardy of not receiving the benefits of court oversight in child welfare.

Capturing AI/AN data through case file reviews or other qualitative methods would not provide the data that Congress, states, and tribes need on an ongoing basis to make necessary changes in policy, practice, and resource allocation to address the serious problems that have been impacting AI/AN children for over two decades. Existing qualitative methods, like case file reviews under the Child and Family Services Reviews, have demonstrated the limitations of this data for informing Congress on how best to address critical concerns for AI/AN children. Case file reviews in many states include only a handful of cases involving AI/AN children and the data retrieved does not lend itself to adequately informing local efforts to address serious concerns related to outcomes for this population, much less issues of national concern. AFCARS is much better suited to collecting the type of data required for AI/AN children and efforts to shift data collection to other less comprehensive data systems with less regular data collection and reporting will have a negligible effect on improving data for this population.

4. Previously we received comments noting concerns with variability in some of the data elements across states and within jurisdictions. Please provide specific suggestions to simplify data elements to facilitate the consistent collection and reporting of AFCARS data. Also, provide a rationale for each suggestion and how the simplification would still yield pertinent data.

In the absence of a national data reporting requirement, it is guaranteed the current variability in state data collection and reporting will continue as evidenced by only a few states collecting any data specific to AI/AN children, and the current AFCARS data questions that use self-identification as a determinant of whether a child is AI/AN, rather than the appropriate questions related to their citizenship in a tribal government. Even with appropriate questions related to whether an AI/AN child or their family are eligible for ICWA protections, linkages to other AFCARS data cannot be assumed to be sufficiently correlated for informing policymakers and child welfare agencies without the other data elements for AI/AN children in the 2016 Final Rule also being implemented. ACF as much as any stakeholder should have a strong interest in improving the availability of accurate and reliable data for this population, which they have dedicated significant amounts of their resources to in the form of technical assistance and training.

5. Previously we received comments questioning the utility, reliability, and purpose of certain data elements at the national level. Provide specific recommendations on which data elements in the regulation to remove because they would not yield reliable national information about children involved with the child welfare system or are not needed for monitoring the title IV-B and IV-E programs. Please be specific in identifying the data elements and provide a rationale for why this information would not be reliable or is not necessary.

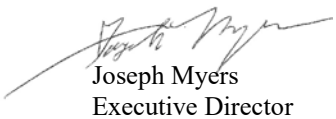
Each of the ICWA-related data points are tied to existing federal law and regulation and are necessary to monitor and support title IV-B and IV-E programs. Each of the ICWA-related data points is critical. The Title IV-B plan requirement for states that requires that states consult with tribal governments on their plans to implement ICWA has so far relied primarily on anecdotal information that is not collected or tracked uniformly by ACF leading to uneven responses to concerns about poor outcomes for AI/AN children in different states. The data elements contained in the 2016 Final Rule are linked in terms of being able to provide a complete picture of how AI/AN children are doing, and by eliminating or streamlining some of these data elements ACF would be compromising the integrity of the data to confidently inform policymakers and other stakeholders as to the important data trends and explanations for these trends.

In addition, as was stated earlier in our general comments, ICWA has been viewed as the "gold standard" in child welfare practice by leading national child welfare organizations and now with the passage of the Family First Prevention Services Act we can see there is increased support and interest in capturing more information on how states and tribes can improve outcomes for children and families beyond just improving the placement experience. The 2016 Final Rule data elements specific to AI/AN children are aligned with these acknowledgements and will be significantly helpful to all stakeholders involved in improving services and outcomes for AI/AN children.

Conclusion

The experience of having little to no data collected for AI/AN children through AFCARS over the last two decades has resulted in not meaningful improvements in the safety and well-being for AI/AN children and could be argued as having contributed to the worsening conditions for this population. We know of no other federal child welfare law that does not have some form of basic data collection and certainly not one that is 40 years old as ICWA is. The AFCARS data elements for AI/AN children in the 2016 Final Rule have incredible potential to improve outcomes for this population, but only if the data elements are not heavily modified or eliminated. While there are burdens for states to collect this data, for the past 40 years it has primarily AI/AN children, their families, and tribal communities that have born the burden while little to no reliable data has been collected and the crisis of foster care disproportionality has worsened. The time has come to move forward with this critically important data collection for AI/AN children and families and end the delays for not collecting the data that is necessary to support and promote healing for this population.

Sincerely,



Joseph Myers
Executive Director

As of: September 14, 2020
Received: June 06, 2018
Status: Posted
Posted: June 07, 2018
Tracking No. 1k2-93l5-6tpt
Comments Due: June 13, 2018
Submission Type: E-mail

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0026
Santa Ynez Band of Chumash Indians

Submitter Information

Name: Kenneth Kahn
Address: 93460
Organization: Santa Ynez Band of Chumash Indians

General Comment

See Attached

Attachments

Santa Ynez Band of Chumash Indians

SANTA YNEZ BAND OF CHUMASH INDIANS

P.O. BOX 517 · SANTA YNEZ · CA · 93460

Tel: 805.688.7997 · Fax: 805.686.9578

www.santaynezchumash.org

BUSINESS COMMITTEE

KENNETH KAHN, CHAIRMAN
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June 6, 2018

Attn: Kathleen McHugh
United States Department of Health and Human Services
Administration for Children and Families
Policy Division
330 C Street SW
Washington, DC 20024

Via electronic correspondence at: *CBComments@acf.hhs.gov*

Re: RIN: 0970-AC72 **Adoption and Foster Care Analysis and Reporting System;** Advance Notice of Proposed Rulemaking (3/15/2018)

Dear Sir or Madam,

The Santa Ynez Band of Chumash Indians (Chumash) submits these comments on the Advanced Notice of Proposed Rulemaking regarding the Adoption and Foster Care Analysis Reporting System (AFCARS) for Title IV-B and Title IV-E as they relate to the Indian Child Welfare Act of 1978 (ICWA). Data points specific to ICWA were incorporated into AFCARS as detailed in the Final Rule published on December 14, 2016.

General Comments:

The data collection requirements of the Final Rule are consistent with ACF's statutory mission.

Section 479 of the Social Security Act mandates Health and Human Services collect national, uniform, and reliable information on children in state care and, pursuant to Section 474(f) requires HHS to impose penalties for non-compliance. Under Section 1102 of the Act, the Secretary is to promulgate regulations necessary for the effective administration of the functions for which HHS is responsible under the Act.

The Final Rule, which ACF promulgated pursuant to the above-referenced statutory requirements, will ensure the collection of necessary and comprehensive national data on the

status of American Indian/Alaska Native (AI/AN) children for whom ICWA applies and collect historical data on children in foster care. Thus, the Final Rule's data collection elements are necessary to the fulfillment of ACF's statutory mission under Section 479 of the Act.

The administration provided all interested parties with ample notice and opportunities to comment on the final rule.

Tribes, tribal organizations, and tribal advocates have long sought the inclusion of ICWA-related data points in the AFCARS. As such, the initial rules were changed due to comments by tribal entities and others to the February 9, 2015 proposed rule. On April 2, 2015 the Agency issued a Supplemental Notice of Proposed Rulemaking (SNPRM) changing certain data elements. And, yet another SNPRM was issued on April 7, 2016. Both the April 2015 Intent to Publish a SNPRM and the April 2016 SNPRM sought comments on the inclusion of the ICWA data points. Ultimately, the Final Rule, published on December 14, 2016, (Final Rule) included the ICWA data elements.

The Final Rule thoroughly responded to comments on both the benefits and burdens of the proposed regulatory action. Given the multiple opportunities to comment during the rulemaking process, any additional collection activity is unnecessary. In addition, tribes, tribal organizations, and advocates received notice of all of these opportunities, and with ample time to comment on this vital and important rule change.

States also had ample opportunity to participate. As the Final Rule explains in detail, ACF engaged in robust consultation with states and responded to their concerns, for example, by streamlining many data elements. (81 Fed. Reg. 90524, 90565-66.) States had at least six different opportunities to raise their concerns, which the ACF considered and addressed fully. (81 Fed. Reg. at 90566.)

States are already in the process of implementing these changes.

As these regulations have been effective for approximately fifteen months, all states should be in the process of implementing them. The Tribe is aware that California, a state with 109 federally-recognized tribes, is already well under way with its implementation efforts, having relied on the final rule. At this stage, any modification of the data collection requirements would be a waste of finite state child welfare resources, which itself is an additional burden.

These regulations are important to the Tribe, its families, and state child welfare systems.

The regulations themselves—in response to the comments from stakeholders across the country—describe the importance of these changes. As stated in the December 2016 Final Rule, 81 Fed. Reg. 90524, 90527:

> Overall, tribes, organizations, states, and private citizens supported our mission to collect additional information related to Indian children as defined in ICWA. Moreover, some states, tribes, national organizations, and federal

agencies have stated that ICWA is the "gold standard" of child welfare practice and its implementation and associated data collection will likely help to inform efforts to improve outcomes for all children and families in state child welfare systems.

Generally, tribes, organizations representing tribal interests, national child welfare advocacy organizations, and private citizens fully support the overall goal and purpose of including ICWA-related data in AFCARS, and the data elements as proposed in the 2016 SNPRM. These commenters believe that collecting ICWA-related data in AFCARS will:

1. provide data on core ICWA requirements such as "active efforts" and placement preferences, as well as assess how the child welfare system is working for Indian children as defined by ICWA, families and communities;

2. facilitate access to culturally-appropriate services to extended families and other tribal members who can serve as resources and high-quality placements for tribal children;

3. help address and reduce the disproportionality of AI/AN children in foster care; and

4. provide avenues for collaboration between states and tribes that are more meaningful, and outcome driven, including improved policy development, technical assistance, training, and resource allocation as a result of having reliable data available.

Overall, tribal commenters and national child welfare advocacy organizations believe that collecting ICWA-related data in AFCARS is a step in the right direction to ensure that Indian families will be kept together when possible, and will help prevent AI/AN children from entering the foster care system. Many of the tribal commenters that supported the 2016 SNPRM also recommended extensive training for title IV-E agencies and court personnel in order to ensure accurate and reliable data.

Other federal reports have demonstrated the need for quality national data to assess states' efforts in implementing ICWA. See Government Accountability Office, *Indian Child Welfare Act: Existing Information on Implementation Issues Could be Used to Target Guidance and Assistance to States*, GAO-05-290 (Apr. 4, 2005) http://www.gao.gov/products/GAO-05-290.

Nothing has changed since ACF made clear in its final rule that data collection is necessary to protect Indian children and families and their tribes. There remains a pressing need for comprehensive national data on ICWA implementation. Congress has not amended the Act's data collection provisions. And there have been no changes in circumstances that would alter the burdens or benefits of the final rule's data collection requirements.

Tribes have relied on the final rule.

Tribes have long sought data points regarding the implementation of ICWA. This has included advocacy on local, state, and federal levels. With the promulgation of the final rule in December of 2016, tribes largely ceased advocacy efforts to mandate data collection, instead refocusing tribal resources toward working collaboratively with their governmental partners to implement the data elements listed in the final rule. To this end, some tribes have worked to develop and update agreements to reflect the data elements in the final rule and the 2016 BIA ICWA Regulations, since a goal of both is to increase uniformity.

This ANPRM arbitrarily seeks information only on the burdens of reporting.

This ANPRM arbitrarily focuses on collecting information about the burdens without considering the benefits. As required by law, the final rule conducted a careful analysis of the benefits and burdens, and appropriately amended the proposed rule to achieve a balanced final rule.

The agency "determined in the final rule that the benefits outweigh the burden associated with collecting and reporting the additional data." (81 Fed. Reg. at 90528.) The agency explained how its weighing of the benefits and burdens led it to make certain changes to its proposal. For example: as stated in the final rule at 81 Fed Reg. 90528:

> In response to state and tribal comments suggesting congruence with the BIA's final rule, we revised data elements in this final rule as appropriate to reflect the BIA's regulations including removing requirements that state title IV-E agencies report certain information only from ICWA-specific court orders. These changes should allow the state title IV-E agency more flexibility, alleviate some of the burden and other concerns identified by states, help target technical assistance to increase state title IV-E agency communication and coordination with courts, and improve practice and national data on all children who are in foster care.

There have been no material changes in circumstances justifying the agency's new approach. The executive order is not a sufficient basis for the agency to act, as the executive order itself is arbitrary and unlawful where it provides an insufficient basis for reasonable decision-making relaying solely on an examination the burden of regulations without the required balancing of benefits. Additionally, the executive orders to fail to provide justification to deviate from the statutory requirement for regulations.

The foregoing are responses to the Questions for Comment provided in the ANPRM:

1. Identify the data elements, non-ICWA-related, that are overly burdensome for state and tribal title IV-E agencies and explain why. Please be specific in identifying the data elements and provide a rationale for why collecting and reporting this information is overly burdensome.

No response.

2. Previously, we received comments regarding burdens and the system changes needed to report the ICWA-related data elements of the 2016 SNPRM. We would like to receive more detailed comments on the specific limitations we should be aware of that states will encounter in reporting the ICWA-related data elements in the final rule. Please be specific in identifying the data elements and provide a rationale for why this information is overly burdensome.

The ANPRM requests IV-E states and tribes to provides the number of children in foster care who are considered Indian children as defined in ICWA. However, it is specifically due to the lack of a national data reporting requirement, that any number provided in response to this question would be significantly inaccurate. This speaks to the critical importance of the ICWA-related data points – without a data reporting requirement, many states simply do not appropriately track Indian children in their child welfare system, let alone the individual ICWA-related data points.

3. Previously, we received comments that particular data elements did not lend themselves to national statistics and were best assessed with qualitative methods such as case review. Please provide specific recommendations on which data elements in the regulation to retain that are important to understanding and assessing the foster care population at the national level. Also, provide a rationale for your suggestion that may include its relevance to monitor compliance with the title IV-B and IV-E programs or another strong justification for using the data at the national level.

As discussed above, there has been ample opportunity for comment and this additional ANPRM is itself both unlawful as crafted and is a waste of finite resources. Tribes and states properly relied on the final rule in working toward implementation for nearly a year and a half. Any modification to the existing data points frustrate those efforts, would require states to begin again collaborating with their tribal partners and ultimately further delay implementation. This comes at the expense of the health, safety and welfare of not only Indian children, their families,

and their tribes, but the child welfare system at large where a modification of the final rule would cost resources that are system-wide.

4. Previously we received comments noting concerns with variability in some of the data elements across states and within jurisdictions. Please provide specific suggestions to simplify data elements to facilitate the consistent collection and reporting of AFCARS data. Also, provide a rationale for each suggestion and how the simplification would still yield pertinent data.

In the absence of a national data reporting requirement, it is guaranteed there will be variability with data elements, frustrating a stated purpose of the 2016 BIA ICWA Regulations, to establish uniformity of application throughout the nation. The need to eliminate the data variability is precisely why it is important to have a national data collection standard. It will assist HHS/ACF efforts to support states in properly implementing ICWA by having targeted, data-driven identification areas where states need support the most.

5. Previously we received comments questioning the utility, reliability, and purpose of certain data elements at the national level. Provide specific recommendations on which data elements in the regulation to remove because they would not yield reliable national information about children involved with the child welfare system or are not needed for monitoring the title IV-B and IV-E programs. Please be specific in identifying the data elements and provide a rationale for why this information would not be reliable or is not necessary.

Each of the ICWA-related data points are tied to existing federal law and regulation and are necessary to monitor and support title IV-B and IV-E programs and are all critical. Further, as discussed above, ICWA is the "gold standard" of child welfare and ensuring compliance with this federal law informs how the existing child welfare system may improve in whole.

The Indian Child Welfare Act is widely considered the "gold standard" of child welfare, and a refinement of family reunification objectives mandated by nearly every state. Any hindrance or stoppage of ICWA data point collection significantly impacts tribal children, families, and county agencies trying to comply with this federal law. It is in the interest of protecting our children and families that we respectfully submit these comments and provide our strong support for each of the ICWA-related data points. As your agency did in publishing the Final Rule in 2016, Chumash strongly believes that any burden associated with date collection is far outweighed by the benefits.

Sincerely,

Kenneth Kahn,
Tribal Chairman

As of: September 14, 2020
Received: June 06, 2018
Status: Posted
Posted: June 07, 2018
Tracking No. 1k2-93l5-bmoz
Comments Due: June 13, 2018
Submission Type: E-mail

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0027
Nualto Tribal Council

Submitter Information

Name: Michael Stickman
Organization: Nualto Tribal Council

General Comment

See Attached

Attachments

Nualto Tribal Council

NULATO TRIBAL COUNCIL
P.O. Box 65049 • Nulato, Alaska 99765
PHONE 907-898-2339 • FAX 907-898-2207
nulatotribe@yahoo.com

June 13, 2018

Attn: Kathleen McHugh
United States Department of Health and Human Services
Administration for Children and Families
Policy Division
330 C Street SW
Washington, DC 20024

Submitted via electronic correspondence at: CBcomments@acf.hhs.gov

Re: RIN: 0970-AC72 **Adoption and Foster Care Analysis and Reporting System;** Advance Notice of Proposed Rulemaking (3/15/2018)

Dear Ms. McHugh:

The Nulato Tribal Council submits these comments regarding the Advance Notice of Proposed Rulemaking published in the *Federal Register* on March 15, 2018 (Volume 83, No. 51, page 11449). Our comments pertain to data elements specific to American Indian and Alaska Native (AI/AN) children contained within the 2016 Adoption and Foster Care Analysis Reporting System (AFCARS) Final Rule published on December 14, 2016. The data elements we are commenting on address a number of relevant federal law requirements pertaining to the Indian Child Welfare Act (ICWA). We oppose any streamlining, modification, or elimination of these critical AFCARS data elements for AI/AN children.

It has been almost 25 years since the establishment of the AFCARS data collection system and 40 years since the enactment of ICWA. AI/AN children are still waiting to have basic data collected that describes their conditions, how relevant federal law under Title IV-B, Title IV-E, and ICWA is being implemented with respect to AI/AN children, and the identification of critical data that can inform local and national interventions to eliminate well-documented and long term foster care disproportionality and service disparities that AI/AN children face. Each year that data is not collected is another year AI/AN children will not see significant improvements to their well-being and policymakers and other government officials will not have the data they need to make smart, effective changes that can address these very serious, long-term problems; this is an untenable situation. We also note that nothing has changed since the publication of the 2016 Final Rule that would change the need for this critical data for AI/AN children. Instead, Congress has made it clear with the passage of the Family First Prevention Services Act (Division E of the Bipartisan Budget Agreement Act of H.R. 1892) that they intend for Title IV-E to be expanded to focus on additional services and efforts, not just a narrow band of placement activities.

General Comments

The 2016 Final Rule is within ACF's Statutory Authority and Mission. Section 479 of the Social Security Act mandates the Department of Health and Human Services (DHHS) collect national, uniform, and reliable information on children in state foster care and adoptive care. The statutory language is expansive and suggests a broad collection of data for children under state care who are in foster care or adoption that includes their demographics, characteristics, and status while in care. Section 1102 of the act instructs the Secretary of DHHS to develop regulations necessary to carry out the functions for which DHHS is responsible under the act.

In addition, Section 422 of the Social Security Act requires DHHS to collect descriptions from states of a state's efforts to consult with tribes on the specific measures taken by a state to comply with ICWA. This provision has been in federal law since 1994 and DHHS has responded by asking states to provide this

information, along with additional information related to ICWA implementation in state Annual Progress and Services Reports. DHHS also has a long history of collecting information, although limited, on ICWA implementation through their Child and Family Services Review process with states. These reports and reviews are authorized under the broad discretionary authority provided to DHHS under Titles IV-B and IV-E of the Social Security Act to collect data from states and review their progress against different federal child welfare requirements.

The Final Rule, which ACF developed under the statute, ensures the collection of necessary and comprehensive national data on the status of American Indian/Alaska Native (AI/AN) children to whom ICWA applies, and historical data on children in foster care. Thus, the Final Rule's data collection elements are necessary to ACF's statutory mission under the Social Security Act. In addition, there is no statutory requirement that all data elements must be specifically tied to Title IV-E or Title IV-B requirements only.

ACF provided ample notice and opportunities to comment on the 2016 Final Rule. On April 2, 2015, ACF issued a Supplemental Notice of Proposed Rulemaking (SNPRM) proposing changes to AFCARS data elements. A year later on April 7, 2016, ACF published another SNPRM proposing the addition of new AFCARS data elements related specifically to data concerning American Indian and Alaska Native (AI/AN) children and families. The proposed data was related to federal law requirements specific to ICWA and placements of AI/AN children. The Final Rule was published eight months later on December 14, 2016, and included the ICWA data elements.

The 2016 Final Rule was the product of a thorough and well-reasoned process that included opportunities for states, tribes, and other interested parties to comment. Issues related to the benefits for AI/AN children and families and burdens upon states to collect and report the data were thoroughly addressed in the Final Rule. While there was almost unanimous support provided to including the new data elements for AI/ANs, there was also very little concern expressed by states submitting comments specific to the addition of new data elements for AI/AN children and families. The few state comments that were received that expressed concern with the ICWA data elements were generally vague and expressed general concern regarding the burden of collecting new data of any type. Furthermore, as evidenced in the 2016 Final Rule discussion, ACF engaged in several discussions with states (6) regarding their perspectives on the proposed changes and as a result streamlined many of the data elements proposed in the SNPRM. The very thorough and well-thought out regulatory process used in developing the 2016 Final Rule evidences that no additional collection of information is necessary.

The data in the 2016 Final Rule is vital to the federal government, Congress, states, and tribes to effectively address the needs of AI/AN children and families. AI/AN children have been overrepresented in state foster care systems for over two decades, going back to the initial implementation of the AFCARS system. Prior to the 2016 Final Rule AFCARS only asked questions related to whether a child in state care and custody was self-identified as AI/AN. This self-identification does not provide necessary information to understand whether a child has a political relationship with a federally recognized tribe as a citizen of that tribe and whether other federal law requirements under ICWA are being implemented, especially those related to the placement of the child in substitute care and whether the child's tribe was engaged in supporting the child and family. As a result, AFCARS data has provided little help in understanding how to address chronic and persistent issues, such as foster care disproportionality, that are barriers to the well-being of AI/AN children and families—issues that not only affect the well-being of children, but also cost states and tribes considerable amounts of their finite resources.

Another practical implication for not implementing the data elements for AI/AN children in the Final Rule is it sends a message to states and tribes that the federal government does not consider data collection on this population a priority issue, which also disincentivize state and tribal efforts to address these issues at the federal and local level. As an example of how insufficient data collection can frustrate efforts to improve outcomes for AI/AN children, in the 2005 General Accountability Office (GAO) report on ICWA implementation (GAO-05-290) GAO indicated that they were hindered in their task to fully research and understand the questions submitted by a group of bi-partisan members of Congress because of

insufficient data available from both state and federal data collection systems. At the local level, while states and tribes are increasingly partnering to improve ICWA implementation and improve outcomes for AI/AN children, data collection is a consistent concern and hampers efforts by states and tribes to demonstrate the need for additional policies and resources with state legislators. Since the publication of the Final Rule in December of 2016 a number of states have already begun work with tribes in their state on data system improvements and begun discussions of how the data would be supported and shared among state and tribal governments. Unfortunately, this Advanced Notice of Proposed Rule Making (ANPRM) has caused these efforts to be called into question and further delay the ability to seek real, meaningful answers to issues that frustrate AI/AN children's well-being on a daily basis.

The regulations themselves, in response to the comments from tribes and states, describe the importance of the 2016 Final Rule changes. As stated in the December 2016 Final Rule, 81 Fed. Reg. 90524, 90527:

> Overall, tribes, organizations, states, and private citizens supported our mission to collect additional information related to Indian children as defined in ICWA. Moreover, some states, tribes, national organizations, and federal agencies have stated that ICWA is the "gold standard" of child welfare practice and its implementation and associated data collection will likely help to inform efforts to improve outcomes for all children and families in state child welfare systems.

In light of these comments and the recent passage of the Family First Prevention Services Act by Congress in February of 2018 (Division E of the Bipartisan Budget Agreement Act, H.R. 1892) where Congress is clearly expanding the purposes of the Title IV-E program to include not only placement activities, but also prevention services to families, we see even more relevance and need for the data elements for AI/AN children and families included in the 2016 Final Rule.

Some of the expected benefits from implementing the full set of data elements for AI/AN children contained in the 2016 Final Rule include, but are not limited to, the following:

1. provide data on core ICWA requirements such as "active efforts" to prevent removals of AI/AN children and success in securing appropriate placements, especially kinship care placements, that have been demonstrated to improve AI/AN children's connection to their family, culture, and tribal supports they need to succeed;

2. facilitate access to culturally appropriate services to AI/AN children and families to avoid out-of-home placement, keep children safe, and avoid unnecessary trauma to AI/AN children;

3. identify effective strategies to securing extended family and other tribal families who can serve as resources to AI/AN children and help address the shortage of AI/AN family placements for AI/AN children;

4. identify when tribes are being engaged to help support AI/AN children and families and trends related to how that engagement impacts outcomes for this population; and

5. provide avenues for collaboration between states and tribes that are more meaningful, and outcome driven, including improved policy development, technical assistance, training, and resource allocation as a result of having reliable data available.

The ANPRM is arbitrary and capricious where it seeks only information on burdens. This ANPRM arbitrarily focuses on collecting information about the burdens without considering the benefits. As required by law, the Final Rule conducted a careful analysis of the benefits and burdens, and appropriately amended the SNPRM to achieve a balanced Final Rule.

The Agency "determined in the final rule that the benefits outweigh the burden associated with collecting and reporting the additional data." 81 Fed. Reg. at 90528. The Agency explained how weighing of the benefits and burdens led it to make certain changes to its proposal. For example: as stated in the Final Rule at 81 Fed Reg. 90528:

and assessing the foster care population at the national level. Also, provide a rationale for your suggestion that may include its relevance to monitor compliance with the title IV-B and IV-E programs or another strong justification for using the data at the national level.

All of the data elements for AI/AN children in the 2016 Final Rule are appropriate for a national data system like AFCARS. The activities related to the data are required by federal law, such as ICWA, and should be documented in any child welfare case file. The vast majority of the data would come from state agency activities with a few data elements coming in the form of state court orders, which should also be included in any well documented case file. To assume that some data may not be retrievable if it comes from judicial determinations is essentially saying that case files do not need to contain court orders, which would be out of alignment with nationally recognized standards in child welfare case management. In addition, not having this information in a case file poses risk that court orders are not being properly implemented and places children in jeopardy of not receiving the benefits of court oversight in child welfare.

Capturing AI/AN data through case file reviews or other qualitative methods would not provide the data that Congress, states, and tribes need on an ongoing basis to make necessary changes in policy, practice, and resource allocation to address the serious problems that have been impacting AI/AN children for over two decades. Existing qualitative methods, like case file reviews under the Child and Family Services Reviews, have demonstrated the limitations of this data for informing Congress on how best to address critical concerns for AI/AN children. Case file reviews in many states include only a handful of cases involving AI/AN children and the data retrieved does not lend itself to adequately informing local efforts to address serious concerns related to outcomes for this population, much less issues of national concern. AFCARS is much better suited to collecting the type of data required for AI/AN children and efforts to shift data collection to other less comprehensive data systems with less regular data collection and reporting will have a negligible effect on improving data for this population.

4. Previously we received comments noting concerns with variability in some of the data elements across states and within jurisdictions. Please provide specific suggestions to simplify data elements to facilitate the consistent collection and reporting of AFCARS data. Also, provide a rationale for each suggestion and how the simplification would still yield pertinent data.

In the absence of a national data reporting requirement, it is guaranteed the current variability in state data collection and reporting will continue as evidenced by only a few states collecting any data specific to AI/AN children, and the current AFCARS data questions that use self-identification as a determinant of whether a child is AI/AN, rather than the appropriate questions related to their citizenship in a tribal government. Even with appropriate questions related to whether an AI/AN child or their family are eligible for ICWA protections, linkages to other AFCARS data cannot be assumed to be sufficiently correlated for informing policymakers and child welfare agencies without the other data elements for AI/AN children in the 2016 Final Rule also being implemented. ACF as much as any stakeholder should have a strong interest in improving the availability of accurate and reliable data for this population, which they have dedicated significant amounts of their resources to in the form of technical assistance and training.

5. Previously we received comments questioning the utility, reliability, and purpose of certain data elements at the national level. Provide specific recommendations on which data elements in the regulation to remove because they would not yield reliable national information about children involved with the child welfare system or are not needed for monitoring the title IV-B and IV-E programs. Please be specific in identifying the data elements and provide a rationale for why this information would not be reliable or is not necessary.

Each of the ICWA-related data points are tied to existing federal law and regulation and are necessary to monitor and support title IV-B and IV-E programs. Each of the ICWA-related data points is critical. The Title IV-B plan requirement for states that requires that states consult with tribal governments on their plans to implement ICWA has so far relied primarily on anecdotal information that is not collected or tracked uniformly by ACF leading to uneven responses to concerns about poor outcomes for AI/AN children in different states. The data elements contained in the 2016 Final Rule are linked in terms of

> In response to state and tribal comments suggesting congruence with the BIA's final rule, we revised data elements in this final rule as appropriate to reflect the BIA's regulations including removing requirements that state title IV-E agencies report certain information only from ICWA-specific court orders. These changes should allow the state title IV-E agency more flexibility, alleviate some of the burden and other concerns identified by states, help target technical assistance to increase state title IV-E agency communication and coordination with courts, and improve practice and national data on all children who are in foster care.

There have been no significant changes justifying ACF's proposal to reexamine the 2016 Final Rule. ACF seems to rely upon the President's Executive Order (13777) for all federal agencies to identify regulations that are perceived as burdensome or unnecessary, but this is not a sufficient basis for ACF to act, as the Executive Order itself is arbitrary and unlawful where it provides an insufficient basis for reasonable decision-making relaying solely on an examination of the burden of regulations without the required balancing of benefits. Additionally, the Executive Order fails to provide justification to deviate from the statutory requirement for regulations.

Responses to the Questions for Comment provided in the ANPRM:

1. Identify the data elements, non-ICWA-related, that are overly burdensome for state and tribal title IV-E agencies and explain why. Please be specific in identifying the data elements and provide a rationale for why collecting and reporting this information is overly burdensome.

We believe that the new data elements provided in the 2016 Final Rule that address health assessments, educational achievement, siblings, mental health services, sex trafficking, sexual orientation, permanency planning, adoption, guardianship, and housing are important for AI/AN children and youth as well. Burdens to collecting this data for tribes and states are relatively small considering the benefits to improving outcomes for AI/AN children and families, especially given many of the data elements are correlated to some of the most vulnerable populations in child welfare systems and identification of risks associated to their well-being.

2. Previously, we received comments regarding burden and the system changes needed to report the ICWA-related data elements of the 2016 SNPRM. We would like to receive more detailed comments on the specific limitations that states will encounter in reporting the ICWA-related data elements in the final rule. Please be specific in identifying the data elements and provide a rationale for why this information is overly burdensome.

The 2016 Final Rule requests title IV-E states provide the number of children in foster care who are considered Indian children as defined in ICWA. This is data that is currently not collected or reported in any national child welfare data system and is the key to understanding other important issues that are unique to AI/AN children and federal law requirements under ICWA. The current data in AFCARS only identifies AI/AN children through self-identification, which provides inaccurate and unreliable data. Relevant data measures in ICWA related to placement, engagement with the child's tribe, and efforts to avoid placement are not collected leaving federal agency, states, Congress, and tribes with little information to address pernicious issues impacting this population like foster care disproportionality. The 2016 Final Rule only requires states to collect the data elements in the 2016 Final Rule for AI/AN children that are ICWA eligible. Regardless of whether AFCARS data is collected all states are required by law to examine whether a child is ICWA eligible, so this effort is already required outside of AFCARS requirements. The 2016 Final Rule data specific to AI/AN children is not required to be collected for other non-Indian children so while there will be additional data collection for AI/AN children that are ICWA eligible, given the small number of AI/AN children in the vast majority of states this will not require a significant burden.

3. Previously, we received comments that particular data elements did not lend themselves to national statistics and were best assessed with qualitative methods such as case review. Please provide specific recommendations on which data elements in the regulation to retain that are important to understanding

being able to provide a complete picture of how AI/AN children are doing, and by eliminating or streamlining some of these data elements ACF would be compromising the integrity of the data to confidently inform policymakers and other stakeholders as to the important data trends and explanations for these trends.

In addition, as was stated earlier in our general comments, ICWA has been viewed as the "gold standard" in child welfare practice by leading national child welfare organizations and now with the passage of the Family First Prevention Services Act we can see there is increased support and interest in capturing more information on how states and tribes can improve outcomes for children and families beyond just improving the placement experience. The 2016 Final Rule data elements specific to AI/AN children are aligned with these acknowledgements and will be significantly helpful to all stakeholders involved in improving services and outcomes for AI/AN children.

Conclusion

The experience of having little to no data collected for AI/AN children through AFCARS over the last two decades has resulted in not meaningful improvements in the safety and well-being for AI/AN children and could be argued as having contributed to the worsening conditions for this population. We know of no other federal child welfare law that does not have some form of basic data collection and certainly not one that is 40 years old as ICWA is. The AFCARS data elements for AI/AN children in the 2016 Final Rule have incredible potential to improve outcomes for this population, but only if the data elements are not heavily modified or eliminated. While there are burdens for states to collect this data, for the past 40 years it has primarily AI/AN children, their families, and tribal communities that have born the burden while little to no reliable data has been collected and the crisis of foster care disproportionality has worsened. The time has come to move forward with this critically important data collection for AI/AN children and families and end the delays for not collecting the data that is necessary to support and promote healing for this population.

Sincerely,

Michael J. Stickman

Michael J. Stickman, 1st Chief

As of: September 14, 2020
Received: June 08, 2018
Status: Posted
Posted: June 08, 2018
Tracking No. 1k2-93lq-w3ln
Comments Due: June 13, 2018
Submission Type: API

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0028
Foster Adopt Connect

Submitter Information

Name: Lori Ross
Address: 64057
Email: lori@fosteradopt.org
Organization: Foster Adopt Connect

General Comment

Dear Ms. McHugh:

For the reasons outlined on the attached document, we urge the U.S. Department of Health and Human Services, ACYF, ACF, Childrens Bureau to retain all of the data elements in the 2016 AFCARS Final Rule, including the data elements related to sexual orientation and gender identity and expression. We appreciate the opportunity to comment on the benefits of these data elements outlined in the Final Rule.

Sincerely,
Lori Ross
President/CEO
FosterAdopt Connect
Independence, MO

Attachments

Foster Adopt Connect

June 8, 2018

Lori Ross
President/CEO
FosterAdopt Connect
18600 E 37th Terrace S
Independence, MO 64057

RE: Proposed rulemaking for Adoption and Foster Care Analysis and Reporting System (AFCARS) data elements, 45 CFR 1355 (Mar. 15, 2018) [RIN 0970-AC72]

Submitted via email to CBComments@acf.hhs.gov.

Dear Ms. McHugh:

On behalf of FosterAdopt Connect please accept the following comments regarding the Notice of Proposed Rulemaking at 83 Fed. Reg. 11449 ("Proposed Rule") proposing to streamline the Adoption and Foster Care Analysis and Reporting System (AFCARS) data elements and request comments regarding whether new data elements are overly burdensome. FosterAdopt Connect requests that U.S. Department of Health and Human Services, Administration for Children and Families ("ACF"), Administration on Children Youth and Families ("ACYF"), Children's Bureau ("Children's Bureau") maintain the current data elements in the December 14, 2016 AFCARS Final Rule ("Final Rule"), including those related to sexual orientation, gender identity, and gender expression. The data elements in the Final Rule previously went through a thorough notice and comment period, during which comments on the burden of data elements were addressed and the data elements adjusted as described in the Final Rule.

FosterAdopt Connect is the Midwest's premier foster and adopt agency. We provide support and services to foster and adoptive families to ensure their success. Our programs on innovative, "out of the box" programs that help find "forever families" for kids who are hard to place (including many LGBTQ children and young people) and wrap those families in supportive services to ensure their success. What began in 1998 as a support group for foster/adoptive families has grown into a vibrant organization with five locations in Missouri and Kansas and 160 employees.

A. The Data Elements in the Final Rule are Not Overly Burdensome and Have Already Been Streamlined through Numerous Comment Periods

We recommend that the data elements in the Final Rule be retained and not further streamlined. The 2016 Final Rule represents a "streamlining" of the original proposed rule (2015 NPRM and 2016 SNPRM) and the burdens identified by commenters were addressed in the Final Rule. In fact, states and tribal entities and other stakeholders have had numerous opportunities to provide public comments on AFCARS data elements including in 2003, 2008, 2010, 2015, and 2016. The Final Rule data elements reflect those numerous public comments, are not overly burdensome and will

provide nationwide information regarding children and families whose existence and experiences have remained officially invisible. Any burden involved in implementing new data elements is outweighed by the benefit of more informed state and federal policy resulting in improved outcomes for some of the most marginalized children in the child welfare system and reduced systemic costs.

Because AFCARS has not been updated since 1993, data elements added in the Final Rule reflect significant advances in child welfare policy and practice and include statutorily required data from the *Preventing Sex Trafficking and Strengthening Families Act* (P.L. 110-351) and changes in foster care services and oversight in the *Fostering Connections to Success and Increasing Adoptions Act of 2008* (P.L.110-351), and the *Child and Family Services Improvement and Innovation Act* (P.L. 112-34). Critically, the Final Rule will also provide data to ensure implementation and oversight of the *Indian Child Welfare Act* (P.L. 95-608), improving outcomes for tribal youth. The burden on states of implementing new data element collection will be reduced with the current development of the new Comprehensive Child Welfare Information System (CCWIS), and many of the data elements will assist states in implementing the recently passed *Family First Prevention Services Act* ("Family First," P.L 115-123), as described in examples below.

B. Removal of Data Elements Related to Foster Youth Sexual Orientation and Gender Identity and Expression ("SOGIE") Would Negatively Impact the Safety, Permanency, and Well-being of LGBTQ Children and Eliminate Cost Savings

HHS should maintain the data elements in the AFCARS Final Rule related to sexual orientation, gender identity, and gender expression so that states and tribes can improve outcomes, identify and fund needed resources, and reduce disparities experienced by lesbian, gay, bisexual, transgender, and questioning ("LGBTQ") foster children. LGBTQ youth are disproportionately overrepresented in foster care and suffer worse safety, permanency, and well-being outcomes than their non-LGBTQ peers. Data on these youth at the state level is urgently needed to improve outcomes, reduce costs, and reduce disparities; data at the national level is necessary to inform federal law, policy and funding determinations, to identify best practices for replication and, critically, to enhance the Administration on Children and Families' efforts to prevent removal and allow to children to remain safely at home with their families.

The core objectives of safety, permanency, and well-being apply to all children in the custody of state and tribal child welfare systems, including LGBTQ children, and the Social Security Act requires collection of data regarding characteristics of all children in care.[1] In April 2011, ACF confirmed and reiterated "the fundamental belief that every child and youth who is unable to live with his or her parents is entitled to safe, loving and affirming foster care placement, irrespective of the young person's sexual orientation, gender identity or gender expression."[2] ACF further acknowledged that LGBTQ youth are overrepresented in the population served by the child welfare system and in the population of youth experiencing homelessness.[3] Yet, LGBTQ youth will be inadequately served until states and tribes have more information about these youth and their experiences and outcomes, and how institutions can better respond to their individual needs.

[1] https://www.ssa.gov/OP_Home/ssact/title04/0479.htm
[2] Administration for Children and Families, *ACYF-CB-IM-11-03, Lesbian, Gay, Bisexual, Transgender and Questioning Youth in Foster Care* (April 6, 2011) https://www.acf.hhs.gov/sites/default/files/cb/im1103.pdf
[3] *Ibid.*

Disproportionate representation of LGBTQ youth in care and the poor outcomes they experience were confirmed in a 2013 study conducted in connection with the R.I.S.E. Project, a five-year, $13.3 million demonstration grant funded by ACYF to create a model program to support LGBTQ youth in the foster care system.[4] The purpose of the study was to determine the percentage of Los Angeles County foster youth who identify as LGBTQ, and whether their experiences in foster care were different from those of their peers. The study found that 19 percent of youth ages 12-21 in foster care self-identify as LGBTQ, which is 1.5 to 2 times the number of LGBTQ youth estimated to be living outside of foster care. 13.6 percent of participants identified as lesbian, gay, bisexual or questioning ("LGBQ"); eleven percent of the participants identified as gender-nonconforming, and 5.6% identified as transgender. Other studies have estimated even higher numbers of LGBTQ youth in foster care, including a forthcoming study which estimates that 22.8% of youth in out of home care identify as LGBQ.[5] Using the estimates from the studies cited above, the number of foster youth in the United States over the age of 14 who identify as having a sexual orientation other than "straight" are 14,300 to 24,000.[6] 57% of the foster youth over 14 who identify as LGBQ, or between 8,100 and 11,300 youth, are youth of color.[7]

In addition to being disproportionately represented in the system, LGBTQ youth experience worse conditions and outcomes in foster care. The federally-funded R.I.S.E. study confirmed that LGBTQ youth have a higher number of foster care placements and are more likely to be living in a group home.[8] Over twice as many LGBTQ youth reported being treated poorly by the foster care system compared to non-LGBTQ youth, and LGBTQ youth are more likely to be hospitalized for emotional reasons and have higher incidences of juvenile justice involvement.[9] They were also more likely to have become homeless, with many citing lack of acceptance in foster care as the reason they experienced homelessness.[10] States and tribes will continue to be stymied in their ability to improve outcomes and reduce costs for LGBTQ foster youth until sexual orientation and gender identity data is available. Collecting this data nationally will allow the Children's Bureau, states and tribes to identify successes and best practices in improving outcomes for LGBTQ foster youth and to replicate them to address disparities.

We also oppose eliminating data elements relating to the Indian Child Welfare Act ("ICWA"). States and tribal entities will only be required to report most of the ICWA-related data elements if ICWA applies in a child's case, greatly reducing any burden associated with collecting and reporting these elements. Eliminating the collection of demographic information regarding American Indian and Alaska Native youth not only negatively impacts another vulnerable population with poor outcomes, but inhibits the ability to learn more about the specific experiences of LGBTQ-identified American Indian and Alaska Native youth.

The Children's Bureau should retain the voluntary sexual orientation question for foster youth over the age of 14

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[4] Bianca D.M. Wilson, Khush Cooper, Angel Kastanis, Sheila Nezhad, *New Report: Sexual and Gender Minority Youth in Foster Care*, WILLIAMS INST. (Aug. 2014), https://www.acf.hhs.gov/sites/default/files/cb/pii_rise_lafys_report.pdf

[5] *See for example* Center for the Study of Social Policies, *Out of the Shadows: Supporting LGBTQ Youth in Child Welfare through Cross-System Collaboration,* 2016 https://www.cssp.org/pages/body/Out-of-the-shadows-current-landscape.pdf

[6] AFCARS data shows that 105,182 foster youth in 2016 were 14 or older; these estimates utilize the 13.6 % and 22.8% numbers for LGBQ foster youth from the studies cited under (4) and (5) above.

[7] Same as 5 above.

[8] Same as 4 above.

[9] *Ibid.*

[10] *Ibid.*

All of the poor outcomes documented for LGBTQ foster youth, including a greater number of foster care placements, overrepresentation in congregate care, and hospitalization for emotional reasons, carry substantial costs to state and tribal child welfare systems. Identifying LGBQ foster youth through the voluntary sexual orientation question and implementing effective interventions to reduce instability, minimize costly stays in group homes, hospitals and juvenile justice facilities and improve permanency in family home settings would provide tremendous cost savings. We therefore urge the Children's Bureau to retain the voluntary question in the Final Rule related to sexual orientation of foster youth over the age of 14 because the many benefits resulting from information related to the new data elements outweigh any labor and cost associated with implementation.

For example, the average annual cost of foster care maintenance payments under Title IV-E and administrative costs for children in foster care in FY10 was $25,782.[11] That same year, adoption subsidies for children whose parents received subsidies and administrative costs for an adopted child averaged IV-E agencies $10,302 in costs.[12] Thus, identifying an affirming, supportive family for an LGBQ child leading to adoption – which would be impossible to do if the child's sexual orientation was unknown – would lead to an annual cost savings of $15,480 per child. Further, congregate care (in which LGBQ foster youth are overrepresented) including group homes, residential treatment facilities, psychiatric institutions and emergency shelters costs state governments 3-5 times more than family foster care.[13] Based on average annual foster care maintenance payments per child of $19,107 in FY2010,[14] placing an LGBQ child with an affirming, supportive foster family rather having her remain in congregate care would save a minimum of $38,214 per child per year.

It should be noted that all costs are not easily quantified, such as the well-being of youth receiving affirming care, or the long-term health benefits of a youth exiting sooner to a permanent family, and the cost savings to states and tribes estimated above are simply those within the foster care system itself. For example, studies indicate that LGBTQ youth exit foster care to homelessness and are commercially sexually exploited and victimized at higher rates than their non-LGBTQ peers in care. Costs associated with these negative outcomes are significant although challenging to quantify.

The Children's Bureau should retain the data element related to the reason for removal of a child from a family home due to "family conflict related to child's sexual orientation, gender identity, or gender expression."

Data regarding the degree to which family conflict impacts removal can drive needed funding for family acceptance work leading to family preservation, a priority of the current ACF administration. Helping a child remain with their family of origin through targeted supportive services related to this source of family conflict will provide enormous cost savings for states and tribes. Utilizing the FY10 foster care maintenance payments costs described above, cost savings would amount to $19,107 per child per year for each child not placed in a foster home; the annual savings would be 3-5 times greater for each child not placed in congregate care.

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[11] Zill, E. *Better Prospects, Lower Cost: The Case for Increasing Foster Care Adoption,* Adoption Advocate (35), May 2011, National Council for Adoption http://www.adoptioncouncil.org/images/stories/NCFA_ADOPTION_ADVOCATE_NO35.pdf

[12] *Ibid.*

[13] National Conference of State Legislatures, *Congregate Care, Residential Treatment and Group Home State Legislative Enactments 2009-2013,* February 2017 http://www.ncsl.org/research/human-services/congregate-care-and-group-home-state-legislative-enactments.aspx

[14] Same as 11 above.

Given that an estimated 19% of foster youth identify as LGBTQ[15], this data element will be crucial to successfully implementing Family First prevention funding aimed at keeping children with their families of origin rather than entering foster care. Removing this data point would harm the ability of states and tribes to further efforts to reduce the over-representation of LGBTQ youth in care, in general, and LGBTQ youth of color, in particular. In addition, research indicates that reducing the severity of family rejection based on SOGIE results in a reduction in suicidal ideation and self-harm, depression, substance use and sexually transmitted infections. All of these negative public health outcomes are costly not only to children personally, but to the child welfare system and our communities as a whole. This data element related to family rejection will help drive effective case planning and services resulting in better outcomes for youth and families and cost savings to states and tribes.

C. The Children's Bureau Should Retain the Voluntary Sexual Orientation Question for Adoptive and Foster Parents and Guardians.

The LGBTQ community is a significant untapped resource in the effort to find permanent families for all children and youth in foster care. Gay and lesbian foster parents are raising six percent of foster children in the United States, and same-sex couples are six times more likely to be serving as foster parents than their different-sex counterparts.[16] National surveys tell us that nearly 2 million lesbian, gay and bisexual adults are interested in adopting children.[17] Data resulting from the voluntary sexual orientation question for adoptive and foster parents and guardians will help states and tribes recruit and support LGBQ caregivers, increasing the pool of available homes for foster children, and help identify states and agencies which can do better in recruitment of LGBQ resource families.

In its April 2011 guidance, ACF confirmed that "LGBT parents should be considered among the available options for states and jurisdictions to provide timely and safe placement of children in need of foster or adoptive homes."[18] Almost forty years of research has overwhelmingly concluded that children raised by same-sex couples are just as healthy, socially adjusted, and psychologically fit as children with heterosexual parents.[19] Recruitment of LGBQ families could provide a source of affirming, supportive homes for LGBTQ foster youth, reducing the costs detailed above that are associated with the placement instability and overrepresentation in congregate care that these youth experience.

D. The Children's Bureau Should Add Voluntary Gender Identity Questions for Foster Youth Over the Age of 14 and Foster and Adoptive Parents and Guardians Because this Information is Important and it is Efficient to Collect this Information Along with Current Data Elements.

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[15] Same as 4 above.
[16] Gary Gates, LGBT Parenting in the United States, The Williams Institute, UCLA School of Law, February 2013, http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/lgbt-parenting-in-the-united-states/
[17] The Williams Institute & The Urban Institute, Foster and Adoptive Parenting by Gay and Lesbian Parents in the United States, (2007). https://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/lgbt-parenting-in-the-united-states/
[18] Same as 2 above.
[19] *ECDF Act Facts*, Family Equality Council (2017), https://www.familyequality.org/get_informed/advocacy/ecdf/ecdf-facts/

A forthcoming study found that "[y]outh who are transgender and/or gender-expansive often have a difficult time in child welfare systems; violence enacted upon people who are LGBTQ is often not because they are "out" as LGBTQ, but because service providers, caretakers, and peers are policing the youth's gender behaviors."[20] Because of the particular challenges faced by transgender foster youth, adding gender identity questions for both foster youth and foster and adoptive parents and guardians will help states and tribes save costs by identifying affirming placements and reducing placement instability. Collecting gender identity data as well as sexual orientation data will help states and tribes develop streamlined comprehensive services with no gaps. Collecting gender identity data will be especially useful as new programs are developed with Family First funding, and Title IV-E agencies will benefit from and save money by adding these data elements now in conjunction with the new Comprehensive Child Welfare Information System (CCWIS).

E. <u>The sexual orientation and gender identity and expression data elements of foster youth can be administered safely, and the Children's Bureau should provide training and resources to states and tribes to do so.</u>

The child welfare profession has acknowledged the importance of collecting sexual orientation and gender identity ("SOGI") information about children, along with other critical information about the child's circumstances, in order to tailor an individualized case plan. In 2013, the Center for the Study of Social Policy, Legal Services for Children, the National Center for Lesbian Rights, and Family Builders by Adoption issued a set of professional guidelines addressing all aspects of managing SOGI information in child welfare systems.[21] The guidelines address the need to collect SOGI information in order to develop case plans and track outcomes in individual cases, and to engage in agency planning and assessment.

As a means of assessing risk and tracking disparities and outcomes, many public agencies already collect SOGI information on youth. Sexual orientation questions have been included on school-based surveys of adolescents since the mid-1980s through versions of the Youth Risk Behavior Survey (as noted in Children's Bureau comments to the Final Rule) and SOGI information is collected by many health care providers. Researchers have surveyed LGBTQ youth in the juvenile justice system, significantly increasing the profession's understanding of the disproportionate numbers of LGBTQ youth in detention, as well as differences in offense and detention patterns.[22] The regulations promulgated under the Prison Rape Elimination Act ("PREA") require youth and adult correctional officers to collect SOGI information as part of the initial screening process to identify residents and inmates who may be vulnerable to sexual assault while incarcerated.[23] Increasing numbers of state and local child welfare and juvenile justice agencies, as well as providers serving youth experiencing

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[20] Robinson, Brandon Andrew. Forthcoming. "Child Welfare Systems and LGBTQ Youth Homelessness: Gender Segregation, Instability, and Intersectionality." *Child Welfare.* Robinson further states that "mental health treatments and other behavior modifications may be used against youth who are transgender and gender-expansive as a way to try to modify their gender expression (Mallon & DeCrescenzo, 2006; Marksamer, 2011). Youth of color who are transgender and gender expansive face compounding stressors and experiences of discrimination within child welfare systems, whereby racism and racial profiling can shape how some youth's behaviors, including their gender behaviors, are monitored and disciplined (Mallon & DeCrescenzo, 2006)."

[21] Shannan Wilber, *Guidelines for Managing Information Related to the Sexual Orientation and Gender Identity and Expression of Children in Child Welfare Systems,* FAMILY BUILDERS BY ADOPTION (2013), http://cssr.berkeley.edu/cwscmsreports/documents/Information%20Guidelines%20P4.pdf

[22] Angela Irvine, *"We've Had Three of Them": Addressing the Invisibility of Lesbian, Gay, Bisexual and Gender Non-Conforming Youths in the Juvenile Justice System*, 19 COLUM. J. OF GENDER & L. 675 (2012).

[23] National Standards to Prevent, Detect and Respond to Rape, 28 CFR § 115 (2012).

homelessness, have developed policies requiring the collection of SOGI data as part of the initial intake and assessment.

In the Final Rule, the Children's Bureau summarized its well supported rationale for collecting information regarding the sexual orientation of youth 14 years old and older. The Final Rule stated that "[i]nformation on sexual orientation should be obtained and maintained in a manner that reflects respectful treatment, sensitivity, and confidentiality." Additionally, the rule directed agencies to guidance and recommended practices developed by "state and county agencies, advocacy organizations and human rights organizations."

F. Conclusion

For the reasons outlined above, we urge the U.S. Department of Health and Human Services, ACYF, ACF, Children's Bureau to retain all of the data elements in the 2016 AFCARS Final Rule, including the data elements related to sexual orientation and gender identity and expression. We appreciate the opportunity to comment on the benefits of these data elements outlined in the Final Rule.

Sincerely,

Lori Ross

As of: September 14, 2020
Received: June 07, 2018
Status: Posted
Posted: June 08, 2018
Tracking No. 1k2-93lr-evug
Comments Due: June 13, 2018
Submission Type: E-mail

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0029
Movement Advancement Project

Submitter Information

Name: Naomi Goldberg
Address: 80301
Organization: Movement Advancement Project

General Comment

See attached

Attachments

Movement Advancement Project

movement advancement project

June 13, 2018

Kathleen McHugh
U.S. Department of Health and Human Services
Administration for Children and Families
Director, Policy Division
330 C Street SW
Washington, D.C. 20024

RE: Proposed rulemaking for Adoption and Foster Care Analysis and Reporting System (AFCARS) data elements, 45 CFR 1355 (Mar. 15, 2018) [RIN 0970-AC72]

Submitted via email to CBComments@acf.hhs.gov.

Dear Ms. McHugh:

On behalf of the Movement Advancement Project, I am writing to request that U.S. Department of Health and Human Services, Administration for Children and Families ("ACF"), Administration on Children Youth and Families ("ACYF"), Children's Bureau ("Children's Bureau") maintain the current data elements in the December 14, 2016 AFCARS Final Rule ("Final Rule"), including those related to sexual orientation, gender identity, and gender expression. The data elements in the Final Rule previously went through a thorough notice and comment period, during which comments on the burden of data elements were addressed and the data elements adjusted as described in the Final Rule.

MAP is an independent think tank that provides rigorous research, insight, and analysis to help speed equality for lesbian, gay, bisexual, and transgender (LGBT) people. MAP's policy research informs the public and policymakers about the legal and policy needs of LGBT people, LGBT youth, and their families, including those youth and families who would be directly impacted by the proposed changes to the AFCARS.

A. Removal of Data Elements Related to Foster Youth Sexual Orientation and Gender Identity and Expression ("SOGIE") Would Negatively Impact the Safety, Permanency, and Well-being of LGBT Children

HHS should maintain the data elements in the AFCARS Final Rule related to sexual orientation, gender identity, and gender expression so that states and tribes can improve outcomes, identify and fund needed resources, and reduce disparities experienced by LGBT foster children. LGBT youth are disproportionately overrepresented in foster care and suffer worse safety, permanency, and well-being outcomes than their non-LGBT peers. Data on these youth at the state level is urgently needed to improve outcomes and reduce disparities; data at the national level is necessary

to inform federal law, policy and funding determinations, to identify best practices for replication and, critically, to enhance the Administration on Children and Families' efforts to prevent removal and allow to children to remain safely at home with their families.

The core objectives of safety, permanency, and well-being apply to all children in the custody of state and tribal child welfare systems, including LGBT children, and the Social Security Act requires collection of data regarding characteristics of all children in care.[1] In April 2011, ACF confirmed and reiterated "the fundamental belief that every child and youth who is unable to live with his or her parents is entitled to safe, loving and affirming foster care placement, irrespective of the young person's sexual orientation, gender identity or gender expression."[2] ACF further acknowledged that LGBT youth are overrepresented in the population served by the child welfare system and in the population of youth experiencing homelessness.[3] Yet, LGBT youth will be inadequately served until states and tribes have more information about these youth and their experiences and outcomes, and how institutions can better respond to their individual needs.

Disproportionate representation of LGBT youth in care and the poor outcomes they experience were confirmed in a 2013 study conducted in connection with the R.I.S.E. Project, a five-year, $13.3 million demonstration grant funded by ACYF to create a model program to support LGBT youth in the foster care system.[4] The purpose of the study was to determine the percentage of Los Angeles County foster youth who identify as LGBT, and whether their experiences in foster care were different from those of their peers. The study found that 19 percent of youth ages 12-21 in foster care self-identify as LGBT, which is 1.5 to 2 times the number of LGBT youth estimated to be living outside of foster care. 13.6 percent of participants identified as lesbian, gay, bisexual or questioning ("LGBQ"); eleven percent of the participants identified as gender-nonconforming, and 5.6% identified as transgender. Other studies have estimated even higher numbers of LGBT youth in foster care, including a forthcoming study which estimates that 22.8% of youth in out of home care identify as LGBQ.[5] Using the estimates from the studies cited above, the number of foster youth in the United States over the age of 14 who identify as having a sexual orientation other than "straight" are 14,300 to 24,000.[6] 57% of the foster youth over 14 who identify as LGBQ, or between 8,100 and 11,300 youth, are youth of color.[7]

In addition to being disproportionately represented in the system, LGBT youth experience worse conditions and outcomes in foster care. The federally-funded R.I.S.E. study confirmed that LGBT youth have a higher number of foster care placements and are more likely to be living in a group home.[8] Over twice as many LGBT youth reported being treated poorly by the foster care system compared to non-LGBT youth, and LGBT youth are more likely to be hospitalized for emotional

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[4] Bianca D.M. Wilson, Khush Cooper, Angel Kastanis, Sheila Nezhad, *New Report: Sexual and Gender Minority Youth in Foster Care*, WILLIAMS INST. (Aug. 2014), https://www.acf.hhs.gov/sites/default/files/cb/pii_rise_lafys_report.pdf
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reasons and have higher incidences of juvenile justice involvement.[9] They were also more likely to have become homeless, with many citing lack of acceptance in foster care as the reason they experienced homelessness.[10] States and tribes will continue to be stymied in their ability to improve outcomes for LGBT foster youth until sexual orientation and gender identity data is available. Collecting this data nationally will allow the Children's Bureau, states and tribes to identify successes and best practices in improving outcomes for LGBT foster youth and to replicate them to address disparities.

We also oppose eliminating data elements relating to the Indian Child Welfare Act ("ICWA"). States and tribal entities will only be required to report most of the ICWA-related data elements if ICWA applies in a child's case, greatly reducing any burden associated with collecting and reporting these elements. Eliminating the collection of demographic information regarding American Indian and Alaska Native youth not only negatively impacts another vulnerable population with poor outcomes, but inhibits the ability to learn more about the specific experiences of LGBT-identified American Indian and Alaska Native youth.

The Children's Bureau should retain the data element related to the reason for removal of a child from a family home due to "family conflict related to child's sexual orientation, gender identity, or gender expression."

Data regarding the degree to which family conflict impacts removal can drive needed funding for family acceptance work leading to family preservation, a priority of the current ACF administration. Helping a child remain with their family of origin through targeted supportive services related to this source of family conflict will provide enormous cost savings for states and tribes. Utilizing the FY10 foster care maintenance payments costs described above, cost savings would amount to $19,107 per child per year for each child not placed in a foster home; the annual savings would be 3-5 times greater for each child not placed in congregate care.

Given that an estimated 19% of foster youth identify as LGBT[11], this data element will be crucial to successfully implementing Family First prevention funding aimed at keeping children with their families of origin rather than entering foster care. Removing this data point would harm the ability of states and tribes to further efforts to reduce the over-representation of LGBT youth in care, in general, and LGBT youth of color, in particular. In addition, research indicates that reducing the severity of family rejection based on SOGIE results in a reduction in suicidal ideation and self-harm, depression, substance use and sexually transmitted infections. All of these negative public health outcomes are costly not only to children personally, but to the child welfare system and our communities as a whole. This data element related to family rejection will help drive effective case planning and services resulting in better outcomes for youth and families and cost savings to states and tribes.

B. The Children's Bureau Should Retain the Voluntary Sexual Orientation Question for Adoptive and Foster Parents and Guardians.

[9] *Ibid.*
[10] *Ibid.*
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The LGBT community is a significant untapped resource in the effort to find permanent families for all children and youth in foster care. Gay and lesbian foster parents are raising six percent of foster children in the United States, and same-sex couples are six times more likely to be serving as foster parents than their different-sex counterparts.[12] National surveys tell us that nearly 2 million lesbian, gay and bisexual adults are interested in adopting children.[13] Data resulting from the voluntary sexual orientation question for adoptive and foster parents and guardians will help states and tribes recruit and support LGBQ caregivers, increasing the pool of available homes for foster children, and help identify states and agencies which can do better in recruitment of LGBQ resource families.

In its April 2011 guidance, ACF confirmed that "LGBT parents should be considered among the available options for states and jurisdictions to provide timely and safe placement of children in need of foster or adoptive homes."[14] Almost forty years of research has overwhelmingly concluded that children raised by same-sex couples are just as healthy, socially adjusted, and psychologically fit as children with heterosexual parents.[15] Recruitment of LGBQ families could provide a source of affirming, supportive homes for LGBT foster youth, reducing the costs detailed above that are associated with the placement instability and overrepresentation in congregate care that these youth experience.

C. The Children's Bureau Should Add Voluntary Gender Identity Questions for Foster Youth Over the Age of 14 and Foster and Adoptive Parents and Guardians Because this Information is Important and it is Efficient to Collect this Information Along with Current Data Elements.

A forthcoming study found that "[y]outh who are transgender and/or gender-expansive often have a difficult time in child welfare systems; violence enacted upon people who are LGBT is often not because they are "out" as LGBT, but because service providers, caretakers, and peers are policing the youth's gender behaviors."[16] Because of the particular challenges faced by transgender foster youth, adding gender identity questions for both foster youth and foster and adoptive parents and guardians will help states and tribes save costs by identifying affirming placements and reducing placement instability. Collecting gender identity data as well as sexual orientation data will help states and tribes develop streamlined comprehensive services with no gaps. Collecting gender identity data will be especially useful as new programs are developed with Family First funding,

[12] Gary Gates, LGBT Parenting in the United States, The Williams Institute, UCLA School of Law, February 2013, http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/lgbt-parenting-in-the-united-states/
[13] The Williams Institute & The Urban Institute, Foster and Adoptive Parenting by Gay and Lesbian Parents in the United States, (2007). https://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/lgbt-parenting-in-the-united-states/
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[15] *ECDF Act Facts*, Family Equality Council (2017), https://www.familyequality.org/get_informed/advocacy/ecdf/ecdf-facts/
[16] Robinson, Brandon Andrew. Forthcoming. "Child Welfare Systems and LGBTQ Youth Homelessness: Gender Segregation, Instability, and Intersectionality." *Child Welfare*. Robinson further states that "mental health treatments and other behavior modifications may be used against youth who are transgender and gender-expansive as a way to try to modify their gender expression (Mallon & DeCrescenzo, 2006; Marksamer, 2011). Youth of color who are transgender and gender expansive face compounding stressors and experiences of discrimination within child welfare systems, whereby racism and racial profiling can shape how some youth's behaviors, including their gender behaviors, are monitored and disciplined (Mallon & DeCrescenzo, 2006)."

and Title IV-E agencies will benefit from and save money by adding these data elements now in conjunction with the new Comprehensive Child Welfare Information System (CCWIS).

D. The sexual orientation and gender identity and expression data elements of foster youth can be administered safely, and the Children's Bureau should provide training and resources to states and tribes to do so.

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In the Final Rule, the Children's Bureau summarized its well supported rationale for collecting information regarding the sexual orientation of youth 14 years old and older. The Final Rule stated that "[i]nformation on sexual orientation should be obtained and maintained in a manner that reflects respectful treatment, sensitivity, and confidentiality." Additionally, the rule directed agencies to guidance and recommended practices developed by "state and county agencies, advocacy organizations and human rights organizations."

E. Conclusion

[17] Shannan Wilber, *Guidelines for Managing Information Related to the Sexual Orientation and Gender Identity and Expression of Children in Child Welfare Systems,* FAMILY BUILDERS BY ADOPTION (2013), http://cssr.berkeley.edu/cwscmsreports/documents/Information%20Guidelines%20P4.pdf

[18] Angela Irvine, *"We've Had Three of Them": Addressing the Invisibility of Lesbian, Gay, Bisexual and Gender Non-Conforming Youths in the Juvenile Justice System*, 19 COLUM. J. OF GENDER & L. 675 (2012).

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For the reasons outlined above, we urge the U.S. Department of Health and Human Services, ACYF, ACF, Children's Bureau to retain all of the data elements in the 2016 AFCARS Final Rule, including the data elements related to sexual orientation and gender identity and expression. We appreciate the opportunity to comment on the benefits of these data elements outlined in the Final Rule.

Sincerely,

Naomi Goldberg, MPP
Director of Policy and Research

As of: September 14, 2020
Received: June 07, 2018
Status: Posted
Posted: June 08, 2018
Tracking No. 1k2-93lr-rbxo
Comments Due: June 13, 2018
Submission Type: E-mail

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0030
Bradbury-Sullivan LGBT Community Center

Submitter Information

Name: Adrian Shanker
Address: 18101
Organization: Bradbury-Sullivan LGBT Community Center

General Comment

See attached

Attachments

Bradbury-Sullivan LGBT Community Center

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June 13, 2018

Kathleen McHugh
U.S. Department of Health and Human Services
Administration for Children and Families
Director, Policy Division
330 C Street SW
Washington, D.C. 20024

RE: Proposed rulemaking for Adoption and Foster Care Analysis and Reporting System (AFCARS) data elements, 45 CFR 1355 (Mar. 15, 2018) [RIN 0970-AC72]

Submitted via email to CBComments@acf.hhs.gov.

Dear Ms. McHugh:

On behalf of Bradbury-Sullivan LGBT Community Center please accept the following comments regarding the Notice of Proposed Rulemaking at 83 Fed. Reg. 11449 ("Proposed Rule") proposing to streamline the Adoption and Foster Care Analysis and Reporting System (AFCARS) data elements and request comments regarding whether new data elements are overly burdensome. Bradbury-Sullivan LGBT Community Center requests that U.S. Department of Health and Human Services, Administration for Children and Families ("ACF"), Administration on Children Youth and Families ("ACYF"), Children's Bureau ("Children's Bureau") maintain the current data elements in the December 14, 2016 AFCARS Final Rule ("Final Rule"), including those related to sexual orientation, gender identity, and gender expression. The data elements in the Final Rule previously went through a thorough notice and comment period, during which comments on the burden of data elements were addressed and the data elements adjusted as described in the Final Rule.

Located in Allentown, Pennsylvania, Bradbury-Sullivan LGBT Community Center provides youth, health, and arts programs to celebrate and support the LGBT community in the Lehigh Valley region of Pennsylvania. Our youth programs include a daily youth-drop in center, an emergency services pantry, a youth art gallery and more. Further, our organization provides training, including to adoption and foster care agencies, on LGBT issues.

A. The Data Elements in the Final Rule are Not Overly Burdensome and Have Already Been Streamlined through Numerous Comment Periods

We recommend that the data elements in the Final Rule be retained and not further streamlined. The 2016 Final Rule represents a "streamlining" of the original proposed rule (2015 NPRM and 2016

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SNPRM) and the burdens identified by commenters were addressed in the Final Rule. In fact, states and tribal entities and other stakeholders have had numerous opportunities to provide public comments on AFCARS data elements including in 2003, 2008, 2010, 2015, and 2016. The Final Rule data elements reflect those numerous public comments, are not overly burdensome and will provide nationwide information regarding children and families whose existence and experiences have remained officially invisible. Any burden involved in implementing new data elements is outweighed by the benefit of more informed state and federal policy resulting in improved outcomes for some of the most marginalized children in the child welfare system and reduced systemic costs.

Because AFCARS has not been updated since 1993, data elements added in the Final Rule reflect significant advances in child welfare policy and practice and include statutorily required data from the *Preventing Sex Trafficking and Strengthening Families Act* (P.L. 110-351) and changes in foster care services and oversight in the *Fostering Connections to Success and Increasing Adoptions Act of 2008* (P.L.110-351), and the *Child and Family Services Improvement and Innovation Act* (P.L. 112-34). Critically, the Final Rule will also provide data to ensure implementation and oversight of the *Indian Child Welfare Act* (P.L. 95-608), improving outcomes for tribal youth. The burden on states of implementing new data element collection will be reduced with the current development of the new Comprehensive Child Welfare Information System (CCWIS), and many of the data elements will assist states in implementing the recently passed *Family First Prevention Services Act* ("Family First," P.L 115-123), as described in examples below.

B. Removal of Data Elements Related to Foster Youth Sexual Orientation and Gender Identity and Expression ("SOGIE") Would Negatively Impact the Safety, Permanency, and Well-being of LGBTQ Children and Eliminate Cost Savings

HHS should maintain the data elements in the AFCARS Final Rule related to sexual orientation, gender identity, and gender expression so that states and tribes can improve outcomes, identify and fund needed resources, and reduce disparities experienced by lesbian, gay, bisexual, transgender, and questioning ("LGBTQ") foster children. LGBTQ youth are disproportionately overrepresented in foster care and suffer worse safety, permanency, and well-being outcomes than their non-LGBTQ peers. Data on these youth at the state level is urgently needed to improve outcomes, reduce costs, and reduce disparities; data at the national level is necessary to inform federal law, policy and funding determinations, to identify best practices for replication and, critically, to enhance the Administration on Children and Families' efforts to prevent removal and allow to children to remain safely at home with their families.

The core objectives of safety, permanency, and well-being apply to all children in the custody of state and tribal child welfare systems, including LGBTQ children, and the Social Security Act requires

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collection of data regarding characteristics of all children in care.[1] In April 2011, ACF confirmed and reiterated "the fundamental belief that every child and youth who is unable to live with his or her parents is entitled to safe, loving and affirming foster care placement, irrespective of the young person's sexual orientation, gender identity or gender expression."[2] ACF further acknowledged that LGBTQ youth are overrepresented in the population served by the child welfare system and in the population of youth experiencing homelessness.[3] Yet, LGBTQ youth will be inadequately served until states and tribes have more information about these youth and their experiences and outcomes, and how institutions can better respond to their individual needs.

Disproportionate representation of LGBTQ youth in care and the poor outcomes they experience were confirmed in a 2013 study conducted in connection with the R.I.S.E. Project, a five-year, $13.3 million demonstration grant funded by ACYF to create a model program to support LGBTQ youth in the foster care system.[4] The purpose of the study was to determine the percentage of Los Angeles County foster youth who identify as LGBTQ, and whether their experiences in foster care were different from those of their peers. The study found that 19 percent of youth ages 12-21 in foster care self-identify as LGBTQ, which is 1.5 to 2 times the number of LGBTQ youth estimated to be living outside of foster care. 13.6 percent of participants identified as lesbian, gay, bisexual or questioning ("LGBQ"); eleven percent of the participants identified as gender-nonconforming, and 5.6% identified as transgender. Other studies have estimated even higher numbers of LGBTQ youth in foster care, including a forthcoming study which estimates that 22.8% of youth in out of home care identify as LGBQ.[5] Using the estimates from the studies cited above, the number of foster youth in the United States over the age of 14 who identify as having a sexual orientation other than "straight" are 14,300 to 24,000.[6] 57% of the foster youth over 14 who identify as LGBQ, or between 8,100 and 11,300 youth, are youth of color.[7]

In addition to being disproportionately represented in the system, LGBTQ youth experience worse conditions and outcomes in foster care. The federally-funded R.I.S.E. study confirmed that LGBTQ youth have a higher number of foster care placements and are more likely to be living in a group home.[8] Over twice as many LGBTQ youth reported being treated poorly by the foster care system compared to non-LGBTQ youth, and LGBTQ youth are more likely to be hospitalized for emotional

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[1] https://www.ssa.gov/OP_Home/ssact/title04/0479.htm
[2] Administration for Children and Families, *ACYF-CB-IM-11-03, Lesbian, Gay, Bisexual, Transgender and Questioning Youth in Foster Care* (April 6, 2011) https://www.acf.hhs.gov/sites/default/files/cb/im1103.pdf
[3] *Ibid.*
[4] Bianca D.M. Wilson, Khush Cooper, Angel Kastanis, Sheila Nezhad, *New Report: Sexual and Gender Minority Youth in Foster Care*, WILLIAMS INST. (Aug. 2014), https://www.acf.hhs.gov/sites/default/files/cb/pii_rise_lafys_report.pdf
[5] *See for example* Center for the Study of Social Policies, *Out of the Shadows: Supporting LGBTQ Youth in Child Welfare through Cross-System Collaboration*, 2016 https://www.cssp.org/pages/body/Out-of-the-shadows-current-landscape.pdf
[6] AFCARS data shows that 105,182 foster youth in 2016 were 14 or older; these estimates utilize the 13.6 % and 22.8% numbers for LGBQ foster youth from the studies cited under (4) and (5) above.
[7] Same as 5 above.
[8] Same as 4 above.

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reasons and have higher incidences of juvenile justice involvement.[9] They were also more likely to have become homeless, with many citing lack of acceptance in foster care as the reason they experienced homelessness.[10] States and tribes will continue to be stymied in their ability to improve outcomes and reduce costs for LGBTQ foster youth until sexual orientation and gender identity data is available. Collecting this data nationally will allow the Children's Bureau, states and tribes to identify successes and best practices in improving outcomes for LGBTQ foster youth and to replicate them to address disparities.

We also oppose eliminating data elements relating to the Indian Child Welfare Act ("ICWA"). States and tribal entities will only be required to report most of the ICWA-related data elements if ICWA applies in a child's case, greatly reducing any burden associated with collecting and reporting these elements. Eliminating the collection of demographic information regarding American Indian and Alaska Native youth not only negatively impacts another vulnerable population with poor outcomes, but inhibits the ability to learn more about the specific experiences of LGBTQ-identified American Indian and Alaska Native youth.

The Children's Bureau should retain the voluntary sexual orientation question for foster youth over the age of 14

All of the poor outcomes documented for LGBTQ foster youth, including a greater number of foster care placements, overrepresentation in congregate care, and hospitalization for emotional reasons, carry substantial costs to state and tribal child welfare systems. Identifying LGBQ foster youth through the voluntary sexual orientation question and implementing effective interventions to reduce instability, minimize costly stays in group homes, hospitals and juvenile justice facilities and improve permanency in family home settings would provide tremendous cost savings. We therefore urge the Children's Bureau to retain the voluntary question in the Final Rule related to sexual orientation of foster youth over the age of 14 because the many benefits resulting from information related to the new data elements outweigh any labor and cost associated with implementation.

For example, the average annual cost of foster care maintenance payments under Title IV-E and administrative costs for children in foster care in FY10 was $25,782.[11] That same year, adoption subsidies for children whose parents received subsidies and administrative costs for an adopted child averaged IV-E agencies $10,302 in costs.[12] Thus, identifying an affirming, supportive family for an LGBQ child leading to adoption – which would be impossible to do if the child's sexual orientation was unknown – would lead to an annual cost savings of $15,480 per child. Further, congregate care (in which LGBQ foster youth are overrepresented) including group homes, residential treatment facilities, psychiatric institutions and emergency shelters costs state governments 3-5 times more than

[9] *Ibid.*
[10] *Ibid.*
[11] Zill, E. *Better Prospects, Lower Cost: The Case for Increasing Foster Care Adoption,* Adoption Advocate (35), May 2011, National Council for Adoption http://www.adoptioncouncil.org/images/stories/NCFA_ADOPTION_ADVOCATE_NO35.pdf
[12] *Ibid.*

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family foster care.[13] Based on average annual foster care maintenance payments per child of $19,107 in FY2010,[14] placing an LGBQ child with an affirming, supportive foster family rather having her remain in congregate care would save a minimum of $38,214 per child per year.

It should be noted that all costs are not easily quantified, such as the well-being of youth receiving affirming care, or the long-term health benefits of a youth exiting sooner to a permanent family, and the cost savings to states and tribes estimated above are simply those within the foster care system itself. For example, studies indicate that LGBTQ youth exit foster care to homelessness and are commercially sexually exploited and victimized at higher rates than their non-LGBTQ peers in care. Costs associated with these negative outcomes are significant although challenging to quantify.

The Children's Bureau should retain the data element related to the reason for removal of a child from a family home due to "family conflict related to child's sexual orientation, gender identity, or gender expression."

Data regarding the degree to which family conflict impacts removal can drive needed funding for family acceptance work leading to family preservation, a priority of the current ACF administration. Helping a child remain with their family of origin through targeted supportive services related to this source of family conflict will provide enormous cost savings for states and tribes. Utilizing the FY10 foster care maintenance payments costs described above, cost savings would amount to $19,107 per child per year for each child not placed in a foster home; the annual savings would be 3-5 times greater for each child not placed in congregate care.

Given that an estimated 19% of foster youth identify as LGBTQ[15], this data element will be crucial to successfully implementing Family First prevention funding aimed at keeping children with their families of origin rather than entering foster care. Removing this data point would harm the ability of states and tribes to further efforts to reduce the over-representation of LGBTQ youth in care, in general, and LGBTQ youth of color, in particular. In addition, research indicates that reducing the severity of family rejection based on SOGIE results in a reduction in suicidal ideation and self-harm, depression, substance use and sexually transmitted infections. All of these negative public health outcomes are costly not only to children personally, but to the child welfare system and our communities as a whole. This data element related to family rejection will help drive effective case planning and services resulting in better outcomes for youth and families and cost savings to states and tribes.

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[13] National Conference of State Legislatures, *Congregate Care, Residential Treatment and Group Home State Legislative Enactments 2009-2013,* February 2017
http://www.ncsl.org/research/human-services/congregate-care-and-group-home-state-legislative-enactments.aspx
[14] Same as 11 above.
[15] Same as 4 above.

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C. The Children's Bureau Should Retain the Voluntary Sexual Orientation Question for Adoptive and Foster Parents and Guardians.

The LGBTQ community is a significant untapped resource in the effort to find permanent families for all children and youth in foster care. Gay and lesbian foster parents are raising six percent of foster children in the United States, and same-sex couples are six times more likely to be serving as foster parents than their different-sex counterparts.[16] National surveys tell us that nearly 2 million lesbian, gay and bisexual adults are interested in adopting children.[17] Data resulting from the voluntary sexual orientation question for adoptive and foster parents and guardians will help states and tribes recruit and support LGBQ caregivers, increasing the pool of available homes for foster children, and help identify states and agencies which can do better in recruitment of LGBQ resource families.

In its April 2011 guidance, ACF confirmed that "LGBT parents should be considered among the available options for states and jurisdictions to provide timely and safe placement of children in need of foster or adoptive homes."[18] Almost forty years of research has overwhelmingly concluded that children raised by same-sex couples are just as healthy, socially adjusted, and psychologically fit as children with heterosexual parents.[19] Recruitment of LGBQ families could provide a source of affirming, supportive homes for LGBTQ foster youth, reducing the costs detailed above that are associated with the placement instability and overrepresentation in congregate care that these youth experience.

D. The Children's Bureau Should Add Voluntary Gender Identity Questions for Foster Youth Over the Age of 14 and Foster and Adoptive Parents and Guardians Because this Information is Important and it is Efficient to Collect this Information Along with Current Data Elements.

A forthcoming study found that "[y]outh who are transgender and/or gender-expansive often have a difficult time in child welfare systems; violence enacted upon people who are LGBTQ is often not because they are "out" as LGBTQ, but because service providers, caretakers, and peers are policing the youth's gender behaviors."[20] Because of the particular challenges faced by transgender foster

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[16] Gary Gates, LGBT Parenting in the United States, The Williams Institute, UCLA School of Law, February 2013, http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/lgbt-parenting-in-the-united-states/

[17] The Williams Institute & The Urban Institute, Foster and Adoptive Parenting by Gay and Lesbian Parents in the United States, (2007). https://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/lgbt-parenting-in-the-united-states/

[18] Same as 2 above.

[19] *ECDF Act Facts*, Family Equality Council (2017), https://www.familyequality.org/get_informed/advocacy/ecdf/ecdf-facts/

[20] Robinson, Brandon Andrew. Forthcoming. "Child Welfare Systems and LGBTQ Youth Homelessness: Gender Segregation, Instability, and Intersectionality." *Child Welfare*. Robinson further states that "mental health treatments and other behavior modifications may be used against youth who are transgender and gender-expansive as a way to try to modify their gender expression (Mallon & DeCrescenzo, 2006; Marksamer, 2011). Youth of color who are transgender and gender expansive face compounding stressors and experiences of discrimination within child welfare systems, whereby racism and racial profiling can

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youth, adding gender identity questions for both foster youth and foster and adoptive parents and guardians will help states and tribes save costs by identifying affirming placements and reducing placement instability. Collecting gender identity data as well as sexual orientation data will help states and tribes develop streamlined comprehensive services with no gaps. Collecting gender identity data will be especially useful as new programs are developed with Family First funding, and Title IV-E agencies will benefit from and save money by adding these data elements now in conjunction with the new Comprehensive Child Welfare Information System (CCWIS).

E. The sexual orientation and gender identity and expression data elements of foster youth can be administered safely, and the Children's Bureau should provide training and resources to states and tribes to do so.

The child welfare profession has acknowledged the importance of collecting sexual orientation and gender identity ("SOGI") information about children, along with other critical information about the child's circumstances, in order to tailor an individualized case plan. In 2013, the Center for the Study of Social Policy, Legal Services for Children, the National Center for Lesbian Rights, and Family Builders by Adoption issued a set of professional guidelines addressing all aspects of managing SOGI information in child welfare systems.[21] The guidelines address the need to collect SOGI information in order to develop case plans and track outcomes in individual cases, and to engage in agency planning and assessment.

As a means of assessing risk and tracking disparities and outcomes, many public agencies already collect SOGI information on youth. Sexual orientation questions have been included on school-based surveys of adolescents since the mid-1980s through versions of the Youth Risk Behavior Survey (as noted in Children's Bureau comments to the Final Rule) and SOGI information is collected by many health care providers. Researchers have surveyed LGBTQ youth in the juvenile justice system, significantly increasing the profession's understanding of the disproportionate numbers of LGBTQ youth in detention, as well as differences in offense and detention patterns.[22] The regulations promulgated under the Prison Rape Elimination Act ("PREA") require youth and adult correctional officers to collect SOGI information as part of the initial screening process to identify residents and inmates who may be vulnerable to sexual assault while incarcerated.[23] Increasing numbers of state and local child welfare and juvenile justice agencies, as well as providers serving youth experiencing

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shape how some youth's behaviors, including their gender behaviors, are monitored and disciplined (Mallon & DeCrescenzo, 2006)."

[21] Shannan Wilber, *Guidelines for Managing Information Related to the Sexual Orientation and Gender Identity and Expression of Children in Child Welfare Systems*, FAMILY BUILDERS BY ADOPTION (2013), http://cssr.berkeley.edu/cwscmsreports/documents/Information%20Guidelines%20P4.pdf

[22] Angela Irvine, *"We've Had Three of Them": Addressing the Invisibility of Lesbian, Gay, Bisexual and Gender Non-Conforming Youths in the Juvenile Justice System*, 19 COLUM. J. OF GENDER & L. 675 (2012).

[23] National Standards to Prevent, Detect and Respond to Rape, 28 CFR § 115 (2012).

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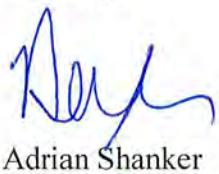
homelessness, have developed policies requiring the collection of SOGI data as part of the initial intake and assessment.

In the Final Rule, the Children's Bureau summarized its well supported rationale for collecting information regarding the sexual orientation of youth 14 years old and older. The Final Rule stated that "[i]nformation on sexual orientation should be obtained and maintained in a manner that reflects respectful treatment, sensitivity, and confidentiality." Additionally, the rule directed agencies to guidance and recommended practices developed by "state and county agencies, advocacy organizations and human rights organizations."

F. Conclusion

For the reasons outlined above, we urge the U.S. Department of Health and Human Services, ACYF, ACF, Children's Bureau to retain all of the data elements in the 2016 AFCARS Final Rule, including the data elements related to sexual orientation and gender identity and expression. We appreciate the opportunity to comment on the benefits of these data elements outlined in the Final Rule.

Sincerely,



Adrian Shanker
Executive Director
Bradbury-Sullivan LGBT Community Center
522 W. Maple St.
Allentown, PA 18101
www.bradburysullivancenter.org

As of: September 14, 2020
Received: June 08, 2018
Status: Posted
Posted: June 08, 2018
Tracking No. 1k2-93lu-m3us
Comments Due: June 13, 2018
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0031
Arkansas

Submitter Information

Name: Nellena Garrison
Address: 72201
Email: nellena.garrison@dhs.arkansas.gov
Organization: Arkansas

General Comment

Below are the comments/questions for Arkansas:
134-Child requested placement. Definition is The child, age 18 or older, has requested placement into foster care. When would this be used? In Arkansas, youth age 18 and older are considered an adult and cannot ask to come in foster care when 18 or older. Or is this when they are returning to foster care after leaving and they age out?

152-Shelter care foster family home-What is the federal opinion on emergency foster family homes? We are seeking the guidance on this based on research saying that the moves are just as traumatic as the removals.

223-Transfer to another agency-In Arkansas, we have dual custody clients that are in DYS (Division of Youth Services) and DCFS (Division of Children and Family Services) custody. We do not often exit these clients from foster care, so an exit of juvenile justice agency would be rarely used. There are times where some clients leave DCFS custody and go to just the custody of DYS, especially if they are going to be committed to DYS for an extended period of time.

Regarding the following values related to sexual orientation:
7. Childs sexual orientation
137. Family conflict related to childs sexual orientation, gender identify or gender expression. This is the one where it says the word queer in the definition too.
185. First foster parent sexual orientation
197. Second foster parent sexual orientation
Questions: It seems based on the definitions that DHS is required to ask, but are they required to disclose? Do either the foster parent applicant or foster child have the option to state that they do not wish to disclose this information? If so, it should be made clear to applicants/children whether this information may be disclosed at their discretion or if it is an actual requirement.

Comment: Adding the new data elements would be a substantial financial burden, not only adding any new fields/values to the screens but to have the logic programmed to pull the data. These enhancements will be costly.

As of: September 14, 2020
Received: June 08, 2018
Status: Posted
Posted: June 08, 2018
Tracking No. 1k2-93lu-oolm
Comments Due: June 13, 2018
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0032
Comment on FR Doc # 2018-05042

Submitter Information

Name: Margreta Silverstone
Address: 20912
Email: mks@margreta.com

General Comment

Dear Ms. McHugh,

Please find my comments on the burden of the new AFCARS and alternatives to consider attached.

Sincerely,
Margreta Silverstone

Attachments

The ANPRM as published in the federal register on March 15.docx (1)

Response to ANPRM

The ANPRM as published in the federal register on March 15, 2018, requests response and comments on the Final Rule made regarding AFCARS Data reporting changes made by the Administration for Children and Families (ACF) in December 2016.

1 Is AFCARS regulation one in which the reporting burden imposes costs that exceeds benefits?

1.1 Burden imposed by the number of changes being requested:

As stated in the AFCARS briefing document, there are 272 data elements that are now required for AFCARS reporting. Prior to these changes there were 103 required data elements. The number of data elements has therefore more than doubled putting a significant increased burden on the States to report foster care and adoption data to the federal government. In essence, these changes equate to at minimum a partial but more likely a complete overhaul of current State's Child Welfare system that is used to collect AFCARS data.

1.2 Burden of Changes by Cost

Doubling the number of data elements to be reported for AFCARS will create a significant cost burden on States from the following perspectives:

1.2.1 System Changes

The changes proposed in the final rule made in December of 2016, effect every part of a Child Welfare system from demographic and clinical data collection to major changes to how removals and placements are reported. For a State to even begin to implement these changes, analysis of effects on existing data structures, remapping, as well as GUI screens and other functional changes will be needed. In most cases, an Reason For Proposal would need to be issued and a vendor would need to be contracted to assist. Even those States who maintain an ongoing maintenance contract with a vendor such as Wisconsin and Florida, would need to issue a new RFP to enter into a contract for the amount of work needed. Specific aspects of a Child Welfare software system should be considered as significant cost components:

1.2.1.1 Front End system changes

169 new AFCARS data elements will equate to dozens of brand new screens as well as the same for existing screens. Navigation among all affected screens must also be taken into consideration.

1.2.1.2 System Outputs

Enterprise system reports, templates and statistics data reports (dashboards) will have to be changed accordingly.

1.2.1.3 Data Management

1.2.1.3.1 Changes to Database structures

Implementation of all 169 new data elements would equate to major changes to existing database tables. Some of the changes to groups of existing data elements such as Clinical Diagnosis and removal/placements may require significant restructuring of existing or creation of new tables depending on their intricacy.

1.2.1.3.2 Data Warehousing & ETL

A one on one dependency exists between each front end design change, its storage and use in the data warehouse. Each piece of data is shared among multiple applications behind the scenes and will be affected by the subsequent changes. This includes the storage, operation and interaction of the current AFCARS reports, which will have to be restructured to accommodate the new changes.

1.2.1.4 Interfaces

Each existing interface will have to be analyzed to determine if the AFCARS data element changes will affect their corresponding data exchange. Affected systems will have to alter the corresponding intermediary and system databases.

1.2.4.5 Case Structure

Consideration should be given to open cases and case history at the time of implementation. The changes to the removal/placements structure must be careful scrutinized to maintain case integrity.

1.2.2 Worker Training

The current culture for most State Child Welfare agencies is one where workers are overworked, yet given great responsibility for the Foster Care and Adoption child populations. Mandating that they be trained and required to collect double the data than they are right now would constitute a significant burden to implement.

Most Child Welfare agencies do not have funds allocated for independent ongoing software training programs and most IT contracts omit worker training in order to cut costs. Analysis should be conducted and an estimation of the number of hours needed to train workers and staff on all new AFCARS system changes should be completed. The amount of training hours needed should be applied to the number of current and future staff who will need training in order to determine a valid cost estimate.

If the interest of the worker is considered first, it would make sense to implement these changes in phases over a period of years. It would also make sense to survey the worker population and consider their input when prioritizing the needed changes.

1.3 Clarity of Directives

In reviewing the lengthy final rule issued by the Administration on Children and Families on 12/14/2016, there are many sections and subsections that would need clarification between the State and the ACF before system requirements could be finalized. Examples are:

1.3.1 1355.44(B)(3) "Reason to Know if a Child is an Indian Child" vs 1355.44(B)(9) "Child's Race

This would be considered a simple comparison, but the clarification needed here would be:

- If Child's Race (B)(9) is answered as American Indian, Alaskan Native or Native Hawaiian or Other Pacific Islander is answered Yes then would question (B)(3) need to also be answered Yes?
- Do we understand correctly that if (B)(3) is answered yes, the approximately 21 subsequent questions associated would need to be answered?

1.3.2 Restructuring of Removal Questions

There has been a change in language regarding the Removal Questions. In section 1355.44(D)(2) and 1355.55(D)(3) the language reads "collect and report the date(s) on which the child was removed for each removal of a child who enters the placement and care responsibility of the title IV-E agency".

Because the current AFCARS reporting structure has data element 18 as reporting the First removal only and is collected as one date only and data element 19 as reporting the total number of removals as opposed to "each" date, clarification would be needed as to how the system is to report "each" removal. "Each removal" indicates that if there were more than one removal in the reporting period that there would need to be more than one data field included for one data element or a one to many relationship. This would be a first for the AFCARS report data structure.

Because the restructuring would require work for both the Federal data collection and the State effort, we recommend this remain as currently functioning and work with States to ensure their case review activities address this (see Section 4 for additional discussion of elements to include in a case review).

1.4 Consideration of existing system status by State

In response to the magnitude of the AFCARS data element changes, there are various factors or questions that should be considered in requiring States to implement them, especially when a financial penalty as a result of noncompliance is taken into consideration.

1.4.1 Federally Recognized Tribes

As stated in the AFCARS briefing document, 65 of the new data elements that are being required to be reported gather data on ICWA. When the fact that 15 States do not have federally

recognized tribes within them is considered, it becomes clear that the implementation of changes in these States would not be cost beneficial.[1]

1.4.2 Does the State have a currently operational CCWIS system

As of May 17, 2018, per the CCWIS Status published document,[2] 21 states have declared as CCWIS and 23 have yet to declare. The final rule for the AFCARS changes was published on December 14, 2016. Each State who has a current CCWIS system in development should be queried as to if the AFCARS changes have also been taken into consideration. From a cost perspective, it may be appropriate to suspend development of the CCWIS system so the AFCARS changes can be taken into consideration.

1.4.3 Did the State have an operational SACWIS system

Previous data history, structures and systems should be examined when considering the new AFCARS changes. Functional sections of AFCARS data that have been collected and reported on for multiple years will require complete functional and data redesign. Analysis should be conducted to determine if remapping of existing data fields is feasible or other technical solutions are available to maintain data continuity.

One example of this is 1355.44(B)(11)(12)(13) Health Assessment, old AFCARS data elements 10-15 Clinically Diagnosed. Whereas the old design of the Clinically Diagnosed data elements were a series of Yes/No questions, the new set of data elements will require multiple types of functional design. 1355.44(B)(11)(12) & (13) will require a combination of Yes/No, date, dropdown and or checkbox values.

1.4.4 The status of the States current AFCARS report

Each State's current AFCARS report status should be examined. If there are existing gaps in data reported or penalties being accrued, this should be taken into consideration. This is an indication of poor data collection or absence of data collection, which could affect design and implementation of the new AFCARS requirements.

1.4.5 What is the status of the States overall system development plan

The development plan for each States Child Welfare system should be examined. Parallel to the AFCARS data element changes are the CCWIS Data Exchange requirements. It should be examined how the State plans to implement the AFCARS changes alongside the CCWIS system requirements. Implementation plans could be through utilization of their existing maintenance contract, the existing CCWIS contract that has already been awarded or included as a part of the existing RFP for CCWIS. If a separate contract is awarded for the AFCARS changes the existing CCWIS requirements and design must be considered in order to avoid duplication of work or design that would have to be reversed due to the new AFCARS requirements.

[1] http://www.ncsl.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx
[2] https://www.acf.hhs.gov/cb/resource/ccwis-status

2 Analysis by Data Element

Analysis was completed per data element between the existing and new AFCARS reporting requirements. Results of this comparison illustrate that a complete restructuring of any State's existing federal Foster Care and Adoption reports will be necessary. Considerable design and data changes would also have to occur overall to the State's existing Child Welfare system. If all the new data element changes were to be implemented simultaneously, a new RFP would more than likely have to be issued due to the amount of work that will be needed for implementation. Analysis of the new requirements has been broken down into 4 major categories and is described in detail below. Level of burden to implement a change, whether the data element should be removed or retained as valuable on a national level was taken into consideration. In addition, analysis from a system perspective has also been included.

2.1 New single or suites of questions

There are three single/sets of questions that could be implemented by the State's existing maintenance team (whether State employees or contracted staff):

1355.44(B)(2)(ii) - Sexual Orientation
1355.44(B)(17)(i-iii) - Is Child Currently Pregnant
1355.44(B)(23-25) - Siblings

Since each of these data elements are new and contain a maximum of (3) questions per set, these changes could probably be incorporated into a State's ongoing system release schedule. These changes could probably be made by editing an existing GUI screen without having to create a new one, or at minimum a new tab could be created in a corresponding module of functionality.

Because of the minimal implementation needed for each of these data elements, these elements are not considered a burden. They have national value as these data elements are additional demographic information on the child/family.

2.2 Restructuring of existing suites of questions

There are three distinct sets of data elements that would require restructuring and may be able to be implemented by the State's existing maintenance team. They require a longer term design plan, but with planning could be added to the existing system release schedule.

1355.44(B)(11)(i-ii);(B)(12);(B)(13) - Clinical Diagnosis/Health Assessment
1355.44(B)(21)(22) - Federal Financial Support

These (2) sets of data are currently captured in the current AFCARS report, but the new AFCARS changes would required them to be restructured. The language and data format of the questions has changed. New data values have been added to the answers of some of the questions.

1355.44(B)(14-18) - Education

Education data elements are not included in the current AFCARS report, so these data elements are considered new. Most systems, however, do collect Education data and could be altered to meet the new reporting requirements with moderate design changes and data mapping.

Because of the moderate implementation needed for each of these data elements and their inclusion in most States current information system, they are not considered a burden. These data elements do have national value and assist in understanding the overall care of Foster Care and Adoption populations.

2.3 Removal, Placement, Permanency and Discharge Restructuring

1355.44 (D)(E)(F)(G) documents all design changes covering the heart of the data collected by the State's Child Welfare system. Changes to existing data reported are so numerous, it would require a significant redesign of each State's system.

Considerable analysis would have to be completed in each State in order to determine if data remapping is possible to adapt to each AFCARS change depending on the Child Welfare system's existing data structure. In addition, the number of requirements to reword existing questions, create new questions and creation of new value responses to questions are so great a new RFP would have to be issued by each State to meet the changes described in the AFCARS final rule.

This presents a burden to the States to implement in the timeframe given. It also presents a cost burden for both IT and training support. While the changes to the heart of the Child Welfare system that have been mandated may be appropriate and necessary, a full reexamination is recommended. It is recommended that the reexamination consider feedback from States based on survey or a task force. Discovery should be completed as to what a States overall data, IT infrastructure, policy and workforce needs and challenges are in order to have successful implementation of new AFCARS requirements.

Making changes to almost all of the existing (40) AFCARS data elements as well as adding 14 new elements to the heart of the data collected by a State's Child Welfare system constitutes an enormous burden from every aspect.

While the proposed changes to this grouping of data may be appropriate a full reexamination is recommended as well as an implementation that is done in phases.

2.4 Adoption Restructuring

1355.44(H) and 1355.45 documents what constitutes the collection of data on adoptions from a States Child Welfare system. Twenty-Three of the thirty-seven existing data elements that are reported in the adoption report are according to the final rule, now required to be reported in

the Foster Care Report. With the removal of a few of the remaining questions in the AFCARS adoption report, the new adoption report would only have (11) elements.

The explanation contained in the final rule section I.IV.B, page 90529, Adoption Assistance data file needs further clarification. The justification for removing most of the data from the existing Adoption data report and placing in the Foster Care report needs to be revisited. It is not cost beneficial from a mapping perspective for a State to move data elements from one report to another. The way the final rule is written, begs the question, do we need an separate data file for adoption? Why not have States send one file. The need for (2) distinct files is in question due to the amount of changes to the existing adoption report.

It is an enormous burden to remove more than half of an existing report's data elements and remap them to another report. It is recommended that existing data structure of the Adoption report be maintained, until reexamination of all the final rule changes is conducted. Priority to all changes listed in in the final rule should be conducted to determine where the specific Adoption changes fit into the schema.

Justification of why the amount of data elements are being required to be remapped from one report to another should be provided. Questions as to why a separate Adoption report would be necessary based on the number of final rule changes should be answered.

3 ICWA

3.1 Are the ICWA related data points Child Welfare Agencies are being asked to collect, reporting on its own activity or that of a third party?

Examination should be completed by stakeholders as to which agency, the Bureau of Indian Affairs/Department of the Interior or the Department of Health and Human Services/The Administration for Children and Families should bear burden for the expanse of new ICWA requirements. Below, is an initial assessment of each new ICWA data element required per section number. Clarification should be given where indicated.

ICWA Questions & Comments			
	Reason to know a child is an "Indian child" as defined in the Indian Child Welfare Act	1355.44(b)(3)	
	Data Element Name	Section Number	Recommendation/Clarification
1	Inquired with the child's biological or adoptive mother	1355.44(b)(3)(i).	Should be Established in BIA system
2	Inquired with the child's biological or adoptive father	1355.44(b)(3)(ii).	Should be Established in BIA system
3	Inquired with the child's Indian custodian	1355.44(b)(3)(iii).	Should be Established in BIA system

4	Inquired with the child's extended family	1355.44(b)(3)(iv).	Should be Established in BIA system
5	Inquired with the child	1355.44(b)(3)(v).	Should be Established in BIA system
6	Child is a member or eligible for membership in an Indian tribe	1355.44(b)(3)(vi).	Should be Established in BIA system
7	Domicile or residence of the child, the child's parent, or the child's Indian custodian is on a reservation or in an Alaska Native village	1355.44(b)(3)(vii).	Should be Established in BIA system
8	Application of ICWA	1355.44(b)(4).	Should be Established in BIA system
9	The date that the state title IV-E agency first discovered information indicating the child is or may be an Indian child as defined in ICWA	1355.44(b)(4)(i).	Should be Established in the Child Welfare System
10	All federally recognized Indian tribe(s) that may potentially be the Indian child's tribe(s)	1355.44(b)(4)(ii).	Should be Established in BIA system
11	Court determination that ICWA applies	1355.44(b)(5).	Should be Established in BIA system
12	Date court determined that ICWA applies	1355.44(b)(5)(i).	Should be Established in BIA system
13	Indian tribe that the court determined is the Indian child's tribe for ICWA purposes	1355.44(b)(5)(ii).	Should be Established in BIA system
	Notification		
14	Whether the Indian child's parent or Indian custodian was sent legal notice more than 10 days prior to the first child custody proceeding in accordance with 25 U.S.C. 1912(a)	1355.44(b)(6)(i).	Should be Established in BIA system
15	Whether the Indian child's tribe(s) was sent legal notice more than 10 days prior to the first child custody proceedings in accordance with 25 U.S.C. 1912(a)	1355.44(b)(6)(ii).	Should be Established in BIA system
16	The Indian tribe(s) that were sent notice for a child custody	1355.44(b)(6)(iii).	Should be Established in BIA system

	proceeding as required in ICWA at 25 U.S.C. 1912(a)		
17	Request to transfer to tribal court	1355.44(b)(7).	Should be Established in BIA system
18	Denial of transfer	1355.44(b)(8).	Should be Established in BIA system
19	Either of the parents objected to transferring the case to tribal court	1355.44(b)(8)(i).	Should be Established in BIA system
20	The tribal court declined the transfer to the tribal court	1355.44(b)(8)(ii).	Should be Established in BIA system
21	The state court determined good cause exists for denying the transfer to tribal court	1355.44(b)(8)(iii).	Should be Established in BIA system
	Involuntary Termination/modification of parental rights under ICWA		
22	State court found beyond reasonable doubt that continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child in accordance with 25 U.S.C. 1912(f)	1355.44(c)(6)(i).	**Redundant** This is functionality is currently handled by existing CW systems
23	Court decision to involuntary terminate parental rights included the testimony of one or more qualified expert witnesses in accordance with 25 U.S.C. 1912(f)	1355.44(c)(6)(ii).	**Redundant** This is functionality is currently handled by existing CW systems **Clarification** Additional guidance to States should be provided on what minimum criteria is needed to be a "qualified expert witness"
24	Prior to terminating parental rights, the court concluded that active efforts have been made to prevent the breakup of the Indian family and that those efforts were unsuccessful in accordance with 25 U.S.C. 1912(d)	1355.44(c)(6)(iii).	**Redundant** This is functionality is currently handled by existing CW systems

25	Voluntary termination/modification of parental rights under ICWA	1355.44(c)(7).	**Clarification** BIA should provide guidance to States on what elements and transactions they can address through their system
	Removals Under ICWA		
26	Court order for foster care placement was made as a result of clear and convincing evidence that continued custody of the Indian child by the parent or Indian custodian was likely to result in serious emotional or physical damage to the Indian child in accordance with 25 U.S.C. 1912(e) and 25 CFR 121(a)	1355.44(d)(3)(i).	**Redundant** This is functionality is currently handled by existing CW systems
27	Evidence presented for foster care placement as indicated in paragraph (d)(3)(i) included the testimony of a qualified expert witness in accordance with 25 U.S.C. 1912(e) and 25 CFR 121(a)	1355.44(d)(3)(ii).	**Clarification** Additional guidance to States should be provided on what minimum criteria is needed to be a "qualified expert witness"
28	Evidence presented for foster care placement as indicated in paragraph (d)(3)(i) indicates that prior to each removal reported in paragraph (d)(1) that active efforts have been made to prevent the breakup of the Indian family and that those efforts were unsuccessful in accordance with 25 U.S.C. 1912(d)	1355.44(d)(3)(iii).	**Redundant** This is functionality is currently handled by existing CW systems
	Available ICWA Foster Care and pre-adoptive placement preferences		
29	A member of the Indian's extended family	1355.44(e)(8)(i).	**Redundant** This is functionality is currently handled by existing CW systems
30	A foster home licensed, approved, or specified by the Indian child's tribe	1355.44(e)(8)(ii).	**Redundant** This is functionality is currently handled by existing CW systems

31	An Indian foster home licensed or approved by an authorized non-Indian licensing authority	1355.44(e)(8)(iii).	**Redundant** This is functionality is currently handled by existing CW systems
32	An institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs	1355.44(e)(8)(iv).	**Redundant** This is functionality is currently handled by existing CW systems
33	A placement that complies with the order of preference for foster care or pre-adoptive placements established by an Indian child's tribe, in accordance with 25 U.S.C. 1915(c)	1355.44(e)(8)(v).	**Redundant** This is functionality is currently handled by existing CW systems
35 34	Foster care and pre-adoptive placements preferences under ICWA	1355.44(e)(9).	**Redundant** This is functionality is currently handled by existing CW systems
35	Good cause under ICWA	1355.44(e)(10).	**Clarification** What is the definition of good cause under ICWA in comparison to Title IV-E
36	Request of one or both of the Indian child's parents	1355.44(e)(11)(i).	**Clarification** What is the definition of good cause under ICWA in comparison to Title IV-E
37	Request of the Indian child	1355.44(e)(11)(ii).	**Clarification** What is the definition of good cause under ICWA in comparison to Title IV-E
38	Unavailability of suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the placement preferences in ICWA art 25 U.S.C. 1915but none has been located	1355.44(e)(11)(iii).	**Redundant** This is functionality is currently handled by existing CW systems
39	Extraordinary physical, mental or emotional needs of the Indian child, such as specialized treatment services that may be	1355.44(e)(11)(iv).	**Redundant** This is functionality is currently handled by existing CW systems

	unavailable in the community where families who meet the placement preferences live		
40	Presence of a sibling attachment that can be maintained only through a particular placement	1355.44(e)(11)(v).	**Redundant** This is functionality is currently handled by existing CW systems
	Active Efforts		
41	Assist the parent(s) or Indian custodian through the steps of a case plan and with developing the resources necessary to satisfy the case plan	1355.44(f)(10)(i).	**Redundant** This is functionality is currently handled by existing CW systems
42	Conduct a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal	1355.44(f)(10)(ii).	**Redundant** This is functionality is currently handled by existing CW systems
43	Identify appropriate services and to help the parent overcome barriers, including actively assisting the parents in obtaining such services	1355.44(f)(10)(iii).	**Redundant** This is functionality is currently handled by existing CW systems
44	Identify, notify and invite representatives of the Indian child's tribe to participate in providing support and services to the Indian child's family and in family team meetings, permanency planning and resolution of placement issues	1355.44(f)(10)(iv).	**Redundant** This is functionality is currently handled by existing CW systems
45	Conduct or cause to be conducted a diligent search for the Indian child's expended family members, and contacting and consulting with extended family members to provide family structure and support for the Indian child and the Indian child's parents	1355.44(f)(10)(v).	**Redundant** This is functionality is currently handled by existing CW systems
46	Offer and employ all available and culturally appropriate family preservation strategies and facilitate the use of remedial and rehabilitative services provide by the child's tribe	1355.44(f)(10)(vi).	**Redundant** This is functionality is currently handled by existing CW systems

47	Take steps to keep siblings together whenever possible	1355.44(f)(10)(vii).	**Redundant** This is functionality is currently handled by existing CW systems
48	Support regular visits with parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child	1355.44(f)(10)(viii).	**Redundant** This is functionality is currently handled by existing CW systems
49	Identify community resources including housing, financial, transportation, mental health, substance use and peer support services and actively assisting the Indian child's parents or when appropriate, the child's family in utilizing and accessing those resources	1355.44(f)(10)(ix).	**Redundant** This is functionality is currently handled by existing CW systems
50	Monitor progress and participation in services	1355.44(f)(10)(x).	**Redundant** This is functionality is currently handled by existing CW systems
51	Consider alternative ways to address the needs of the Indian child's parents and, where appropriate, the family, if the optimum services do not exist or are not available	1355.44(f)(10)(xi).	**Redundant** This is functionality is currently handled by existing CW systems
52	Provide post-reunification services and monitoring	1355.44(f)(10)(xii).	**Redundant** This is functionality is currently handled by existing CW systems
53	Other active efforts tailored to the facts and circumstances of the case	1355.44(f)(10)(xiii).	**Redundant** This is functionality is currently handled by existing CW systems
	Available ICWA Adoptive Placements		
54	A member of the Indian child's extended family	1355.44(h)(20)(i).	**Redundant** This is functionality is currently handled by existing CW systems

55	Other members of the Indian child's tribe	1355.44(h)(20)(ii).	**Redundant** This is functionality is currently handled by existing CW systems
56	Other Indian families	1355.44(h)(20)(iii).	**Redundant** This is functionality is currently handled by existing CW systems
57	A placement that complies with the order of preference for foster care or pre-adoptive placements established by an Indian child's tribe, in accordance with 25 U.S.C. 1915(c)	1355.44(h)(20)(iv).	**Recommendation:** The BIA module should be built to support the identification of compliance.
58	Adoption placement preferences under ICWA	1355.44(h)(21).	**Redundant** This is functionality is currently handled by existing CW systems
59	Good cause under ICWA	1355.44(h)(22).	**Clarification** What is the definition of good cause under ICWA in comparison to Title IV-E
60	Request of one or both of the child's parents	1355.44(h)(23)(i)	**Clarification** What is the definition of good cause under ICWA in comparison to Title IV-E
61	Request of the Indian child	1355.44(h)(23)(ii).	**Clarification** What is the definition of good cause under ICWA in comparison to Title IV-E
62	The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the placement preferences in ICWA at 25 U.S.C. 1915 but none has been located	1355.44(h)(23)(iii).	**Redundant** This is functionality is currently handled by existing CW systems
63	The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who	1355.44(h)(23)(iv).	**Redundant** This is functionality is currently handled by existing CW systems

	meet the placement preferences live		
64	The presence of a sibling attachment that can be maintained only through a particular placement	1355.44(h)(23)(v).	**Redundant** This is functionality is currently handled by existing CW systems

From a system perspective, it is argued here that data that is native to the purpose of the agency originate in their corresponding system. Therefore, the determination as to whether a child is a Native American and if all policies and procedures were followed to make this determination should exist in the Bureau of Indian Affairs system. Alternatively, one would not expect data pertaining to the history of a child's foster care/adoption to originate in the Bureau of Indian Affairs system.

If the final rule stands and Child Welfare agencies are required to implement all of the new ICWA data elements despite the redundancy listed above, the volume of the questions would command a distinct path of data collection. Prior to the commencement of the investigation it would have to be determined if the child is an "Indian Child" or not. Which type of investigation is completed would be determined by the answer to this question.

3.2 Is efficiency, reliability and consistency which §479(C)(1)&(2) require for the AFCARS data collection being met with the new AFCARS data element requirements?

Will the collection of ICWA data be efficient?

Will the collection of ICWA data be reliable?

Will the collection of ICWA data be consistent?

Is the data readily available to be collected?

There are several points to consider when answering this question. While some of these points are not direct in response to the question of whether or not it's the Child Welfare Agency's responsibility to collect ICWA data, all should be considered as a whole to determine feasibility and cost for States.

First, for the 15 States that do not have federally recognized tribes[3], is it appropriate to require them to add 65 new pieces of functionality to their child welfare system? This would be a considerable burden in every aspect for a State to implement functionality that they would not use on a regular basis if ever.

[3] http://www.ncsl.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx

Second, It should be taken into consideration that as of May 2018, only 9 tribes are listed as having any type of Child Welfare system. Of the 9 listed, only (3) have operational systems and none of them were SACWIS compliant.[4] This is pertinent to past data collection. No tribe to date has declared a CCWIS, which means no tribe has intent to build their own systems that could supply data to support a State's Child Welfare system. Because tribes do not have data being actively collected that could support these new requirements the burden is clearly being shifted onto States for the volume of new AFCARS ICWA data that is being required to be reported.

A more cost effective manner for addressing ICWA requirements may be the creation of an ICWA module by BIA that can be connected to each State/jurisdiction's information system. This notion of modularity is consistent with CCWIS regulations. There may need to be a few additional data elements added into the State's child welfare system in order for the integration of the BIA ICWA module to work effectively. Please see the table below for details.

3.3 Will States receive penalties and lose funds due to the inability to collect ICWA data, which will result in a non-compliant AFCARS report?

What is recommended here is in alignment with the premise of CCWIS system requirements is that data sharing be established through interfaces between both State and federal systems. The 65 ICWA new data elements are an inappropriate burden to the title IV-E agencies and these data elements should be removed.

4 Case Review

In your request for feedback, you also asked for suggestions on data elements that would be better used as part of a case review activity, not an AFCARS report. In reviewing the non-ICWA related data elements, the following elements would be better collected as part of an overall case review function.

Case Review Questions			
	Data Element Name	Section Number	Recommendation/Clarification
1	Date of health assessment	1355.44(b)(11)(ii).	Should be handled by Case Review
2	Timely health assessment	1355.44(b)(12).	Should be handled by Case Review
3	Educational level	1355.44(b)(15).	Should be handled by Case Review
4	Educational stability	1355.44(b)(16).	Should be handled by Case Review

[4] https://www.acf.hhs.gov/cb/resource/ccwis-status

5	Proximity	1355.44(b)(16)(i).	Should be handled by Case Review
6	District/zoning rules	1355.44(b)(16)(ii).	Should be handled by Case Review
7	Residential facility	1355.44(b)(16)(iii).	Should be handled by Case Review
8	Services/programs	1355.44(b)(16)(iv).	Should be handled by Case Review
9	Child request	1355.44(b)(16)(v).	Should be handled by Case Review
10	Parent/Legal guardian request	1355.44(b)(16)(vi).	Should be handled by Case Review
11	Other	1355.44(b)(16)(vii).	Should be handled by Case Review
12	Termination/modification of parental rights petition	1355.44(c)(5)(i).	Should be handled by Case Review
13	Jurisdiction or country where child is living	1355.44(e)(7).	Should be handled by Case Review
14	Date of permanency plan	1355.44(f)(2).	Should be handled by Case Review
15	Date of periodic review	1355.44(f)(3).	Should be handled by Case Review
16	Date of permanency hearing	1355.44(f)(4).	Should be handled by Case Review
17	Juvenile justice	1355.44(f)(5)	Should be handled by Case Review
18	Caseworker visit dates	1355.44(f)(6).	Should be handled by Case Review
29	Caseworker visit location	1355.44(f)(7).	Should be handled by Case Review
20	Transition plan	1355.44(f)(8).	Should be handled by Case Review
21	Date of transition plan	1355.44(f)(9).	Should be handled by Case Review

We note in particular that both because of the nature of the information and the proposed change in structure on the removal issue (see 1.3.2), it would be better to leave that element as currently structured in AFCARS and use case review to address removal and placement instability.

5 3 Conclusion

Overall, based on the analysis above, the AFCARS changes made in the final rule need to be reexamined by not just federal, but stakeholders from each State. Review of a State's training, data and

system structures, CCWIS system status and current AFCARS reporting status should all be considered in conjunction with national policy needs. A complete reevaluation should be conducted taking all these pieces into consideration to decrease overall burden across a State's implementation of any new AFCARS requirements.

As of: September 14, 2020
Received: June 08, 2018
Status: Posted
Posted: June 08, 2018
Tracking No. 1k2-93lv-3r1k
Comments Due: June 13, 2018
Submission Type: E-mail

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0033
Shoshone Bannock Tribes, Fort Hall Indian Reservation

Submitter Information

Address: 83203
Organization: Shoshone Bannock Tribes, Fort Hall Indian Reservation

General Comment

See Attached

Attachments

Shoshone Bannock Tribes

The SHOSHONE-BANNOCK TRIBES

FORT HALL INDIAN RESERVATION
PHONE (208) 478-3700
FAX # (208) 237-0797

FORT HALL BUSINESS COUNCIL
P.O. BOX 306
FORT HALL, IDAHO 83203

June 8, 2018

Ms. Kathleen McHugh, Director
Policy Division
Administration for Children and Families
United States Department of Health and Human Services
330 C Street, SW
Washington, DC 20024

Via Electronic Mail: CBComments@acf.hhs.gov

Re: RIN: 0970-AC72 Adoption and Foster Care Analysis and Reporting System; Advance Notice of Proposed Rulemaking (3/15/2018)

Dear Director McHugh,

The health and wellbeing of our people is one of the highest priorities for the Shoshone-Bannock Tribes (Tribes). The Tribes have reserved rights as set forth in the Fort Bridger Treaty of July 3, 1868, between the Shoshone-Bannock Tribes and the United States government. One of our foremost Tribal missions is to promote the physical and emotional wellness of Indian children and their families in our tribal community. It is encouraging to see federal agencies upholding their trust responsibilities for the health, welfare, and safety of our Tribal people, through development of federal laws and regulations, including the Indian Child Welfare Act (ICWA) data collection requirements that are the subject of these comments. The Tribes continue to work on behalf of our most vulnerable community members - our children and their families. Therefore, the Tribes respectfully request your support in upholding the trust responsibilities and treaty obligations for the protection of our children and our future by supporting the retained inclusion of the ICWA-related data points that the Administration for Children and Families (ACF) incorporated into the Final Rule, dated December 14, 2016 (Final Rule).

Since 1993, when AFCARS was established, it has been amended several times to incorporate additional data elements in order to get a better picture of state child welfare systems and increase compliance by analyzing such data. The AFCARS has evolved to capture data regarding sibling connections, sexual abuse, use of psychotropic medications, and more. The AFCARS will, rightfully, continue to grow and evolve to serve the best interest of all children in

state care, including Indian children. The 'best interest' standard is a dynamic standard, as it is neither static nor stagnant. The AFCARS must also evolve to address that best interest standard. Collection of ICWA data elements in the AFCARS is a continued step in the right direction for Indian children, their families, and their tribes.

The Shoshone-Bannock Tribes appreciates this opportunity to comment on the Advanced Notice of Proposed Rulemaking (ANPRM) regarding the Adoption and Foster Care Analysis Reporting System (AFCARS) for Title IV-B and Title IV-E as they relate to the Indian Child Welfare Act of 1978. These regulations are necessary to realize the purpose and intent of the ICWA – to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families.

General Comments of the Tribes:

The lack of Tribal consultation prior to this ANPRM is concerning.

As the ACF is well aware, in enacting the ICWA, Congress found "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that *the United States has a direct interest, as trustee, in protecting Indian children*..." 25 U.S.C. §1901 (3)(emphasis added). The Tribes place a high value on our children and when federal policies are developed that may impact our children, we expect full tribal consultation to occur. We are concerned about the lack of Tribal consultation prior to issuance of this ANPRM.

It is the Tribes' understanding that the OMB has approved a two-year delay in implementing the new AFCARS regulations and is moving forward with this ANPRM to seek comments on 'streamlining' the 2016 AFCARS regulations. The Tribes are concerned that no consultation with tribes was sought prior to the development of these rules and the decision to delay AFCARS implementation for five years, until 2021. Although the ACF feels increasing the number of data requirements for states is unreasonable, the Tribes' concern is that Indian children continue to be overrepresented in 14 states' foster care systems, sometimes at rates more than 10 times their per capita population. Without data, there can be no accountability or improvements, which is what we have seen since AFCARS came into being in 1993.

The data collection requirements of the Final Rule are consistent with ACF's statutory mission.

Several Sections of the Social Security Act address the collection of information on children in state care and penalties for non-compliance, including:

1. Section 479 [42 U.S.C. § 679], which mandates Health and Human Services (HHS) collect national, uniform, and reliable information on children in state care; and
2. Section 474(f) [42 U.S.C. § 674(f)], which requires HHS to impose penalties for non-compliant AFCARS data; and

3. Section 1102 [42 U.S.C. § 1302], which instructs the Secretary to promulgate regulations necessary for the effective administration of the functions for which HHS is responsible under the Social Security Act.

The Final Rule, which ACF promulgated pursuant to these statutory requirements, ensures the collection of necessary and comprehensive national data on the status of Indian children for whom ICWA applies and historical data on children in foster care. Thus, the Final Rule's data collection elements are necessary to ACF's statutory mission under Section 479 of the Social Security Act. The Tribes support the data collection requirements in the Final Rule.

The administration provided all interested parties with ample notice and opportunities to comment on the Final Rule.

Tribes, tribal organizations, and tribal advocates have long sought the inclusion of ICWA-related data points in the AFCARS. The initial rules were changed due to comments by these entities and others after reviewing the ACF's February 9, 2015 proposed rule. On April 2, 2015, the ACF issued a Supplemental Notice of Proposed Rulemaking (SNPRM) changing certain data elements. Yet another SNPRM was issued on April 7, 2016. Specifically, the ACF sought comments on the inclusion of the ICWA data points in both the April 2015 Intent to Publish a SNPRM, as well as the April 2016 SNPRM. Ultimately, the Final Rule was published on December 14, 2016, and included the ICWA data elements.

The Final Rule thoroughly responded to comments on both the benefits and burdens of the proposed regulatory action. *Given the multiple opportunities to comment throughout this time period, any additional collection action is unnecessary.* In addition, tribes, tribal organizations, and advocates received notice of all of these opportunities, and with ample time to comment on this vital and important rule change. In fact, the Tribes provided comments in response to the SNPRM on May 9, 2016. *See* attached comments.

States also had many opportunities to participate. As the Final Rule explains in detail, ACF engaged in robust consultation with states and responded to their concerns, for example, by streamlining many data elements. 81 Fed. Reg. 90524, 90565-66. *States had at least six different opportunities to raise their concerns, which the ACF considered and addressed fully.* 81 Fed. Reg. at 90566.

The Tribes does not think it is unreasonable to ask states, the vast majority of which did not express any significant or specific concerns during the rulemaking process, to provide basic and important information to help tribes, states, and the federal government improve outcomes for Indian children. If there is some additional technical assistance or assistance that states need, we would support that and understand that members of Congress who are following this have even

proposed enhancing the federal match rate for states while they are improving their data systems, as was done in 1993 when AFCARS was first implemented.

States are already in the process of implementing these changes.

Since these regulations have been effective for approximately fifteen months, all states should be in the process of implementing them. The Tribes are aware, for example, that California, a state with 109 federally recognized tribes, is already well under way with its implementation efforts, having relied on the Final Rule. At this stage, any modification of the data collection requirements would be a waste of finite state child welfare resources, which itself is an additional burden.

These regulations are important to Indian children and their tribes and will help ensure compliance with the ICWA.

Nothing has changed since ACF made clear in the Final Rule that data collection is necessary to protect Indian children, their families, and their tribes. There remains a pressing need for comprehensive national data on ICWA implementation and there have been no change in circumstances that would alter the burdens or benefits of the Final Rule's data collection requirements.

The data elements incorporated into the Final Rule include data that is readily available through the case files of Title IV-E managing agencies. This includes common case management data that details the activities of the Title IV-E agency and related activities of the court in certain child welfare cases.

The collection of ICWA-related data will follow a very similar framework and use similar sources of data that have been part of AFCARS requirements for many years.

The regulations themselves—in response to the comments from stakeholders across the country—describe the importance of these changes. As stated in the December 2016 Final Rule, 81 Fed. Reg. 90524, 90527:

> Overall, tribes, organizations, states, and private citizens supported our mission to collect additional information related to Indian children as defined in ICWA. Moreover, some states, tribes, national organizations, and federal agencies have stated that ICWA is the "gold standard" of child welfare practice and its implementation and associated data collection will likely help to inform efforts to improve outcomes for all children and families in state child welfare systems....
>
> Overall, tribal commenters and national child welfare advocacy organizations believe that collecting ICWA-related data in AFCARS is a step in the right

> direction to ensure that Indian families will be kept together when possible, and will help prevent AI/AN children from entering the foster care system. Many of the tribal commenters that supported the 2016 SNPRM also recommended extensive training for title IV–E agencies and court personnel in order to ensure accurate and reliable data.

Other federal reports have demonstrated the need for quality national data to assess states' efforts in implementing ICWA. *See* Government Accountability Office, Indian Child Welfare Act: Existing Information on Implementation Issues Could be Used to Target Guidance and Assistance to States, GAO-05-290 (Apr. 4, 2005) http://www.gao.gov/products/GAO-05-290 (last visited June 7, 2018).

Tribes have relied on the Final Rule.

Tribes have long sought data points regarding the implementation of ICWA. This has included advocacy on local, state, and federal levels. With the promulgation of the Final Rule in December of 2016, tribes largely ceased advocacy efforts to mandate data collection, instead refocusing tribal resources toward working collaboratively with their governmental partners to implement the data elements listed in the Final Rule. To this end, some tribes have worked to develop and update agreements to reflect the data elements in the Final Rule and the 2016 BIA ICWA Regulations, as a goal of both is to increase uniformity.

The ANPRM is arbitrary and capricious where it seeks only information on burdens.

This ANPRM arbitrarily focuses on collecting information about the burdens without considering the benefits. As required by law, the Final Rule conducted a careful analysis of the benefits and burdens, and appropriately amended the proposed rule to achieve a balanced Final Rule.

The ACF "determined in the final rule that the benefits outweigh the burden associated with collecting and reporting the additional data." 81 Fed. Reg. at 90528. The ACF explained how its weighing of the benefits and burdens led it to make certain changes to its proposal. For example, as stated in the Final Rule at 81 Fed Reg. 90528:

> In response to state and tribal comments suggesting congruence with the BIA's final rule, we revised data elements in this final rule as appropriate to reflect the BIA's regulations including removing requirements that state title IV–E agencies report certain information only from ICWA-specific court orders. These changes should allow the state title IV–E agency more flexibility, alleviate some of the burden and other concerns identified by states, help target technical assistance to

increase state title IV–E agency communication and coordination with courts, and improve practice and national data on all children who are in foster care.

There have been no material changes in circumstances justifying the ACF's new approach. The executive order is not a sufficient basis for the ACF to act, as the executive order itself is arbitrary and unlawful where it provides an insufficient basis for reasonable decision-making relaying solely on an examination the burden of regulations without the required balancing of benefits. Additionally, the executive orders to fail to provide justification to deviate from the statutory requirement for regulations.

Specific Responses to the Questions for Comment Provided in the ANPRM:

1. Identify the data elements, non-ICWA-related, that are overly burdensome for state and tribal title IV-E agencies and explain why. Please be specific in identifying the data elements and provide a rationale for why collecting and reporting this information is overly burdensome.

The Tribes cannot identify any overly burdensome tasks. All the data elements are necessary.

2. Previously, we received comments regarding burden and the system changes needed to report the ICWA-related data elements of the 2016 SNPRM. We would like to receive more detailed comments on the specific limitations we should be aware of that states will encounter in reporting the ICWA-related data elements in the final rule. Please be specific in identifying the data elements and provide a rationale for why this information is overly burdensome.

The ANPRM requests IV-E states and tribes to provide the number of children in foster care who are considered Indian children as defined in ICWA. However, it is specifically due to the previous lack of a national data-reporting requirement, that any number provided in response to this question will likely be significantly inaccurate. This speaks to the critical importance of the ICWA-related data points – without a data-reporting requirement, many states simply do not appropriately track Indian children in their child welfare systems, let alone the individual ICWA-related data points. The Tribes cannot identity any overly burdensome tasks for reporting of the data elements.

3. Previously, we received comments that particular data elements did not lend themselves to national statistics and were best assessed with qualitative methods such as case review. Please provide specific recommendations on which data elements in the regulation to retain that are important to understanding and assessing the foster care population at the national level. Also, provide a rationale for your suggestion that may include its relevance to monitor compliance

with the title IV-B and IV-E programs or another strong justification for using the data at the national level.

As discussed above, there has been ample opportunity for comment and this additional ANPRM is itself both unlawful, as crafted, and is a waste of finite resources. Tribes and states properly relied on the Final Rule in working toward implementation for nearly a year and a half. Any modification to the existing data points frustrate those efforts, would require states to begin again, including collaborating with their tribal partners, and ultimately further delay implementation. This comes at the expense of the health, safety, and welfare of not only Indian children, their families, and their tribes, but also the child welfare system at large, where a modification of the Final Rule would cost system-wide resources.

Furthermore, the ICWA, enacted November 8, 1978, is a federal law that the U.S. Congress enacted to address the best interests and welfare of Indian children at the national level. The ICWA is rapidly approaching its 40-year anniversary, however there is not a single state that has fully implemented or complied with the provisions of that law. National statistics and data elements directly tied to ICWA compliance are absolutely essential to continue moving toward conformity with the federal law.

4. Previously we received comments noting concerns with variability in some of the data elements across states and within jurisdictions. Please provide specific suggestions to simplify data elements to facilitate the consistent collection and reporting of AFCARS data. Also, provide a rationale for each suggestion and how the simplification would still yield pertinent data.

In the absence of a national data-reporting requirement, it is guaranteed there will be variability with data elements, which frustrates a stated purpose of the 2016 BIA ICWA Regulations, to establish uniformity of application throughout the nation. The need to eliminate the data variability is precisely why it is important to have a national data collection standard. It will assist HHS/ACF efforts to support states in properly implementing ICWA by having targeted, data-driven identified areas where states need support the most.

5. Previously we received comments questioning the utility, reliability, and purpose of certain data elements at the national level. Provide specific recommendations on which data elements in the regulation to remove because they would not yield reliable national information about children involved with the child welfare system or are not needed for monitoring the title IV-B and IV-E programs. Please be specific in identifying the data elements and provide a rationale for why this information would not be reliable or is not necessary.

Each of the ICWA-related data points are specifically tied to existing federal laws and regulations and are necessary to monitor and support title IV-B and IV-E programs. Each of the ICWA-related data points are critical.

Further, as discussed above, ICWA is the "gold standard" of child welfare and ensuring compliance with this federal law informs how the existing child welfare system may improve in whole. The Tribes agree with the intent of the federal law, and urges immediate implementation of the reporting requirements.

Conclusion:

For the foregoing reasons, the Tribes strongly support each of the ICWA-related data points as set forth in the Final Rule and believe, as the ACF did in publishing the Final Rule, the benefits of this data collection outweighs any perceived burden.

In closing, the Indian Child Welfare Act is widely considered the "gold standard" of child welfare, and a refinement of family reunification objectives mandated by nearly every state. Any hindrance or stoppage of ICWA data point collection significantly affects tribal children, families, and state agencies trying to comply. In the interest of protecting the Tribes' most valuable and vulnerable asset, our children and their families, the Tribes respectfully submits these comments and urges ACF to expedite the implementation of the reporting requirements.

Sincerely,

Nathan Small

Nathan Small
Chairman, Fort Hall Business Council
Shoshone-Bannock Tribes

5

The SHOSHONE-BANNOCK TRIBES

FORT HALL INDIAN RESERVATION
PHONE (208) 478-3700
FAX # (208) 237-0797

FORT HALL BUSINESS COUNCIL
P.O. BOX 306
FORT HALL, IDAHO 83203

May 9, 2016

Ms. Kathleen McHugh, Director
Policy Division
Administration for Children and Families
United States Department of Health and Human Services
330 C Street, SW
Washington, DC 20024

Re: Supplemental Notice of Public Rulemaking – Proposed AFCARS data elements related to the Indian Child Welfare Act of 1978 –RIN 0970-AC47 – Federal Register (April 7, 2016)

Dear Ms. McHugh,

The Shoshone-Bannock Tribes appreciates this opportunity to comment on the Supplemental Notice of Public Rulemaking (SNPRM) regarding the proposed Adoption and Foster Care Automated Reporting System (AFCARS) data elements related to the Indian Child Welfare Act of 1978 (ICWA). These regulations are necessary to realize the purpose and intent of ICWA – to protect the best interests of American Indian and Alaska Native (AI/AN) children and to promote the stability and security of tribes and families.

The unique legal status of AI/AN children and the corresponding safeguards provided under federal laws, like ICWA, are not addressed in current federal reporting requirements for state child welfare systems that serve AI/AN children and families. Lacking adequate data elements, states and child welfare agencies struggle to address the disproportionate number of AI/AN children in state child welfare systems. As a result, the purpose and intent of ICWA remains unfulfilled. The AFCARS data elements proposed in the SNPRM fill this void.

Providing uniform federal data collection regulations enables states and child welfare agencies to identify the best approach to protect the best interests of AI/AN children and to promote the stability and security of tribes and families. Tribes also benefit from access to this data because it allows them to track the progress of their tribal children and families in state child welfare systems. In addition, by collecting and analyzing this data, states and tribes can forge a stronger partnership to realize the purpose and intent of ICWA. Considering AI/AN children are at least two times more

likely than any other group to enter state child welfare systems, the time to adopt uniform federal data collection regulations is now.

The uniform federal data collection regulations provide detailed information on ICWA implementation. They include a series of data elements tied to ICWA requirements that will allow tribes, states, and federal agencies to develop a more detailed understanding of the trends in out-of-home placement and barriers to permanency for AI/AN children. Access to this data will develop better policy, technical assistance, training, and resource allocation. Collecting the data proposed in the SNPRM will provide AI/AN children the same opportunities that other children currently have, and will better inform responses that address the unique issues in both policy and practice.

The proposed data elements in the SNPRM include data that is readily available through the case files of Title IV-E managing agencies. This includes common case management data that details the activities of the Title IV-E agency and related activities of the court in certain child welfare cases. The full AFCARS NPRM, like the SNPRM, also proposes data from Title IV-E agencies and courts. Existing AFCARS data elements that are similar include:

1. Transfer to Another Agency (1355.43(g)(4));
2. Living Arrangement and Provider information (1355.43(e)(1-16);
3. Authority for Placement and Care court order (1355.43(d)(4));
4. Termination of Parental Rights date (1355.43(c)(3)(ii)); and
5. Date of Judicial Finding of Abuse or Neglect date (1355.43(c)(4).

The collection of ICWA-related data will follow a very similar framework and use similar sources of data that have been part of AFCARS requirements for many years.

Title IV-E of the Social Security Act provides authority for the Secretary of the Department of Health and Human Services (DHHS) to regulate the collection and reporting of data regarding children who are in the care of a Title IV-E agency. DHHS recently interpreted this Act to include the *collection and reporting of data related to implementation of ICWA involving AI/AN children in state child welfare systems*. We are pleased to see the current Administration adopt this common sense clarification of current authority.

Specific Comments on SNPRM:

Identifying an "Indian Child" under ICWA – The data elements proposed under this category provide information about efforts and sources to identify an Indian child. While asking the birth or adoptive mother and father and/or Indian custodian are good sources, it would also be highly beneficial to include whether extended family members have been questioned as well, since many times they will have critical information that a particular birth parent may not. This also fits well with Title IV-E requirements to notice all adult relatives when a child in their family has been removed (42 U.S.C. 671(29)).

We would also suggest improving the language regarding whether a child is domiciled or resident on an Indian reservation to "on an Indian reservation or in a predominately Indian community."

This tracks the language in the revised federal guidelines that is intended to address whether a state agency or court has a reason to believe a child is an Indian child for ICWA purposes, not to address jurisdictional issues. In addition, adding the recommended language is in alignment with recognizes that many tribal members live off tribal lands in nearby areas, especially in Public Law 280 states (i.e., California), where tribal lands can be much smaller in size.

Transfer to tribal court – These data elements capture the request from eligible parties to transfer jurisdiction from state to tribal court. The data is critical to understanding changes in the case that can impact future agency and court decisions. We would recommend that one additional data element be included that provides a date on when the transfer of jurisdiction petition was approved.

Notification – The data elements under this category follow the ICWA requirements, but it needs to be pointed out that when asking state agencies to self-report "whether the Indian child's tribe (if known) was given proper legal notice of the child custody proceedings more than 10 days prior to the first child custody proceeding," the reported information may not be reliable or accurately reported. On at least one occasion in a California ICWA proceeding, county counsel interpreted the following provision of the California Welfare and Institutions Code, Section 224.2(b) to relieve the agency from providing any written notice to the Shoshone-Bannock Tribes, as we had verbally confirmed the child's member status:

> Notice shall be sent whenever it is known or there is reason to know that an Indian child is involved, and for every hearing thereafter, including, but not limited to, the hearing at which a final adoption order is to be granted, unless it is determined that the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.) does not apply to the case in accordance with Section 224.3. After a tribe acknowledges that the child is a member or eligible for membership in that tribe, or after a tribe intervenes in a proceeding, the information set out in subparagraphs (C), (D), (E), and (G) of paragraph (5) of subdivision (a) need not be included with the notice.

It should be noted in the data elements that the responses are sought in regard to the federal ICWA provisions, notwithstanding any state law to the contrary.

Active efforts to prevent removal and reunify with Indian family – The data elements under this category provide important information that impacts the ability to prevent removal in the first place and help reunify after removal. These are tied to the efforts by the state agency and court in these areas. While the data elements track many of the federal guidelines, there are some important missing elements that characterize active efforts and support our recommendations. First, we recommend adding language to the third bulleted data element "Invite representatives of the Indian child's tribe to participate in the proceedings." We recommend adding language so it will read, "~~Invite~~ **Engage** representatives of the Indian child's tribe to participate in the **legal** proceedings **and planning for and providing rehabilitative services to the child's family**."

ICWA and the accompanying federal guidelines direct state agencies to make active efforts that are appropriate to the Indian child and family's unique needs. Under A.2 of the revised federal guidelines the language specifies active efforts as "Taking into account the Indian child's tribe's prevailing social and cultural conditions and way of life, and requesting the assistance of

representatives designated by the Indian child's tribe with substantial knowledge of the prevailing social and cultural standards;." We recommend that the first bullet under this category be amended to include this language so it would read "Identify appropriate services to help the parent that take into account the Indian child's tribe's prevailing social and cultural conditions and way of life, and request the assistance of the representatives designated by the Indian child's tribe."

Removals – The data elements in this category follow the ICWA requirements for involuntary placements, but do not address ICWA requirements for voluntary placements. These include parental consent provisions regarding voluntary foster care placement that are not addressed elsewhere in the SNPRM or the full AFCARS NPRM section which addresses voluntary placements. Since the voluntary consent requirements of ICWA are the same for foster care as they are for termination of parental rights (25 U.S.C. 1913(a), we recommend that the three SNPRM data elements addressing voluntary consent in the termination of parental rights category be added to the removal category with language adjusted to reflect consent to a voluntary foster care placement (see 1355.43(i)(22), 1355.43(i)(23), and 1355.43(i)(24)). We also recommend adding a data element that addresses the ICWA requirement regarding the return of the child to the birth parents if consent is withdrawn (25 U.S.C. 1913(b)).

Foster care and pre-adoptive placement preferences – These data elements specify information related to two of the three types of placements that are covered under the ICWA placement preferences for foster care and pre-adoptive placements (25 U.S.C. 1915(b)). ICWA defines foster care placement to include foster care, guardian or conservator, or institutional placement (25 U.S.C. 1903(1)(i)). While the full AFCARS NPRM provides data elements that address guardianships more generally, these data elements do not cover the placement preferences included under ICWA fully. For example, the AFCARS NPRM provides data elements that can identify relative and non-relative guardianship homes, but there are no data elements that can identify whether the guardian home was a tribally licensed or approved home or another Indian family guardian home licensed by the state. Our recommendation is to add clarifying language to the SNPRM in this section as follows:

> "Indicate which foster care or pre-adoptive placements that meet the placement preferences of ICWA in 25 U.S.C. 1915(b) were available to accept placement. "Foster Care Placement" is defined under ICWA as a "…temporary placement in a foster home or institution or the home of a guardian or conservator…" (25 U.S.C. 1903(1)(i))."

Termination of parental rights – The data elements in this category create data elements that track ICWA requirements regarding involuntary and voluntary termination of parental rights. Three of the four ICWA requirements are addressed in the data elements (evidentiary standard—beyond a reasonable doubt, expert witness testimony, and continued custody resulting in serious damage). However, arguably one of the most important requirements to avoid termination of parental rights, provision of active efforts, is not included. This is important because the first determination of active efforts in a removal can occur within the first few months of a case being opened, while the termination of parental rights hearing can occur several months or even a year or more later from the first active efforts determination. We recommend adding a data element that asks if the court made a determination, in a court order that active efforts had been made by the Title IV-E agency.

We thank DHHS for its efforts to fill the voids in federal data collection concerning AI/AN children and families and express our support for the establishment of the proposed data elements contained in the SNPRM. Nearly forty years after Congress enacted ICWA, substantial issues remain regarding the disproportionate number of AI/AN children in state child welfare systems. The proposed AFCARS in the SNPRM represent a strong commitment to address this disproportionality and realize the purpose and intent of ICWA. We look forward to working with DHHS in the future on how to best use the new data proposed in this SNPRM.

Sincerely,

Blaine J. Edmo
Chairman, Fort Hall Business Council
Shoshone-Bannock Tribes

As of: September 14, 2020
Received: June 08, 2018
Status: Posted
Posted: June 11, 2018
Tracking No. 1k2-93no-7gjq
Comments Due: June 13, 2018
Submission Type: E-mail

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0034
Pribilof Islands Aleut Community of St. Paul Island Tribal Government

Submitter Information

Name: Amos Philemonoff
Address: 99660
Organization: Pribilof Islands Aleut Community of St. Paul Island Tribal Government

General Comment

See Attached

Attachments

Pribilof Islands Aleut Community of St. Paul Island Tribal Government

2050 VENIA MINOR ROAD
P.O. BOX 86
ST. PAUL ISLAND, ALASKA 99660

OFFICE OF THE PRESIDENT

June 13, 2018

Attn: Kathleen McHugh
United States Department of Health and Human Services
Administration for Children and Families
Policy Division
330 C Street SW
Washington, DC 20024

Submitted via electronic correspondence at: CBcomments@acf.hhs.gov

Re: RIN: 0970-AC72 **Adoption and Foster Care Analysis and Reporting System;** Advance Notice of Proposed Rulemaking (3/15/2018)

Dear Ms. McHugh:

The **Pribilof Islands Aleut Community of St. Paul Island Tribal Government** submits these comments regarding the Advance Notice of Proposed Rulemaking published in the *Federal Register* on March 15, 2018 (Volume 83, No. 51, page 11449). Our comments pertain to data elements specific to American Indian and Alaska Native (AI/AN) children contained within the 2016 Adoption and Foster Care Analysis Reporting System (AFCARS) Final Rule published on December 14, 2016. The data elements we are commenting on address a number of relevant federal law requirements pertaining to the Indian Child Welfare Act (ICWA). We oppose any streamlining, modification, or elimination of these critical AFCARS data elements for AI/AN children.

It has been almost 25 years since the establishment of the AFCARS data collection system and 40 years since the enactment of ICWA. AI/AN children are still waiting to have basic data collected that describes their conditions, how relevant federal law under Title IV-B, Title IV-E, and ICWA is being implemented with respect to AI/AN children, and the identification of critical data that can inform local and national interventions to eliminate well-documented and long term foster care disproportionality and service disparities that AI/AN children face. Each year that data is not collected is another year AI/AN children will not see significant improvements to their well-being and policymakers and other government officials will not have the data they need to make smart, effective changes that can address these very serious, long-term problems; this is an untenable situation. We also note that nothing has changed since the publication of the 2016 Final Rule that would change the need for this critical data for AI/AN children. Instead, Congress has made it clear with the passage of the Family First Prevention Services Act (Division E of the Bipartisan Budget Agreement Act of H.R. 1892) that they intend

for Title IV-E to be expanded to focus on additional services and efforts, not just a narrow band of placement activities.

General Comments

The 2016 Final Rule is within ACF's Statutory Authority and Mission. Section 479 of the Social Security Act mandates the Department of Health and Human Services (DHHS) collect national, uniform, and reliable information on children in state foster care and adoptive care. The statutory language is expansive and suggests a broad collection of data for children under state care who are in foster care or adoption that includes their demographics, characteristics, and status while in care. Section 1102 of the act instructs the Secretary of DHHS to develop regulations necessary to carry out the functions for which DHHS is responsible under the act.

In addition, Section 422 of the Social Security Act requires DHHS to collect descriptions from states of a state's efforts to consult with tribes on the specific measures taken by a state to comply with ICWA. This provision has been in federal law since 1994 and DHHS has responded by asking states to provide this information, along with additional information related to ICWA implementation in state Annual Progress and Services Reports. DHHS also has a long history of collecting information, although limited, on ICWA implementation through their Child and Family Services Review process with states. These reports and reviews are authorized under the broad discretionary authority provided to DHHS under Titles IV-B and IV-E of the Social Security Act to collect data from states and review their progress against different federal child welfare requirements.

The Final Rule, which ACF developed under the statute, ensures the collection of necessary and comprehensive national data on the status of American Indian/Alaska Native (AI/AN) children to whom ICWA applies, and historical data on children in foster care. Thus, the Final Rule's data collection elements are necessary to ACF's statutory mission under the Social Security Act. In addition, there is no statutory requirement that all data elements must be specifically tied to Title IV-E or Title IV-B requirements only.

ACF provided ample notice and opportunities to comment on the 2016 Final Rule. On April 2, 2015, ACF issued a Supplemental Notice of Proposed Rulemaking (SNPRM) proposing changes to AFCARS data elements. A year later on April 7, 2016, ACF published another SNPRM proposing the addition of new AFCARS data elements related specifically to data concerning American Indian and Alaska Native (AI/AN) children and families. The proposed data was related to federal law requirements specific to ICWA and placements of AI/AN children. The Final Rule was published eight months later on December 14, 2016, and included the ICWA data elements.

The 2016 Final Rule was the product of a thorough and well-reasoned process that included opportunities for states, tribes, and other interested parties to comment. Issues related to the benefits for AI/AN children and families and burdens upon states to collect and report the data were thoroughly addressed in the Final Rule. While there was almost unanimous support provided to including the new data elements for AI/ANs, there was also very little concern expressed by states submitting comments specific to the addition of new data elements for

AI/AN children and families. The few state comments that were received that expressed concern with the ICWA data elements were generally vague and expressed general concern regarding the burden of collecting new data of any type. Furthermore, as evidenced in the 2016 Final Rule discussion, ACF engaged in several discussions with states (6) regarding their perspectives on the proposed changes and as a result streamlined many of the data elements proposed in the SNPRM. The very thorough and well-thought out regulatory process used in developing the 2016 Final Rule evidences that no additional collection of information is necessary.

The data in the 2016 Final Rule is vital to the federal government, Congress, states, and tribes to effectively address the needs of AI/AN children and families. AI/AN children have been overrepresented in state foster care systems for over two decades, going back to the initial implementation of the AFCARS system. Prior to the 2016 Final Rule AFCARS only asked questions related to whether a child in state care and custody was self-identified as AI/AN. This self-identification does not provide necessary information to understand whether a child has a political relationship with a federally recognized tribe as a citizen of that tribe and whether other federal law requirements under ICWA are being implemented, especially those related to the placement of the child in substitute care and whether the child's tribe was engaged in supporting the child and family. As a result, AFCARS data has provided little help in understanding how to address chronic and persistent issues, such as foster care disproportionality, that are barriers to the well-being of AI/AN children and families—issues that not only affect the well-being of children, but also cost states and tribes considerable amounts of their finite resources.

Another practical implication for not implementing the data elements for AI/AN children in the Final Rule is it sends a message to states and tribes that the federal government does not consider data collection on this population a priority issue, which also disincentivize state and tribal efforts to address these issues at the federal and local level. As an example of how insufficient data collection can frustrate efforts to improve outcomes for AI/AN children, in the 2005 General Accountability Office (GAO) report on ICWA implementation (GAO-05-290) GAO indicated that they were hindered in their task to fully research and understand the questions submitted by a group of bi-partisan members of Congress because of insufficient data available from both state and federal data collection systems. At the local level, while states and tribes are increasingly partnering to improve ICWA implementation and improve outcomes for AI/AN children, data collection is a consistent concern and hampers efforts by states and tribes to demonstrate the need for additional policies and resources with state legislators. Since the publication of the Final Rule in December of 2016 a number of states have already begun work with tribes in their state on data system improvements and begun discussions of how the data would be supported and shared among state and tribal governments. Unfortunately, this Advanced Notice of Proposed Rule Making (ANPRM) has caused these efforts to be called into question and further delay the ability to seek real, meaningful answers to issues that frustrate AI/AN children's well-being on a daily basis.

The regulations themselves, in response to the comments from tribes and states, describe the importance of the 2016 Final Rule changes. As stated in the December 2016 Final Rule, 81 Fed. Reg. 90524, 90527:

> Overall, tribes, organizations, states, and private citizens supported our mission to collect additional information related to Indian children as defined in ICWA. Moreover,

> some states, tribes, national organizations, and federal agencies have stated that ICWA is the ''gold standard'' of child welfare practice and its implementation and associated data collection will likely help to inform efforts to improve outcomes for all children and families in state child welfare systems.

In light of these comments and the recent passage of the Family First Prevention Services Act by Congress in February of 2018 (Division E of the Bipartisan Budget Agreement Act, H.R. 1892) where Congress is clearly expanding the purposes of the Title IV-E program to include not only placement activities, but also prevention services to families, we see even more relevance and need for the data elements for AI/AN children and families included in the 2016 Final Rule.

Some of the expected benefits from implementing the full set of data elements for AI/AN children contained in the 2016 Final Rule include, but are not limited to, the following:

1. provide data on core ICWA requirements such as ''active efforts'' to prevent removals of AI/AN children and success in securing appropriate placements, especially kinship care placements, that have been demonstrated to improve AI/AN children's connection to their family, culture, and tribal supports they need to succeed;

2. facilitate access to culturally appropriate services to AI/AN children and families to avoid out-of-home placement, keep children safe, and avoid unnecessary trauma to AI/AN children;

3. identify effective strategies to securing extended family and other tribal families who can serve as resources to AI/AN children and help address the shortage of AI/AN family placements for AI/AN children;

4. identify when tribes are being engaged to help support AI/AN children and families and trends related to how that engagement impacts outcomes for this population; and

5. provide avenues for collaboration between states and tribes that are more meaningful, and outcome driven, including improved policy development, technical assistance, training, and resource allocation as a result of having reliable data available.

The ANPRM is arbitrary and capricious where it seeks only information on burdens. This ANPRM arbitrarily focuses on collecting information about the burdens without considering the benefits. As required by law, the Final Rule conducted a careful analysis of the benefits and burdens, and appropriately amended the SNPRM to achieve a balanced Final Rule.

The Agency "determined in the final rule that the benefits outweigh the burden associated with collecting and reporting the additional data." 81 Fed. Reg. at 90528. The Agency explained how

weighing of the benefits and burdens led it to make certain changes to its proposal. For example: as stated in the Final Rule at 81 Fed Reg. 90528:

> In response to state and tribal comments suggesting congruence with the BIA's final rule, we revised data elements in this final rule as appropriate to reflect the BIA's regulations including removing requirements that state title IV-E agencies report certain information only from ICWA-specific court orders. These changes should allow the state title IV-E agency more flexibility, alleviate some of the burden and other concerns identified by states, help target technical assistance to increase state title IV-E agency communication and coordination with courts, and improve practice and national data on all children who are in foster care.

There have been no significant changes justifying ACF's proposal to reexamine the 2016 Final Rule. ACF seems to rely upon the President's Executive Order (13777) for all federal agencies to identify regulations that are perceived as burdensome or unnecessary, but this is not a sufficient basis for ACF to act, as the Executive Order itself is arbitrary and unlawful where it provides an insufficient basis for reasonable decision-making relaying solely on an examination of the burden of regulations without the required balancing of benefits. Additionally, the Executive Order fails to provide justification to deviate from the statutory requirement for regulations.

Responses to the Questions for Comment provided in the ANPRM:

1. Identify the data elements, non-ICWA-related, that are overly burdensome for state and tribal title IV-E agencies and explain why. Please be specific in identifying the data elements and provide a rationale for why collecting and reporting this information is overly burdensome.

We believe that the new data elements provided in the 2016 Final Rule that address health assessments, educational achievement, siblings, mental health services, sex trafficking, sexual orientation, permanency planning, adoption, guardianship, and housing are important for AI/AN children and youth as well. Burdens to collecting this data for tribes and states are relatively small considering the benefits to improving outcomes for AI/AN children and families, especially given many of the data elements are correlated to some of the most vulnerable populations in child welfare systems and identification of risks associated to their well-being.

2. Previously, we received comments regarding burden and the system changes needed to report the ICWA-related data elements of the 2016 SNPRM. We would like to receive more detailed comments on the specific limitations that states will encounter in reporting the ICWA-related data elements in the final rule. Please be specific in identifying the data elements and provide a rationale for why this information is overly burdensome.

The 2016 Final Rule requests title IV-E states provide the number of children in foster care who are considered Indian children as defined in ICWA. This is data that is currently not collected or reported in any national child welfare data system and is the key to understanding other important issues that are unique to AI/AN children and federal law requirements under ICWA.

The current data in AFCARS only identifies AI/AN children through self-identification, which provides inaccurate and unreliable data. Relevant data measures in ICWA related to placement, engagement with the child's tribe, and efforts to avoid placement are not collected leaving federal agency, states, Congress, and tribes with little information to address pernicious issues impacting this population like foster care disproportionality. The 2016 Final Rule only requires states to collect the data elements in the 2016 Final Rule for AI/AN children that are ICWA eligible. Regardless of whether AFCARS data is collected all states are required by law to examine whether a child is ICWA eligible, so this effort is already required outside of AFCARS requirements. The 2016 Final Rule data specific to AI/AN children is not required to be collected for other non-Indian children so while there will be additional data collection for AI/AN children that are ICWA eligible, given the small number of AI/AN children in the vast majority of states this will not require a significant burden.

3. Previously, we received comments that particular data elements did not lend themselves to national statistics and were best assessed with qualitative methods such as case review. Please provide specific recommendations on which data elements in the regulation to retain that are important to understanding and assessing the foster care population at the national level. Also, provide a rationale for your suggestion that may include its relevance to monitor compliance with the title IV-B and IV-E programs or another strong justification for using the data at the national level.

All of the data elements for AI/AN children in the 2016 Final Rule are appropriate for a national data system like AFCARS. The activities related to the data are required by federal law, such as ICWA, and should be documented in any child welfare case file. The vast majority of the data would come from state agency activities with a few data elements coming in the form of state court orders, which should also be included in any well documented case file. To assume that some data may not be retrievable if it comes from judicial determinations is essentially saying that case files do not need to contain court orders, which would be out of alignment with nationally recognized standards in child welfare case management. In addition, not having this information in a case file poses risk that court orders are not being properly implemented and places children in jeopardy of not receiving the benefits of court oversight in child welfare.

Capturing AI/AN data through case file reviews or other qualitative methods would not provide the data that Congress, states, and tribes need on an ongoing basis to make necessary changes in policy, practice, and resource allocation to address the serious problems that have been impacting AI/AN children for over two decades. Existing qualitative methods, like case file reviews under the Child and Family Services Reviews, have demonstrated the limitations of this data for informing Congress on how best to address critical concerns for AI/AN children. Case file reviews in many states include only a handful of cases involving AI/AN children and the data retrieved does not lend itself to adequately informing local efforts to address serious concerns related to outcomes for this population, much less issues of national concern. AFCARS is much better suited to collecting the type of data required for AI/AN children and efforts to shift data collection to other less comprehensive data systems with less regular data collection and reporting will have a negligible effect on improving data for this population.

4. Previously we received comments noting concerns with variability in some of the data elements across states and within jurisdictions. Please provide specific suggestions to simplify data elements to facilitate the consistent collection and reporting of AFCARS data. Also, provide a rationale for each suggestion and how the simplification would still yield pertinent data.

In the absence of a national data reporting requirement, it is guaranteed the current variability in state data collection and reporting will continue as evidenced by only a few states collecting any data specific to AI/AN children, and the current AFCARS data questions that use self-identification as a determinant of whether a child is AI/AN, rather than the appropriate questions related to their citizenship in a tribal government. Even with appropriate questions related to whether an AI/AN child or their family are eligible for ICWA protections, linkages to other AFCARS data cannot be assumed to be sufficiently correlated for informing policymakers and child welfare agencies without the other data elements for AI/AN children in the 2016 Final Rule also being implemented. ACF as much as any stakeholder should have a strong interest in improving the availability of accurate and reliable data for this population, which they have dedicated significant amounts of their resources to in the form of technical assistance and training.

5. Previously we received comments questioning the utility, reliability, and purpose of certain data elements at the national level. Provide specific recommendations on which data elements in the regulation to remove because they would not yield reliable national information about children involved with the child welfare system or are not needed for monitoring the title IV-B and IV-E programs. Please be specific in identifying the data elements and provide a rationale for why this information would not be reliable or is not necessary.

Each of the ICWA-related data points are tied to existing federal law and regulation and are necessary to monitor and support title IV-B and IV-E programs. Each of the ICWA-related data points is critical. The Title IV-B plan requirement for states that requires that states consult with tribal governments on their plans to implement ICWA has so far relied primarily on anecdotal information that is not collected or tracked uniformly by ACF leading to uneven responses to concerns about poor outcomes for AI/AN children in different states. The data elements contained in the 2016 Final Rule are linked in terms of being able to provide a complete picture of how AI/AN children are doing, and by eliminating or streamlining some of these data elements ACF would be compromising the integrity of the data to confidently inform policymakers and other stakeholders as to the important data trends and explanations for these trends.

In addition, as was stated earlier in our general comments, ICWA has been viewed as the "gold standard" in child welfare practice by leading national child welfare organizations and now with the passage of the Family First Prevention Services Act we can see there is increased support and interest in capturing more information on how states and tribes can improve outcomes for children and families beyond just improving the placement experience. The 2016 Final Rule data elements specific to AI/AN children are aligned with these acknowledgements and will be significantly helpful to all stakeholders involved in improving services and outcomes for AI/AN children.

Conclusion

The experience of having little to no data collected for AI/AN children through AFCARS over the last two decades has resulted in not meaningful improvements in the safety and well-being for AI/AN children and could be argued as having contributed to the worsening conditions for this population. We know of no other federal child welfare law that does not have some form of basic data collection and certainly not one that is 40 years old as ICWA is. The AFCARS data elements for AI/AN children in the 2016 Final Rule have incredible potential to improve outcomes for this population, but only if the data elements are not heavily modified or eliminated. While there are burdens for states to collect this data, for the past 40 years it has primarily AI/AN children, their families, and tribal communities that have born the burden while little to no reliable data has been collected and the crisis of foster care disproportionality has worsened. The time has come to move forward with this critically important data collection for AI/AN children and families and end the delays for not collecting the data that is necessary to support and promote healing for this population.

Sincerely,

Amos T. Philemonoff, Sr.
President, Aleut Community of St. Paul Island

As of: September 14, 2020
Received: June 08, 2018
Status: Posted
Posted: June 11, 2018
Tracking No. 1k2-93lx-clfn
Comments Due: June 13, 2018
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0035
Tennessee

Submitter Information

Name: Michael Leach
Address: 37076
Email: michael.h.leach@tn.gov
Organization: Tennessee

General Comment

See attached file(s)

Attachments

Tennessee

Tennessee has reviewed the Adoption and Foster Care Analysis and Report System (AFCARS) Notice of Proposed Rule-making and appreciates the extended period for submitting comments. Tennessee is in the final stages of finishing up its AFCARS Improvement Plan from the 2013 review. These proposed new requirements represent a substantial effort, both from a case management and a technology perspective.

Tennessee recognizes the importance of AFCARS data in monitoring performance on federal permanency measures and effective management of federal funds to support programs and initiatives to improve outcomes. However, collection of AFCARS data elements has a significant impact on child welfare casework, particularly when many elements are those that cannot be collected in the normal workflow of the case. Additionally, some of these elements are not used by the State in its performance outcomes and therefore would be collected exclusively for federal reporting purposes.

In addition to the added burden on front-line staff to collect and document the information, there is also a burden and cost involved with enhancing TN's SACWIS/CCWIS to allow the documentation of the information. Much of the work planned for future enhancements involves creating interfaces with existing systems such as Education and Medicaid. For some proposed elements, it would seem that the best course of action would be to obtain information from those systems already in place rather than require States to build the same or similar elements in their SACWIS/CCWIS.

- **Education Elements – Child Information: Section 1355.43 (b)(16)**
  - TN Department of Children's Services strives to ensure stability for children in out of home care, which includes, to the extent practicable, keeping those children in their same school districts. DCS, working in collaboration with state and local education agencies, works to strengthen and support the academic achievements of these children.
  - While TN's SACWIS/CCWIS is considered the system of record for child welfare data, TN's Department of Education (DOE) holds responsibility for the capture and tracking of education data for TN's children in public schools.
  - TN DCS fully intends to develop an interface that will derive educational data for the custodial population from the DOE system of record and update each child TFACTS record with that data. The intent is to eliminate the need for DCS case management staff to enter any educational data in TFACTS. This will not only reduce the amount of time staff spend on gathering information and entering into TFACTS, but the quality and timeliness of the data is sure to be much better as it will come straight from the source. It will also get TN one step closer to CCWIS compliance.
  - If we interface with DOE, then we are dependent on whatever data elements are captured in their system. If some of the proposed AFCARS education requirements are NOT captured in the DOE system, then would DCS have to develop those elements in addition to the interface and hold case managers responsible for entering that? That would seem to defeat the purpose of the interface.
  - TN DCS respectfully recommends that ACF consider acquiring this information from the US Department of Education.

- **Sexual Orientation Elements – Child Information – Section 1355.44(b)(2); Living Arrangement and Provider Information – Section 1355.44(e)(19, 25); Exit to Adoption and Guardianship Information – Section 1355.44(h)(8, 14)**
  - TN recognizes the need to better understand the experiences of LGBTQ youth in foster care. Those youth may have unique service needs and may be at an increased risk for poor outcomes.
  - However, TN questions the purpose and intent of gathering/reporting this information for foster and adoptive parents. TN does not ask or require these parents to disclose that information. Rather, TN asks its foster and adoptive parents whether they are willing to accept a youth who identifies with a sexual orientation that is different from their own. That in no way indicates the sexual orientation of the parents but identifies them as a potential resource for LGBTQ youth, and that's the most important aspect of this.
  - TN intends to add the ability to document Sexual Orientation information in TFACTS for any person. However, TN respectfully requests that ACF not require reporting of this information for anyone other than older youth (12 and over) who are in the AFCARS reporting population. Requiring staff to respond to an element for youth under 12 and for foster/adoptive parents will increase the amount of information gathering and data entry they are responsible with little benefit.

- **ICWA – Child Information: Section 1355.44(b)(3-8)**
  - There are 153 new data elements being proposed for AFCARS 2.0…..65 of those new elements are ICWA-related.
  - Tennessee is one of 14 States without a federally or State recognized tribe. Over the past 5 years, less than 1% (47 out of 35,269) of TN's AFCARS reporting populations have a documented tribal affiliation.
  - Using the ACF estimate of 10 hours per case[1] at $42.00 per hour[2], the cost of staff searching sources, gathering info and entering the collected data into TFACTS comes to $19,740 over a 5 year span. However, all staff that carries at least one custodial client on their caseloads must be trained on how to obtain, document and report ICWA-related information…just in case. The average number of custodial case managers over the past 5 years is 1,150.
  - While these numbers may not reflect the same level of burdens a in those states that encounter a higher volume of ICWA-qualified children in their populations, please consider the following information related to the costs of development in TFACTS (TN's SACWIS/CCWIS). TFACTS currently only enables capture of Race (American Indian/Alaska Native) and Tribal Affiliation for any person created. Any ICWA elements above and beyond that would be new development. TN has estimated that this development project would have an approximate duration of six (6) months (design/develop/test/implement) and an approximate resource cost of $280,300.
  - TN already has a list of Management Advisory Committee approved and prioritized TFACTS projects whose estimated collective duration extends two years into the future. Introducing a new ICWA project into the midst of that would disrupt and delay

[1] "Adoption and Foster Care Analysis and Reporting System" Fed. Reg. Vol 81, No 240
[2] "Adoption and Foster Care Analysis and Reporting System" Fed. Reg. Vol 81, No 240

work on projects that, once implemented, would support the critical daily business of the Agency.

- It is TN's opinion that the costs associated with fully implementing all proposed ICWA requirements are prohibitive when compared to the actual/expected usage of the elements. Additionally, the disruption to development schedule for established priority projects would be significant.
- TN respectfully requests that ACF scale down the number of proposed new ICWA requirements to only capture if a child is a member of a federally-recognized tribe and if so, which one. TN doesn't understand the value of indicating how we know and who we asked.

- **Health, Behavioral or Mental Health Conditions – Child Information: Section 1355.44(b)(13)**
  - Tennessee DCS does not reliably receive specific diagnostic information about youth in a usable format. This information is communicated from healthcare providers to TN DCS on a paper form that is handwritten and frequently illegible. This makes it impossible for us to capture the diagnostic information requested by ACF. DCS is always happy to evaluate ways in which we could improve our own practice; however, DCS ultimately depends on each healthcare provider in the community to provide clear documentation, which is outside our locus of control.
  - Even if health care providers were to provide clear, legible information, DCS does not have a staff of clinicians who are able to transcribe or translate that clinical information from a paper document into meaningful diagnostic codes for the purposes of federal tracking.
  - By contrast, our Tennessee Medicaid system (TennCare) receives encounter information for each appointment for billing purposes, which captures diagnostic information.
  - Tennessee DCS has a long-range goal of building an interface with Medicaid so that we can retrieve data directly from this agency regarding items such as diagnosis. However, this system has not yet been built and until that time, we have nothing but handwritten documentation from medical providers, which is illegible and uninterpretable by non-clinicians.
  - Tennessee DCS respectfully recommends that since Medicaid systems directly and electronically receives billing information including diagnosis, that ACF should consider obtaining this data from the US Department of Health and Human Services Medicaid systems.

Thank you for the thoughtful consideration these comments.

As of: September 14, 2020
Received: June 11, 2018
Status: Posted
Posted: June 11, 2018
Tracking No. 1k2-93np-y2c0
Comments Due: June 13, 2018
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0036
Kentucky

Submitter Information

Name: Jennifer Thornhill
Address: 40621
Email: jennifer.thornhill@ky.gov
Organization: Kentucky

General Comment

Kentucky comments attached.

Attachments

Kentucky

Kentucky 83 FR 11449 Comments

1. Overly burdensome elements, non-ICWA related
   - **Living Arrangement and Provider Information**
     - Jurisdiction or country where child is living should be removed, as this not relevant nationally or needed for IV-B or IV-E monitoring.
   - **General and Child Info**
     - There are 11 elements/sub-elements under education, under General and Child Info, that could be simplified, as this appears to be excessive. For example:
       - School enrollment and education level are repetitive. These are asking the same thing. One should be deleted.
       - Proximity and district/zoning are repetitive and could be combined.
       - Child request and parent/legal guardian request could be combined.
       - Other is not needed.

1.a.i. The hours spent annually on searching data sources, gathering information and entering the information into the electronic case management system is not captured for data elements. However, the additional gathering and entering of this information falls to field staff who are already overly burdened. The current workforce is extremely understaffed, therefore, adding any additional burden to the extremely high caseloads is unreasonable. Additionally, when field staff are not able to meet the requirements, financial penalties are incurred, which only adds to workforce and support issues.

1.a.ii. An annual estimate of hours spent to modify existing procedures and systems to collect, validate and verify would not be an accurate representation of the work that would need to be completed. A one time estimate would be a better description of the work. Standards of Practice (SOP) changes would be required to guide field staff in the collecting of data elements during investigations and throughout the life of the case. This would require work from many program and technical staff, with an estimate of 1,000 hours to complete, for the procedure modification, for both ICWA and non-ICWA. At this time, Kentucky is unable to estimate the minimum number of hours to modify the existing system to collect, validate, and verify. Due to the larger number of elements to be tentatively added to the system, further analysis is needed.

1.a.iii. The hours spent annually to complete training and administrative tasks associated with training personnel on the AFCARS requirements is estimated, at a minimum, at 2,537, for both ICWA and non-ICWA. This would be in addition to the 8,500 hours (2017 training hours) already spent training field and administrative staff. A work group would have to be developed to identify all of the new elements, identify where in TWIST the new elements are captured, identify if new trainings are necessary, and determine which existing trainings are affected. New curriculums and training materials would have to be printed. Web-based training development and dissemination to staff would be required, as well as communication to field staff regarding the changes.

b. Hours spent annually extracting the information for AFCARS reporting and transmitting to the ACF, for both ICWA and non-ICWA.

AFCARS 2.0 IMPLEMENTATION	**TASKS**	**HOURS**	**COMMENTS**
Create new 2.0 extract file	-Project Management -Analysis -Development -Unit Testing	375	
Testing	-Break/Fix	150	
Implementation	-Production deployment	8	
Bi-annual extract	-A & B file extracts	40	Includes dry runs, data checks & updates
	TOTALS:	**573**	
NOTE-1: *these hours do not include the enhancements to i-twist to incorporate new field and tables to the database as well as new screens to allow workers to enter the data.*			
NOTE-2: *at this time, the FINAL Technical Bulletin has not been published on the Federal website*			

2. Specific limitations Kentucky will encounter in reporting the ICWA-related data elements include:

- The addition of these elements would be very labor intensive regarding modifications to the SACWIS. This would take resources away from the state that are needed in other areas.
- Kentucky, as well as many other states, faces major budget constraints on a daily basis. The time and resources involved in modifying the SACWIS could potentially cost more than states have available for such a project.
- Kentucky has very few ICWA cases compared to some other states. This is an intensive burden to create areas in the SACWIS for data entry that will not be used as often.
- There are many additional elements being proposed. This would add a lot of data entry requirements for field staff who are already overly burdened.

2.a. SACWIS currently does not capture children who are considered Indian children as defined by ICWA, only those identified by field staff as Native American.

2.b.i. The hours spent annually on searching data sources, gathering information and entering the information into the electronic case management system is not captured for data elements. However, the additional gathering and entering of this information falls to field staff who are already overly burdened. The current workforce is extremely understaffed, therefore, adding

any additional burden to the extremely high caseloads is unreasonable. Additionally, when field staff are not able to meet the requirements, financial penalties are incurred, which only adds to workforce and support issues. This is particularly burdensome when Kentucky has very few ICWA cases.

2.b.ii. Standards of Practice (SOP) changes would be required to guide field staff in the collecting of new ICWA data elements during the investigation and throughout the life of the case. An annual estimate of hours spent to modify existing procedures and systems to collect, validate and verify would not be an accurate representation of the work that would need to be completed. A one-time estimate would be a better description of the work. Standards of Practice (SOP) changes would be required to guide field staff in the collecting of data elements during investigations and throughout the life of the case. This would require work from many program and technical staff, with an estimate of 1,000 hours to complete, for the procedure modification, for both ICWA and non-ICWA. At this time, Kentucky is unable to estimate the minimum number of hours to modify the existing system to collect, validate, and verify. Due to the larger number of elements to be tentatively added to the system, further analysis is needed.

2.b.iii The hours spent annually to complete training and administrative tasks associated with training personnel on the AFCARS requirements is estimated at 2,537, for both ICWA and non-ICWA. Web-based training development and dissemination to staff would be required, as well as communication to field staff regarding the changes.

c. Hours spent annually extracting the information for AFCARS reporting and transmitting to the ACF, for both ICWA and non-ICWA.

AFCARS 2.0 IMPLEMENTATION	**TASKS**	**HOURS**	**COMMENTS**
Create new 2.0 extract file	-Project Management -Analysis -Development -Unit Testing	375	
Testing	-Break/Fix	150	
Implementation	-Production deployment	8	
Bi-annual extract	-A & B file extracts	40	Includes dry runs, data checks & updates
	TOTALS:	**573**	

NOTE-1: *these hours do not include the enhancements to i-twist to incorporate new field and tables to the database as well as new screens to allow workers to enter the data.*
NOTE-2: *at this time, the FINAL Technical Bulletin has not been published on the Federal website*

3. Recommendations on which data elements should be retained, that are important to understanding and assessing the foster care population at a national level. Rationale and any relevance to IV-B and IV-E monitoring.

- **Child Information**
  - Developmental delay, developmental disability, pregnant/fathered, and parenting youth placed together should be retained. All would lend to the capturing of data relevant to assessing the foster care population nationally.
  - Prior adoption date, adoption termination date, and intercountry adoption should be retained. All would lend to the capturing data on adoption recidivism. Intercountry adoption is also consistent with Title IV-B requirements.
- **Child and Family Circumstances at Removal**
  - Psychological/emotional abuse, medical neglect, and domestic violence should all be retained, as they lend to the capturing of data regarding types of maltreatment, nationally.
  - Sex trafficking victim prior to removal, and while in foster care should also be retained for consistency with Title IV-E requirements for the identification and reporting of sex trafficking victims.
- **Living Arrangement and Provider Information**
  - Child's relationship to foster parent should be retained, as this could yield relevant data to inform recruitment. It is also already collected for adoptive parents.
- **Permanency Planning**
  - Case worker visit dates with children should be retained for consistency with IV-B requirements for monthly visits with children.

4. Recommendations to simplify data elements to facilitate the consistent collection and reporting of AFCARS data. Rationale.

- **Living arrangements**
  - Available ICWA foster care and pre-adoptive placement preferences, and Foster care and pre-adoptive placement preferences under ICWA could be combined, as the only difference is the addition of 'placement does not meet ICWA placement preferences' to Foster care and pre-adoptive placement preferences under ICWA.
- **Child Information**
  - There are 11 elements/sub-elements under education, under General and Child Info, that could be simplified, as this appears to be excessive. For example:
    - School enrollment and education level are repetitive. These are asking the same thing. One should be deleted.
    - Proximity and district/zoning are repetitive and could be combined.

        - Child request and parent/legal guardian request could be combined.
        - Other is not needed.
    - There are three (3) elements that require the name of the tribe. This is repetitive and unnecessary. The suggestion would be to leave the element 'Indicate the name of the Indian tribe(s) that the court found is the Indian child's tribe, if listed on the court order' and eliminate the two that state 'Indicate the name(s) of all federally recognized Indian tribe(s) identified that may potentially be the Indian child's tribe(s)' and 'Indicate the name(s) of the Indian tribe(s) that were sent notice for a child custody proceeding as required by ICWA'

5. Recommendations on which data elements should be removed, that would not yield reliable national information about children in the child welfare system. Not needed for the monitoring of IV-B and IV-E programs. Rationale.

- **Living Arrangement and Provider Information**
    - Jurisdiction or country where child is living should be removed, as this not relevant nationally or needed for IV-B or IV-E monitoring.
- **ICWA Elements**
        - Application of ICWA
            - Indicate whether the state title IV-E agency knows or has reason to know that the child is an Indian child as defined by ICWA.- This element is repetitive. If staff have already asked mother, father, child, etc. about Indian heritage and reported that in the previous suggested elements, then this element would not be necessary.
        - Active efforts to prevent removal and reunify for Indian family
            - Most of the elements under this category should be deleted, as they are not specific to only ICWA cases. Most of these elements are requirements for all cases. Suggest deleting all of these elements, with the exception of the following two (2): 'Invite representative of the Indian child's tribe to participate in the proceedings' and 'Consider alternative ways of addressing the needs of the Indian child's parent and extended family if services do not exist or are not available'.
        - Removals
            - Elements under this category should be deleted, as they are not specific to only ICWA cases. These elements are required for all cases.
        - Termination of parental rights
            - All elements under this category should be deleted, as they are not specific to only ICWA cases. These elements are required for all cases.

- Adoption proceedings
  - 'Indicate whether the Indian child exited foster care to adoption' should be deleted. This element is not specific to only ICWA cases.

As of: September 14, 2020
Received: June 11, 2018
Status: Posted
Posted: June 11, 2018
Tracking No. 1k2-93nw-uxfr
Comments Due: June 13, 2018
Submission Type: E-mail

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0037
Equality Ohio

Submitter Information

Name: Grant Stancliff
Organization: Equality Ohio

General Comment

See Attached

Attachments

Equality Ohio

We are writing to comment on the Notice of Proposed Rulemaking at 83 Fed. Reg. 11449 proposing to streamline the Adoption and Foster Care Analysis and Reporting System (AFCARS) [RIN 0970-AC72]. We urge HHS to retain the voluntary sexual orientation questions for foster youth and foster and adoptive parents and guardians, as well as the data element on the reason for removal of a child from a home due to "family conflict related to child's sexual orientation, gender identity, or gender expression." Studies show that approximately 19% of foster youth identify as LGBTQ, and they experience worse safety, well-being and permanency outcomes than non-LGBTQ youth. For states and tribes to improve these outcomes and identify best practices for doing so, data collection on the state and national level is urgently needed. Same-sex couples foster at six times the rate of their opposite-sex counterparts, and can provide loving, supportive homes for America's 400,000+ foster youth.

We also urge HHS to retain the data elements related to the Indian Child Welfare Act, as American Indian and Native Alaskan foster youth are another vulnerable population overrepresented in foster care with worse safety, well-being, and permanency outcomes than non-Native youth.

Further, we ask HHS to add voluntary gender identity questions for foster youth over the age of 14 and foster and adoptive parents and guardians to AFCARS. Collecting gender identity data as well as sexual orientation data will help states and tribes develop streamlined, comprehensive services.

Data collection will help us determine our programatic priorities with an eye toward prevention and increasing protective factors for LGBTQ youth development.

As of: September 14, 2020
Received: June 11, 2018
Status: Posted
Posted: June 11, 2018
Tracking No. 1k2-93nw-lwff
Comments Due: June 13, 2018
Submission Type: E-mail

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0038
Lac Courte Oreilles Tribe of Lake Superior Chippewa Indians

Submitter Information

Name: Louis Taylor
Address: 54843
Organization: Lac Courte Oreilles Tribe of Lake Superior Chippewa Indians

General Comment

See Attached

Attachments

Lac Courte Oreilles Tribe of Lake Superior Chippewa Indians

LAC COURTE OREILLES TRIBAL GOVERNING BOARD
Pride of the Ojibwe

13394 W Trepania Road . Hayward . Wisconsin . 54843
Phone 715-634-8934 . Fax 715-634-4797

June 11, 2018

Attn: Kathleen McHugh
United States Department of Health and Human Services
Administration for Children and Families
Policy Division
330 C Street SW
Washington, DC 20024

Submitted via electronic correspondence at: CBcomments@acf.hhs.gov

Re: RIN: 0970-AC72 **Adoption and Foster Care Analysis and Reporting System;** Advance Notice of Proposed Rulemaking (3/15/2018)

Dear Ms. McHugh:

The **Lac Courte Oreilles Band of Lake Superior Chippewa Indians** submits these comments regarding the Advance Notice of Proposed Rulemaking published in the *Federal Register* on March 15, 2018 (Volume 83, No. 51, page 11449). Our comments pertain to data elements specific to American Indian and Alaska Native (AI/AN) children contained within the 2016 Adoption and Foster Care Analysis Reporting System (AFCARS) Final Rule published on December 14, 2016. The data elements we are commenting on address a number of relevant federal law requirements pertaining to the Indian Child Welfare Act (ICWA). We oppose any streamlining, modification, or elimination of these critical AFCARS data elements for AI/AN children.

It has been almost 25 years since the establishment of the AFCARS data collection system and 40 years since the enactment of ICWA. AI/AN children are still waiting to have basic data collected that describes their conditions, how relevant federal law under Title IV-B, Title IV-E, and ICWA is being implemented with respect to AI/AN children, and the identification of critical data that can inform local and national interventions to eliminate well-documented and long term foster care disproportionality and service disparities that AI/AN children face. Each year that data is not collected is another year AI/AN children will not see significant improvements to their well-being and policymakers and other government officials will not have the data they need to make smart, effective changes that can address these very serious, long-term problems; this is an untenable situation. We also note that nothing has changed since the publication of the 2016 Final Rule that would change the need for this critical data for AI/AN children. Instead, Congress has made it clear with the passage of the Family First Prevention Services Act (Division E of the Bipartisan Budget Agreement Act of H.R. 1892) that they intend for Title IV-E to be expanded to focus on additional services and efforts, not just a narrow band of placement activities.

General Comments

The 2016 Final Rule is within ACF's Statutory Authority and Mission. Section 479 of the Social Security Act mandates the Department of Health and Human Services (DHHS) collect national, uniform, and reliable information on children in state foster care and adoptive care. The statutory language is expansive and suggests a broad collection of data for children under state care who are in foster care or adoption that includes their demographics, characteristics, and status while in care. Section 1102 of the act instructs the Secretary of DHHS to develop regulations necessary to carry out the functions for which DHHS is responsible under the act.

In addition, Section 422 of the Social Security Act requires DHHS to collect descriptions from states of a state's efforts to consult with tribes on the specific measures taken by a state to comply with ICWA. This provision has been in federal law since 1994 and DHHS has responded by asking states to provide this information, along with additional information related to ICWA implementation in state Annual Progress and Services Reports. DHHS also has a long history of collecting information, although limited, on ICWA implementation through their Child and Family Services Review process with states. These reports and reviews are authorized under the broad discretionary authority provided to DHHS under Titles IV-B and IV-E of the Social Security Act to collect data from states and review their progress against different federal child welfare requirements.

The Final Rule, which ACF developed under the statute, ensures the collection of necessary and comprehensive national data on the status of American Indian/Alaska Native (AI/AN) children to whom ICWA applies, and historical data on children in foster care. Thus, the Final Rule's data collection elements are necessary to ACF's statutory mission under the Social Security Act. In addition, there is no statutory requirement that all data elements must be specifically tied to Title IV-E or Title IV-B requirements only.

ACF provided ample notice and opportunities to comment on the 2016 Final Rule. On April 2, 2015, ACF issued a Supplemental Notice of Proposed Rulemaking (SNPRM) proposing changes to AFCARS data elements. A year later on April 7, 2016, ACF published another SNPRM proposing the addition of new AFCARS data elements related specifically to data concerning American Indian and Alaska Native (AI/AN) children and families. The proposed data was related to federal law requirements specific to ICWA and placements of AI/AN children. The Final Rule was published eight months later on December 14, 2016, and included the ICWA data elements.

The 2016 Final Rule was the product of a thorough and well-reasoned process that included opportunities for states, tribes, and other interested parties to comment. Issues related to the benefits for AI/AN children and families and burdens upon states to collect and report the data were thoroughly addressed in the Final Rule. While there was almost unanimous support provided to including the new data elements for AI/ANs, there was also very little concern expressed by states submitting comments specific to the addition of new data elements for AI/AN children and families. The few state comments that were received that expressed concern with the ICWA data elements were generally vague and expressed general concern regarding the burden of collecting new data of any type. Furthermore, as evidenced in the 2016 Final Rule discussion, ACF engaged in several discussions with states (6) regarding their perspectives on the proposed changes and as a result streamlined many of the data elements proposed in the SNPRM. The very thorough and well-thought out regulatory process used in developing the 2016 Final Rule evidences that no additional collection of information is necessary.

The data in the 2016 Final Rule is vital to the federal government, Congress, states, and tribes to effectively address the needs of AI/AN children and families. AI/AN children have been overrepresented in state foster care systems for over two decades, going back to the initial implementation of the AFCARS system. Prior to the 2016 Final Rule AFCARS only asked questions related to whether a child in state care and custody was self-identified as AI/AN. This self-identification does not provide necessary information to understand whether a child has a political relationship with a federally recognized tribe as a citizen of that tribe and whether other federal law requirements under ICWA are being implemented, especially those related to the placement of the child in substitute care and

whether the child's tribe was engaged in supporting the child and family. As a result, AFCARS data has provided little help in understanding how to address chronic and persistent issues, such as foster care disproportionality, that are barriers to the well-being of AI/AN children and families—issues that not only affect the well-being of children, but also cost states and tribes considerable amounts of their finite resources.

Another practical implication for not implementing the data elements for AI/AN children in the Final Rule is it sends a message to states and tribes that the federal government does not consider data collection on this population a priority issue, which also disincentivize state and tribal efforts to address these issues at the federal and local level. As an example of how insufficient data collection can frustrate efforts to improve outcomes for AI/AN children, in the 2005 General Accountability Office (GAO) report on ICWA implementation (GAO-05-290) GAO indicated that they were hindered in their task to fully research and understand the questions submitted by a group of bi-partisan members of Congress because of insufficient data available from both state and federal data collection systems. At the local level, while states and tribes are increasingly partnering to improve ICWA implementation and improve outcomes for AI/AN children, data collection is a consistent concern and hampers efforts by states and tribes to demonstrate the need for additional policies and resources with state legislators. Since the publication of the Final Rule in December of 2016 a number of states have already begun work with tribes in their state on data system improvements and begun discussions of how the data would be supported and shared among state and tribal governments. Unfortunately, this Advanced Notice of Proposed Rule Making (ANPRM) has caused these efforts to be called into question and further delay the ability to seek real, meaningful answers to issues that frustrate AI/AN children's well-being on a daily basis.

The regulations themselves, in response to the comments from tribes and states, describe the importance of the 2016 Final Rule changes. As stated in the December 2016 Final Rule, 81 Fed. Reg. 90524, 90527:

> Overall, tribes, organizations, states, and private citizens supported our mission to collect additional information related to Indian children as defined in ICWA. Moreover, some states, tribes, national organizations, and federal agencies have stated that ICWA is the "gold standard" of child welfare practice and its implementation and associated data collection will likely help to inform efforts to improve outcomes for all children and families in state child welfare systems.

In light of these comments and the recent passage of the Family First Prevention Services Act by Congress in February of 2018 (Division E of the Bipartisan Budget Agreement Act, H.R. 1892) where Congress is clearly expanding the purposes of the Title IV-E program to include not only placement activities, but also prevention services to families, we see even more relevance and need for the data elements for AI/AN children and families included in the 2016 Final Rule.

Some of the expected benefits from implementing the full set of data elements for AI/AN children contained in the 2016 Final Rule include, but are not limited to, the following:

1. provide data on core ICWA requirements such as "active efforts" to prevent removals of AI/AN children and success in securing appropriate placements, especially kinship care placements, that have been demonstrated to improve AI/AN children's connection to their family, culture, and tribal supports they need to succeed;

2. facilitate access to culturally appropriate services to AI/AN children and families to avoid out-of-home placement, keep children safe, and avoid unnecessary trauma to AI/AN children;

3. identify effective strategies to securing extended family and other tribal families who can serve as resources to AI/AN children and help address the shortage of AI/AN family placements for AI/AN children;

4. identify when tribes are being engaged to help support AI/AN children and families and trends related to how that engagement impacts outcomes for this population; and

5. provide avenues for collaboration between states and tribes that are more meaningful, and outcome driven, including improved policy development, technical assistance, training, and resource allocation as a result of having reliable data available.

The ANPRM is arbitrary and capricious where it seeks only information on burdens. This ANPRM arbitrarily focuses on collecting information about the burdens without considering the benefits. As required by law, the Final Rule conducted a careful analysis of the benefits and burdens, and appropriately amended the SNPRM to achieve a balanced Final Rule.

The Agency "determined in the final rule that the benefits outweigh the burden associated with collecting and reporting the additional data." 81 Fed. Reg. at 90528. The Agency explained how weighing of the benefits and burdens led it to make certain changes to its proposal. For example: as stated in the Final Rule at 81 Fed Reg. 90528:

> In response to state and tribal comments suggesting congruence with the BIA's final rule, we revised data elements in this final rule as appropriate to reflect the BIA's regulations including removing requirements that state title IV-E agencies report certain information only from ICWA-specific court orders. These changes should allow the state title IV-E agency more flexibility, alleviate some of the burden and other concerns identified by states, help target technical assistance to increase state title IV-E agency communication and coordination with courts, and improve practice and national data on all children who are in foster care.

There have been no significant changes justifying ACF's proposal to reexamine the 2016 Final Rule. ACF seems to rely upon the President's Executive Order (13777) for all federal agencies to identify regulations that are perceived as burdensome or unnecessary, but this is not a sufficient basis for ACF to act, as the Executive Order itself is arbitrary and unlawful where it provides an insufficient basis for reasonable decision-making relaying solely on an examination of the burden of regulations without the required balancing of benefits. Additionally, the Executive Order fails to provide justification to deviate from the statutory requirement for regulations.

Responses to the Questions for Comment provided in the ANPRM:

1. Identify the data elements, non-ICWA-related, that are overly burdensome for state and tribal title IV-E agencies and explain why. Please be specific in identifying the data elements and provide a rationale for why collecting and reporting this information is overly burdensome.

We believe that the new data elements provided in the 2016 Final Rule that address health assessments, educational achievement, siblings, mental health services, sex trafficking, sexual orientation, permanency planning, adoption, guardianship, and housing are important for AI/AN children and youth as well. Burdens to collecting this data for tribes and states are relatively small considering the benefits to improving outcomes for AI/AN children and families, especially given many of the data elements are correlated to some of the most vulnerable populations in child welfare systems and identification of risks associated to their well-being.

2. Previously, we received comments regarding burden and the system changes needed to report the ICWA-related data elements of the 2016 SNPRM. We would like to receive more detailed comments on the specific limitations that states will encounter in reporting the ICWA-related data elements in the final rule. Please be specific in identifying the data elements and provide a rationale for why this information is overly burdensome.

The 2016 Final Rule requests title IV-E states provide the number of children in foster care who are considered Indian children as defined in ICWA. This is data that is currently not collected or reported in any national child welfare data system and is the key to understanding other important issues that are unique to AI/AN children and federal law requirements under ICWA. The current data in AFCARS only identifies AI/AN children through self-identification, which provides inaccurate and unreliable data. Relevant data measures in ICWA related to placement, engagement with the child's tribe, and efforts to

avoid placement are not collected leaving federal agency, states, Congress, and tribes with little information to address pernicious issues impacting this population like foster care disproportionality. The 2016 Final Rule only requires states to collect the data elements in the 2016 Final Rule for AI/AN children that are ICWA eligible. Regardless of whether AFCARS data is collected all states are required by law to examine whether a child is ICWA eligible, so this effort is already required outside of AFCARS requirements. The 2016 Final Rule data specific to AI/AN children is not required to be collected for other non-Indian children so while there will be additional data collection for AI/AN children that are ICWA eligible, given the small number of AI/AN children in the vast majority of states this will not require a significant burden.

3. Previously, we received comments that particular data elements did not lend themselves to national statistics and were best assessed with qualitative methods such as case review. Please provide specific recommendations on which data elements in the regulation to retain that are important to understanding and assessing the foster care population at the national level. Also, provide a rationale for your suggestion that may include its relevance to monitor compliance with the title IV-B and IV-E programs or another strong justification for using the data at the national level.

All of the data elements for AI/AN children in the 2016 Final Rule are appropriate for a national data system like AFCARS. The activities related to the data are required by federal law, such as ICWA, and should be documented in any child welfare case file. The vast majority of the data would come from state agency activities with a few data elements coming in the form of state court orders, which should also be included in any well documented case file. To assume that some data may not be retrievable if it comes from judicial determinations is essentially saying that case files do not need to contain court orders, which would be out of alignment with nationally recognized standards in child welfare case management. In addition, not having this information in a case file poses risk that court orders are not being properly implemented and places children in jeopardy of not receiving the benefits of court oversight in child welfare.

Capturing AI/AN data through case file reviews or other qualitative methods would not provide the data that Congress, states, and tribes need on an ongoing basis to make necessary changes in policy, practice, and resource allocation to address the serious problems that have been impacting AI/AN children for over two decades. Existing qualitative methods, like case file reviews under the Child and Family Services Reviews, have demonstrated the limitations of this data for informing Congress on how best to address critical concerns for AI/AN children. Case file reviews in many states include only a handful of cases involving AI/AN children and the data retrieved does not lend itself to adequately informing local efforts to address serious concerns related to outcomes for this population, much less issues of national concern. AFCARS is much better suited to collecting the type of data required for AI/AN children and efforts to shift data collection to other less comprehensive data systems with less regular data collection and reporting will have a negligible effect on improving data for this population.

4. Previously we received comments noting concerns with variability in some of the data elements across states and within jurisdictions. Please provide specific suggestions to simplify data elements to facilitate the consistent collection and reporting of AFCARS data. Also, provide a rationale for each suggestion and how the simplification would still yield pertinent data.

In the absence of a national data reporting requirement, it is guaranteed the current variability in state data collection and reporting will continue as evidenced by only a few states collecting any data specific to AI/AN children, and the current AFCARS data questions that use self-identification as a determinant of whether a child is AI/AN, rather than the appropriate questions related to their citizenship in a tribal government. Even with appropriate questions related to whether an AI/AN child or their family are eligible for ICWA protections, linkages to other AFCARS data cannot be assumed to be sufficiently correlated for informing policymakers and child welfare agencies without the other data elements for AI/AN children in the 2016 Final Rule also being implemented. ACF as much as any stakeholder should have a strong interest in improving the availability of accurate and reliable data for this population, which they have dedicated significant amounts of their resources to in the form of technical assistance and training.

5. Previously we received comments questioning the utility, reliability, and purpose of certain data elements at the national level. Provide specific recommendations on which data elements in the regulation to remove because they would not yield reliable national information about children involved with the child welfare system or are not needed for monitoring the title IV-B and IV-E programs. Please be specific in identifying the data elements and provide a rationale for why this information would not be reliable or is not necessary.

Each of the ICWA-related data points are tied to existing federal law and regulation and are necessary to monitor and support title IV-B and IV-E programs. Each of the ICWA-related data points is critical. The Title IV-B plan requirement for states that requires that states consult with tribal governments on their plans to implement ICWA has so far relied primarily on anecdotal information that is not collected or tracked uniformly by ACF leading to uneven responses to concerns about poor outcomes for AI/AN children in different states. The data elements contained in the 2016 Final Rule are linked in terms of being able to provide a complete picture of how AI/AN children are doing, and by eliminating or streamlining some of these data elements ACF would be compromising the integrity of the data to confidently inform policymakers and other stakeholders as to the important data trends and explanations for these trends.

In addition, as was stated earlier in our general comments, ICWA has been viewed as the "gold standard" in child welfare practice by leading national child welfare organizations and now with the passage of the Family First Prevention Services Act we can see there is increased support and interest in capturing more information on how states and tribes can improve outcomes for children and families beyond just improving the placement experience. The 2016 Final Rule data elements specific to AI/AN children are aligned with these acknowledgements and will be significantly helpful to all stakeholders involved in improving services and outcomes for AI/AN children.

Conclusion

The experience of having little to no data collected for AI/AN children through AFCARS over the last two decades has resulted in not meaningful improvements in the safety and well-being for AI/AN children and could be argued as having contributed to the worsening conditions for this population. We know of no other federal child welfare law that does not have some form of basic data collection and certainly not one that is 40 years old as ICWA is. The AFCARS data elements for AI/AN children in the 2016 Final Rule have incredible potential to improve outcomes for this population, but only if the data elements are not heavily modified or eliminated. While there are burdens for states to collect this data, for the past 40 years it has primarily AI/AN children, their families, and tribal communities that have born the burden while little to no reliable data has been collected and the crisis of foster care disproportionality has worsened. The time has come to move forward with this critically important data collection for AI/AN children and families and end the delays for not collecting the data that is necessary to support and promote healing for this population.

Respectfully submitted,

Louis D. Taylor, Chairman

As of: September 14, 2020
Received: June 11, 2018
Status: Posted
Posted: June 12, 2018
Tracking No. 1k2-93nx-vqzp
Comments Due: June 13, 2018
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0039
Comment on FR Doc # 2018-05042

Submitter Information

Name: Shannon Wilkowski

General Comment

I am writing to comment on the Notice of Proposed Rulemaking at 83 Fed. Reg. 11449 (Proposed Rule) proposing to streamline the Adoption and Foster Care Analysis and Reporting System (AFCARS) (RIN 0970-AC72).
I urge HHS to retain the voluntary sexual orientation questions for foster youth and foster and adoptive parents and guardians, as well as the data element on the reason for removal of a child from a home due to family conflict related to childs sexual orientation, gender identity, or gender expression.
Studies show that approximately 19% of foster youth identify as LGBTQ, and they experience worse safety, well-being, and permanency outcomes than non-LGBTQ youth. For states and tribes to improve these outcomes and identify best practices for doing so, data collection on the state and national level is urgently needed.
Same-sex couples foster at six times the rate of their opposite-sex counterparts, and can provide loving, supportive homes for Americas 400,000+ foster youth.
I also urge HHS to retain the data elements related to the Indian Child Welfare Act, as American Indian and Native Alaskan foster youth are another vulnerable population overrepresented in foster care with worse safety, well-being, and permanency outcomes than non-Native youth.

As of: September 14, 2020
Received: June 11, 2018
Status: Posted
Posted: June 12, 2018
Tracking No. 1k2-93oc-999j
Comments Due: June 13, 2018
Submission Type: E-mail

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0040
Montana Legal Justice, PLLC

Submitter Information

Organization: Montana Legal Justice

General Comment

See attached

Attachments

Montana Legal Justice, PLLC Shannon Hathaway

Montana Legal Justice, PLLC Julie Brown

Montana Legal Justice, PLLC Kelly Driscoll

Montana Legal Justice, PLLC Lael Gabrian

Montana Legal Justice, PLLC

521 N. Orange Street
Missoula, MT 59802
(406) 356–6546
www.montanalegaljustice.com

June 12, 2018

Attn: Kathleen McHugh
United States Department of Health and Human Services
Administration for Children and Families
Policy Division
330 C Street SW
Washington, DC 20024

Submitted via electronic correspondence at: CBcomments@acf.hhs.gov

Re: RIN: 0970-AC72 **Adoption and Foster Care Analysis and Reporting System;** Advance Notice of Proposed Rulemaking (3/15/2018)

Dear Ms. McHugh:

The law firm of Montana Legal Justice, PLLC submits these comments regarding the Advance Notice of Proposed Rulemaking published in the *Federal Register* on March 15, 2018 (Volume 83, No. 51, page 11449). Our comments pertain to data elements specific to American Indian and Alaska Native (AI/AN) children contained within the 2016 Adoption and Foster Care Analysis Reporting System (AFCARS) Final Rule published on December 14, 2016. The data elements we are commenting on address a number of relevant federal law requirements pertaining to the Indian Child Welfare Act (ICWA). We oppose any streamlining, modification, or elimination of these critical AFCARS data elements for AI/AN children.

It has been almost 25 years since the establishment of the AFCARS data collection system and 40 years since the enactment of ICWA. AI/AN children are still waiting to have basic data collected that describes their conditions, how relevant federal law under Title IV-B, Title IV-E, and ICWA is being implemented with respect to AI/AN children, and the identification of critical data that can inform local and national interventions to eliminate well-documented and long term foster care disproportionality and service disparities that AI/AN children face. Each year that data is not collected is another year AI/AN children will not see significant improvements to their well-being and policymakers and other government officials will not have the data they need to make smart, effective changes that can address these very serious, long-

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In addition, Section 422 of the Social Security Act requires DHHS to collect descriptions from states of a state's efforts to consult with tribes on the specific measures taken by a state to comply with ICWA. This provision has been in federal law since 1994 and DHHS has responded by asking states to provide this information, along with additional information related to ICWA implementation in state Annual Progress and Services Reports. DHHS also has a long history of collecting information, although limited, on ICWA implementation through their Child and Family Services Review process with states. These reports and reviews are authorized under the broad discretionary authority provided to DHHS under Titles IV-B and IV-E of the Social Security Act to collect data from states and review their progress against different federal child welfare requirements.

The Final Rule, which ACF developed under the statute, ensures the collection of necessary and comprehensive national data on the status of American Indian/Alaska Native (AI/AN) children to whom ICWA applies, and historical data on children in foster care. Thus, the Final Rule's data collection elements are necessary to ACF's statutory mission under the Social Security Act. In addition, there is no statutory requirement that all data elements must be specifically tied to Title IV-E or Title IV-B requirements only.

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benefits for AI/AN children and families and burdens upon states to collect and report the data were thoroughly addressed in the Final Rule. While there was almost unanimous support provided to including the new data elements for AI/ANs, there was also very little concern expressed by states submitting comments specific to the addition of new data elements for AI/AN children and families. The few state comments that were received that expressed concern with the ICWA data elements were generally vague and expressed general concern regarding the burden of collecting new data of any type. Furthermore, as evidenced in the 2016 Final Rule discussion, ACF engaged in several discussions with states (6) regarding their perspectives on the proposed changes and as a result streamlined many of the data elements proposed in the SNPRM. The very thorough and well-thought out regulatory process used in developing the 2016 Final Rule evidences that no additional collection of information is necessary.

The data in the 2016 Final Rule is vital to the federal government, Congress, states, and tribes to effectively address the needs of AI/AN children and families. AI/AN children have been overrepresented in state foster care systems for over two decades, going back to the initial implementation of the AFCARS system. Prior to the 2016 Final Rule AFCARS only asked questions related to whether a child in state care and custody was self-identified as AI/AN. This self-identification does not provide necessary information to understand whether a child has a political relationship with a federally recognized tribe as a citizen of that tribe and whether other federal law requirements under ICWA are being implemented, especially those related to the placement of the child in substitute care and whether the child's tribe was engaged in supporting the child and family. As a result, AFCARS data has provided little help in understanding how to address chronic and persistent issues, such as foster care disproportionality, that are barriers to the well-being of AI/AN children and families—issues that not only affect the well-being of children, but also cost states and tribes considerable amounts of their finite resources.

Another practical implication for not implementing the data elements for AI/AN children in the Final Rule is it sends a message to states and tribes that the federal government does not consider data collection on this population a priority issue, which also disincentivize state and tribal efforts to address these issues at the federal and local level. As an example of how insufficient data collection can frustrate efforts to improve outcomes for AI/AN children, in the 2005 General Accountability Office (GAO) report on ICWA implementation (GAO-05-290) GAO indicated that they were hindered in their task to fully research and understand the questions submitted by a group of bi-partisan members of Congress because of insufficient data available from both state and federal data collection systems. At the local level, while states and tribes are increasingly partnering to improve ICWA implementation and improve outcomes for AI/AN children, data collection is a consistent concern and hampers efforts by states and tribes to demonstrate the need for additional policies and resources with state legislators. Since the publication of the Final Rule in December of 2016 a number of states have already begun work with tribes in their state on data system improvements and begun discussions of how the data would be supported and shared among state and tribal governments. Unfortunately, this Advanced Notice of Proposed Rule Making (ANPRM) has caused these efforts to be called into question and further delay the ability to seek real, meaningful answers to issues that frustrate AI/AN children's well-being on a daily basis.

The regulations themselves, in response to the comments from tribes and states, describe the importance of the 2016 Final Rule changes. As stated in the December 2016 Final Rule, 81 Fed. Reg. 90524, 90527:

> Overall, tribes, organizations, states, and private citizens supported our mission to collect additional information related to Indian children as defined in ICWA. Moreover, some states, tribes, national organizations, and federal agencies have stated that ICWA is the ''gold standard'' of child welfare practice and its implementation and associated data collection will likely help to inform efforts to improve outcomes for all children and families in state child welfare systems.

In light of these comments and the recent passage of the Family First Prevention Services Act by Congress in February of 2018 (Division E of the Bipartisan Budget Agreement Act, H.R. 1892) where Congress is clearly expanding the purposes of the Title IV-E program to include not only placement activities, but also prevention services to families, we see even more relevance and need for the data elements for AI/AN children and families included in the 2016 Final Rule.

Some of the expected benefits from implementing the full set of data elements for AI/AN children contained in the 2016 Final Rule include, but are not limited to, the following:

1. provide data on core ICWA requirements such as ''active efforts'' to prevent removals of AI/AN children and success in securing appropriate placements, especially kinship care placements, that have been demonstrated to improve AI/AN children's connection to their family, culture, and tribal supports they need to succeed;

2. facilitate access to culturally appropriate services to AI/AN children and families to avoid out-of-home placement, keep children safe, and avoid unnecessary trauma to AI/AN children;

3. identify effective strategies to securing extended family and other tribal families who can serve as resources to AI/AN children and help address the shortage of AI/AN family placements for AI/AN children;

4. identify when tribes are being engaged to help support AI/AN children and families and trends related to how that engagement impacts outcomes for this population; and

5. provide avenues for collaboration between states and tribes that are more meaningful, and outcome driven, including improved policy development, technical assistance, training, and resource allocation as a result of having reliable data available.

The ANPRM is arbitrary and capricious where it seeks only information on burdens. This ANPRM arbitrarily focuses on collecting information about the burdens without considering the benefits. As required by law, the Final Rule conducted a careful analysis of the benefits and burdens, and appropriately amended the SNPRM to achieve a balanced Final Rule.

The Agency "determined in the final rule that the benefits outweigh the burden associated with collecting and reporting the additional data." 81 Fed. Reg. at 90528. The Agency explained how weighing of the benefits and burdens led it to make certain changes to its proposal. For example: as stated in the Final Rule at 81 Fed Reg. 90528:

> In response to state and tribal comments suggesting congruence with the BIA's final rule, we revised data elements in this final rule as appropriate to reflect the BIA's regulations including removing requirements that state title IV-E agencies report certain information only from ICWA-specific court orders. These changes should allow the state title IV-E agency more flexibility, alleviate some of the burden and other concerns identified by states, help target technical assistance to increase state title IV-E agency communication and coordination with courts, and improve practice and national data on all children who are in foster care.

There have been no significant changes justifying ACF's proposal to reexamine the 2016 Final Rule. ACF seems to rely upon the President's Executive Order (13777) for all federal agencies to identify regulations that are perceived as burdensome or unnecessary, but this is not a sufficient basis for ACF to act, as the Executive Order itself is arbitrary and unlawful where it provides an insufficient basis for reasonable decision-making relaying solely on an examination of the burden of regulations without the required balancing of benefits. Additionally, the Executive Order fails to provide justification to deviate from the statutory requirement for regulations.

Responses to the Questions for Comment provided in the ANPRM:

1. Identify the data elements, non-ICWA-related, that are overly burdensome for state and tribal title IV-E agencies and explain why. Please be specific in identifying the data elements and provide a rationale for why collecting and reporting this information is overly burdensome.

We believe that the new data elements provided in the 2016 Final Rule that address health assessments, educational achievement, siblings, mental health services, sex trafficking, sexual orientation, permanency planning, adoption, guardianship, and housing are important for AI/AN children and youth as well. Burdens to collecting this data for tribes and states are relatively small considering the benefits to improving outcomes for AI/AN children and families, especially given many of the data elements are correlated to some of the most vulnerable populations in child welfare systems and identification of risks associated to their well-being.

2. Previously, we received comments regarding burden and the system changes needed to report the ICWA-related data elements of the 2016 SNPRM. We would like to receive more detailed comments on the specific limitations that states will encounter in reporting the ICWA-related data elements in the final rule. Please be specific in identifying the data elements and provide a rationale for why this information is overly burdensome.

The 2016 Final Rule requests title IV-E states provide the number of children in foster care who are considered Indian children as defined in ICWA. This is data that is currently not collected or reported in any national child welfare data system and is the key to understanding other important issues that are unique to AI/AN children and federal law requirements under ICWA.

The current data in AFCARS only identifies AI/AN children through self-identification, which provides inaccurate and unreliable data. Relevant data measures in ICWA related to placement, engagement with the child's tribe, and efforts to avoid placement are not collected leaving federal agency, states, Congress, and tribes with little information to address pernicious issues impacting this population like foster care disproportionality. The 2016 Final Rule only requires states to collect the data elements in the 2016 Final Rule for AI/AN children that are ICWA eligible. Regardless of whether AFCARS data is collected all states are required by law to examine whether a child is ICWA eligible, so this effort is already required outside of AFCARS requirements. The 2016 Final Rule data specific to AI/AN children is not required to be collected for other non-Indian children so while there will be additional data collection for AI/AN children that are ICWA eligible, given the small number of AI/AN children in the vast majority of states this will not require a significant burden.

3. Previously, we received comments that particular data elements did not lend themselves to national statistics and were best assessed with qualitative methods such as case review. Please provide specific recommendations on which data elements in the regulation to retain that are important to understanding and assessing the foster care population at the national level. Also, provide a rationale for your suggestion that may include its relevance to monitor compliance with the title IV-B and IV-E programs or another strong justification for using the data at the national level.

All of the data elements for AI/AN children in the 2016 Final Rule are appropriate for a national data system like AFCARS. The activities related to the data are required by federal law, such as ICWA, and should be documented in any child welfare case file. The vast majority of the data would come from state agency activities with a few data elements coming in the form of state court orders, which should also be included in any well documented case file. To assume that some data may not be retrievable if it comes from judicial determinations is essentially saying that case files do not need to contain court orders, which would be out of alignment with nationally recognized standards in child welfare case management. In addition, not having this information in a case file poses risk that court orders are not being properly implemented and places children in jeopardy of not receiving the benefits of court oversight in child welfare.

Capturing AI/AN data through case file reviews or other qualitative methods would not provide the data that Congress, states, and tribes need on an ongoing basis to make necessary changes in policy, practice, and resource allocation to address the serious problems that have been impacting AI/AN children for over two decades. Existing qualitative methods, like case file reviews under the Child and Family Services Reviews, have demonstrated the limitations of this data for informing Congress on how best to address critical concerns for AI/AN children. Case file reviews in many states include only a handful of cases involving AI/AN children and the data retrieved does not lend itself to adequately informing local efforts to address serious concerns related to outcomes for this population, much less issues of national concern. AFCARS is much better suited to collecting the type of data required for AI/AN children and efforts to shift data collection to other less comprehensive data systems with less regular data collection and reporting will have a negligible effect on improving data for this population.

4. Previously we received comments noting concerns with variability in some of the data elements across states and within jurisdictions. Please provide specific suggestions to simplify data elements to facilitate the consistent collection and reporting of AFCARS data. Also, provide a rationale for each suggestion and how the simplification would still yield pertinent data.

In the absence of a national data reporting requirement, it is guaranteed the current variability in state data collection and reporting will continue as evidenced by only a few states collecting any data specific to AI/AN children, and the current AFCARS data questions that use self-identification as a determinant of whether a child is AI/AN, rather than the appropriate questions related to their citizenship in a tribal government. Even with appropriate questions related to whether an AI/AN child or their family are eligible for ICWA protections, linkages to other AFCARS data cannot be assumed to be sufficiently correlated for informing policymakers and child welfare agencies without the other data elements for AI/AN children in the 2016 Final Rule also being implemented. ACF as much as any stakeholder should have a strong interest in improving the availability of accurate and reliable data for this population, which they have dedicated significant amounts of their resources to in the form of technical assistance and training.

5. Previously we received comments questioning the utility, reliability, and purpose of certain data elements at the national level. Provide specific recommendations on which data elements in the regulation to remove because they would not yield reliable national information about children involved with the child welfare system or are not needed for monitoring the title IV-B and IV-E programs. Please be specific in identifying the data elements and provide a rationale for why this information would not be reliable or is not necessary.

Each of the ICWA-related data points are tied to existing federal law and regulation and are necessary to monitor and support title IV-B and IV-E programs. Each of the ICWA-related data points is critical. The Title IV-B plan requirement for states that requires that states consult with tribal governments on their plans to implement ICWA has so far relied primarily on anecdotal information that is not collected or tracked uniformly by ACF leading to uneven responses to concerns about poor outcomes for AI/AN children in different states. The data elements contained in the 2016 Final Rule are linked in terms of being able to provide a complete picture of how AI/AN children are doing, and by eliminating or streamlining some of these data elements ACF would be compromising the integrity of the data to confidently inform policymakers and other stakeholders as to the important data trends and explanations for these trends.

In addition, as was stated earlier in our general comments, ICWA has been viewed as the "gold standard" in child welfare practice by leading national child welfare organizations and now with the passage of the Family First Prevention Services Act we can see there is increased support and interest in capturing more information on how states and tribes can improve outcomes for children and families beyond just improving the placement experience. The 2016 Final Rule data elements specific to AI/AN children are aligned with these acknowledgements and will be significantly helpful to all stakeholders involved in improving services and outcomes for AI/AN children.

Conclusion

The experience of having little to no data collected for AI/AN children through AFCARS over the last two decades has resulted in not meaningful improvements in the safety and well-being for AI/AN children and could be argued as having contributed to the worsening conditions for this population. We know of no other federal child welfare law that does not have some form of basic data collection and certainly not one that is 40 years old as ICWA is. The AFCARS data elements for AI/AN children in the 2016 Final Rule have incredible potential to improve outcomes for this population, but only if the data elements are not heavily modified or eliminated. While there are burdens for states to collect this data, for the past 40 years it has primarily AI/AN children, their families, and tribal communities that have born the burden while little to no reliable data has been collected and the crisis of foster care disproportionality has worsened. The time has come to move forward with this critically important data collection for AI/AN children and families and end the delays for not collecting the data that is necessary to support and promote healing for this population.

Sincerely,

Shannon Hathaway
Partner at Montana Legal Justice, PLLC

Montana Legal Justice, PLLC

521 N. Orange Street
Missoula, MT 59802
(406) 356–6546
www.montanalegaljustice.com

June 12, 2018

Attn: Kathleen McHugh
United States Department of Health and Human Services
Administration for Children and Families
Policy Division
330 C Street SW
Washington, DC 20024

Submitted via electronic correspondence at: CBcomments@acf.hhs.gov

Re: RIN: 0970-AC72 **Adoption and Foster Care Analysis and Reporting System;** Advance Notice of Proposed Rulemaking (3/15/2018)

Dear Ms. McHugh:

The law firm of Montana Legal Justice, PLLC submits these comments regarding the Advance Notice of Proposed Rulemaking published in the *Federal Register* on March 15, 2018 (Volume 83, No. 51, page 11449). Our comments pertain to data elements specific to American Indian and Alaska Native (AI/AN) children contained within the 2016 Adoption and Foster Care Analysis Reporting System (AFCARS) Final Rule published on December 14, 2016. The data elements we are commenting on address a number of relevant federal law requirements pertaining to the Indian Child Welfare Act (ICWA). We oppose any streamlining, modification, or elimination of these critical AFCARS data elements for AI/AN children.

It has been almost 25 years since the establishment of the AFCARS data collection system and 40 years since the enactment of ICWA. AI/AN children are still waiting to have basic data collected that describes their conditions, how relevant federal law under Title IV-B, Title IV-E, and ICWA is being implemented with respect to AI/AN children, and the identification of critical data that can inform local and national interventions to eliminate well-documented and long term foster care disproportionality and service disparities that AI/AN children face. Each year that data is not collected is another year AI/AN children will not see significant improvements to their well-being and policymakers and other government officials will not have the data they need to make smart, effective changes that can address these very serious, long-

term problems; this is an untenable situation. We also note that nothing has changed since the publication of the 2016 Final Rule that would change the need for this critical data for AI/AN children. Instead, Congress has made it clear with the passage of the Family First Prevention Services Act (Division E of the Bipartisan Budget Agreement Act of H.R. 1892) that they intend for Title IV-E to be expanded to focus on additional services and efforts, not just a narrow band of placement activities.

General Comments

The 2016 Final Rule is within ACF's Statutory Authority and Mission. Section 479 of the Social Security Act mandates the Department of Health and Human Services (DHHS) collect national, uniform, and reliable information on children in state foster care and adoptive care. The statutory language is expansive and suggests a broad collection of data for children under state care who are in foster care or adoption that includes their demographics, characteristics, and status while in care. Section 1102 of the act instructs the Secretary of DHHS to develop regulations necessary to carry out the functions for which DHHS is responsible under the act.

In addition, Section 422 of the Social Security Act requires DHHS to collect descriptions from states of a state's efforts to consult with tribes on the specific measures taken by a state to comply with ICWA. This provision has been in federal law since 1994 and DHHS has responded by asking states to provide this information, along with additional information related to ICWA implementation in state Annual Progress and Services Reports. DHHS also has a long history of collecting information, although limited, on ICWA implementation through their Child and Family Services Review process with states. These reports and reviews are authorized under the broad discretionary authority provided to DHHS under Titles IV-B and IV-E of the Social Security Act to collect data from states and review their progress against different federal child welfare requirements.

The Final Rule, which ACF developed under the statute, ensures the collection of necessary and comprehensive national data on the status of American Indian/Alaska Native (AI/AN) children to whom ICWA applies, and historical data on children in foster care. Thus, the Final Rule's data collection elements are necessary to ACF's statutory mission under the Social Security Act. In addition, there is no statutory requirement that all data elements must be specifically tied to Title IV-E or Title IV-B requirements only.

ACF provided ample notice and opportunities to comment on the 2016 Final Rule. On April 2, 2015, ACF issued a Supplemental Notice of Proposed Rulemaking (SNPRM) proposing changes to AFCARS data elements. A year later on April 7, 2016, ACF published another SNPRM proposing the addition of new AFCARS data elements related specifically to data concerning American Indian and Alaska Native (AI/AN) children and families. The proposed data was related to federal law requirements specific to ICWA and placements of AI/AN children. The Final Rule was published eight months later on December 14, 2016, and included the ICWA data elements.

The 2016 Final Rule was the product of a thorough and well-reasoned process that included opportunities for states, tribes, and other interested parties to comment. Issues related to the

benefits for AI/AN children and families and burdens upon states to collect and report the data were thoroughly addressed in the Final Rule. While there was almost unanimous support provided to including the new data elements for AI/ANs, there was also very little concern expressed by states submitting comments specific to the addition of new data elements for AI/AN children and families. The few state comments that were received that expressed concern with the ICWA data elements were generally vague and expressed general concern regarding the burden of collecting new data of any type. Furthermore, as evidenced in the 2016 Final Rule discussion, ACF engaged in several discussions with states (6) regarding their perspectives on the proposed changes and as a result streamlined many of the data elements proposed in the SNPRM. The very thorough and well-thought out regulatory process used in developing the 2016 Final Rule evidences that no additional collection of information is necessary.

The data in the 2016 Final Rule is vital to the federal government, Congress, states, and tribes to effectively address the needs of AI/AN children and families. AI/AN children have been overrepresented in state foster care systems for over two decades, going back to the initial implementation of the AFCARS system. Prior to the 2016 Final Rule AFCARS only asked questions related to whether a child in state care and custody was self-identified as AI/AN. This self-identification does not provide necessary information to understand whether a child has a political relationship with a federally recognized tribe as a citizen of that tribe and whether other federal law requirements under ICWA are being implemented, especially those related to the placement of the child in substitute care and whether the child's tribe was engaged in supporting the child and family. As a result, AFCARS data has provided little help in understanding how to address chronic and persistent issues, such as foster care disproportionality, that are barriers to the well-being of AI/AN children and families—issues that not only affect the well-being of children, but also cost states and tribes considerable amounts of their finite resources.

Another practical implication for not implementing the data elements for AI/AN children in the Final Rule is it sends a message to states and tribes that the federal government does not consider data collection on this population a priority issue, which also disincentivize state and tribal efforts to address these issues at the federal and local level. As an example of how insufficient data collection can frustrate efforts to improve outcomes for AI/AN children, in the 2005 General Accountability Office (GAO) report on ICWA implementation (GAO-05-290) GAO indicated that they were hindered in their task to fully research and understand the questions submitted by a group of bi-partisan members of Congress because of insufficient data available from both state and federal data collection systems. At the local level, while states and tribes are increasingly partnering to improve ICWA implementation and improve outcomes for AI/AN children, data collection is a consistent concern and hampers efforts by states and tribes to demonstrate the need for additional policies and resources with state legislators. Since the publication of the Final Rule in December of 2016 a number of states have already begun work with tribes in their state on data system improvements and begun discussions of how the data would be supported and shared among state and tribal governments. Unfortunately, this Advanced Notice of Proposed Rule Making (ANPRM) has caused these efforts to be called into question and further delay the ability to seek real, meaningful answers to issues that frustrate AI/AN children's well-being on a daily basis.

The regulations themselves, in response to the comments from tribes and states, describe the importance of the 2016 Final Rule changes. As stated in the December 2016 Final Rule, 81 Fed. Reg. 90524, 90527:

> Overall, tribes, organizations, states, and private citizens supported our mission to collect additional information related to Indian children as defined in ICWA. Moreover, some states, tribes, national organizations, and federal agencies have stated that ICWA is the ''gold standard'' of child welfare practice and its implementation and associated data collection will likely help to inform efforts to improve outcomes for all children and families in state child welfare systems.

In light of these comments and the recent passage of the Family First Prevention Services Act by Congress in February of 2018 (Division E of the Bipartisan Budget Agreement Act, H.R. 1892) where Congress is clearly expanding the purposes of the Title IV-E program to include not only placement activities, but also prevention services to families, we see even more relevance and need for the data elements for AI/AN children and families included in the 2016 Final Rule.

Some of the expected benefits from implementing the full set of data elements for AI/AN children contained in the 2016 Final Rule include, but are not limited to, the following:

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4. identify when tribes are being engaged to help support AI/AN children and families and trends related to how that engagement impacts outcomes for this population; and

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Responses to the Questions for Comment provided in the ANPRM:

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Capturing AI/AN data through case file reviews or other qualitative methods would not provide the data that Congress, states, and tribes need on an ongoing basis to make necessary changes in policy, practice, and resource allocation to address the serious problems that have been impacting AI/AN children for over two decades. Existing qualitative methods, like case file reviews under the Child and Family Services Reviews, have demonstrated the limitations of this data for informing Congress on how best to address critical concerns for AI/AN children. Case file reviews in many states include only a handful of cases involving AI/AN children and the data retrieved does not lend itself to adequately informing local efforts to address serious concerns related to outcomes for this population, much less issues of national concern. AFCARS is much better suited to collecting the type of data required for AI/AN children and efforts to shift data collection to other less comprehensive data systems with less regular data collection and reporting will have a negligible effect on improving data for this population.

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5. Previously we received comments questioning the utility, reliability, and purpose of certain data elements at the national level. Provide specific recommendations on which data elements in the regulation to remove because they would not yield reliable national information about children involved with the child welfare system or are not needed for monitoring the title IV-B and IV-E programs. Please be specific in identifying the data elements and provide a rationale for why this information would not be reliable or is not necessary.

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In addition, as was stated earlier in our general comments, ICWA has been viewed as the "gold standard" in child welfare practice by leading national child welfare organizations and now with the passage of the Family First Prevention Services Act we can see there is increased support and interest in capturing more information on how states and tribes can improve outcomes for children and families beyond just improving the placement experience. The 2016 Final Rule data elements specific to AI/AN children are aligned with these acknowledgements and will be significantly helpful to all stakeholders involved in improving services and outcomes for AI/AN children.

Conclusion

The experience of having little to no data collected for AI/AN children through AFCARS over the last two decades has resulted in not meaningful improvements in the safety and well-being for AI/AN children and could be argued as having contributed to the worsening conditions for this population. We know of no other federal child welfare law that does not have some form of basic data collection and certainly not one that is 40 years old as ICWA is. The AFCARS data elements for AI/AN children in the 2016 Final Rule have incredible potential to improve outcomes for this population, but only if the data elements are not heavily modified or eliminated. While there are burdens for states to collect this data, for the past 40 years it has primarily AI/AN children, their families, and tribal communities that have born the burden while little to no reliable data has been collected and the crisis of foster care disproportionality has worsened. The time has come to move forward with this critically important data collection for AI/AN children and families and end the delays for not collecting the data that is necessary to support and promote healing for this population.

Sincerely,

Julie Brown

Founding Partner of Montana Legal Justice, PLLC

Montana Legal Justice, PLLC

521 N. Orange Street
Missoula, MT 59802
(406) 356–6546
www.montanalegaljustice.com

June 12, 2018

Attn: Kathleen McHugh
United States Department of Health and Human Services
Administration for Children and Families
Policy Division
330 C Street SW
Washington, DC 20024

Submitted via electronic correspondence at: CBcomments@acf.hhs.gov

Re: RIN: 0970-AC72 **Adoption and Foster Care Analysis and Reporting System;** Advance Notice of Proposed Rulemaking (3/15/2018)

Dear Ms. McHugh:

The law firm of Montana Legal Justice, PLLC submits these comments regarding the Advance Notice of Proposed Rulemaking published in the *Federal Register* on March 15, 2018 (Volume 83, No. 51, page 11449). Our comments pertain to data elements specific to American Indian and Alaska Native (AI/AN) children contained within the 2016 Adoption and Foster Care Analysis Reporting System (AFCARS) Final Rule published on December 14, 2016. The data elements we are commenting on address a number of relevant federal law requirements pertaining to the Indian Child Welfare Act (ICWA). We oppose any streamlining, modification, or elimination of these critical AFCARS data elements for AI/AN children.

It has been almost 25 years since the establishment of the AFCARS data collection system and 40 years since the enactment of ICWA. AI/AN children are still waiting to have basic data collected that describes their conditions, how relevant federal law under Title IV-B, Title IV-E, and ICWA is being implemented with respect to AI/AN children, and the identification of critical data that can inform local and national interventions to eliminate well-documented and long term foster care disproportionality and service disparities that AI/AN children face. Each year that data is not collected is another year AI/AN children will not see significant improvements to their well-being and policymakers and other government officials will not have the data they need to make smart, effective changes that can address these very serious, long-

term problems; this is an untenable situation. We also note that nothing has changed since the publication of the 2016 Final Rule that would change the need for this critical data for AI/AN children. Instead, Congress has made it clear with the passage of the Family First Prevention Services Act (Division E of the Bipartisan Budget Agreement Act of H.R. 1892) that they intend for Title IV-E to be expanded to focus on additional services and efforts, not just a narrow band of placement activities.

General Comments

The 2016 Final Rule is within ACF's Statutory Authority and Mission. Section 479 of the Social Security Act mandates the Department of Health and Human Services (DHHS) collect national, uniform, and reliable information on children in state foster care and adoptive care. The statutory language is expansive and suggests a broad collection of data for children under state care who are in foster care or adoption that includes their demographics, characteristics, and status while in care. Section 1102 of the act instructs the Secretary of DHHS to develop regulations necessary to carry out the functions for which DHHS is responsible under the act.

In addition, Section 422 of the Social Security Act requires DHHS to collect descriptions from states of a state's efforts to consult with tribes on the specific measures taken by a state to comply with ICWA. This provision has been in federal law since 1994 and DHHS has responded by asking states to provide this information, along with additional information related to ICWA implementation in state Annual Progress and Services Reports. DHHS also has a long history of collecting information, although limited, on ICWA implementation through their Child and Family Services Review process with states. These reports and reviews are authorized under the broad discretionary authority provided to DHHS under Titles IV-B and IV-E of the Social Security Act to collect data from states and review their progress against different federal child welfare requirements.

The Final Rule, which ACF developed under the statute, ensures the collection of necessary and comprehensive national data on the status of American Indian/Alaska Native (AI/AN) children to whom ICWA applies, and historical data on children in foster care. Thus, the Final Rule's data collection elements are necessary to ACF's statutory mission under the Social Security Act. In addition, there is no statutory requirement that all data elements must be specifically tied to Title IV-E or Title IV-B requirements only.

ACF provided ample notice and opportunities to comment on the 2016 Final Rule. On April 2, 2015, ACF issued a Supplemental Notice of Proposed Rulemaking (SNPRM) proposing changes to AFCARS data elements. A year later on April 7, 2016, ACF published another SNPRM proposing the addition of new AFCARS data elements related specifically to data concerning American Indian and Alaska Native (AI/AN) children and families. The proposed data was related to federal law requirements specific to ICWA and placements of AI/AN children. The Final Rule was published eight months later on December 14, 2016, and included the ICWA data elements.

The 2016 Final Rule was the product of a thorough and well-reasoned process that included opportunities for states, tribes, and other interested parties to comment. Issues related to the

benefits for AI/AN children and families and burdens upon states to collect and report the data were thoroughly addressed in the Final Rule. While there was almost unanimous support provided to including the new data elements for AI/ANs, there was also very little concern expressed by states submitting comments specific to the addition of new data elements for AI/AN children and families. The few state comments that were received that expressed concern with the ICWA data elements were generally vague and expressed general concern regarding the burden of collecting new data of any type. Furthermore, as evidenced in the 2016 Final Rule discussion, ACF engaged in several discussions with states (6) regarding their perspectives on the proposed changes and as a result streamlined many of the data elements proposed in the SNPRM. The very thorough and well-thought out regulatory process used in developing the 2016 Final Rule evidences that no additional collection of information is necessary.

The data in the 2016 Final Rule is vital to the federal government, Congress, states, and tribes to effectively address the needs of AI/AN children and families. AI/AN children have been overrepresented in state foster care systems for over two decades, going back to the initial implementation of the AFCARS system. Prior to the 2016 Final Rule AFCARS only asked questions related to whether a child in state care and custody was self-identified as AI/AN. This self-identification does not provide necessary information to understand whether a child has a political relationship with a federally recognized tribe as a citizen of that tribe and whether other federal law requirements under ICWA are being implemented, especially those related to the placement of the child in substitute care and whether the child's tribe was engaged in supporting the child and family. As a result, AFCARS data has provided little help in understanding how to address chronic and persistent issues, such as foster care disproportionality, that are barriers to the well-being of AI/AN children and families—issues that not only affect the well-being of children, but also cost states and tribes considerable amounts of their finite resources.

Another practical implication for not implementing the data elements for AI/AN children in the Final Rule is it sends a message to states and tribes that the federal government does not consider data collection on this population a priority issue, which also disincentivize state and tribal efforts to address these issues at the federal and local level. As an example of how insufficient data collection can frustrate efforts to improve outcomes for AI/AN children, in the 2005 General Accountability Office (GAO) report on ICWA implementation (GAO-05-290) GAO indicated that they were hindered in their task to fully research and understand the questions submitted by a group of bi-partisan members of Congress because of insufficient data available from both state and federal data collection systems. At the local level, while states and tribes are increasingly partnering to improve ICWA implementation and improve outcomes for AI/AN children, data collection is a consistent concern and hampers efforts by states and tribes to demonstrate the need for additional policies and resources with state legislators. Since the publication of the Final Rule in December of 2016 a number of states have already begun work with tribes in their state on data system improvements and begun discussions of how the data would be supported and shared among state and tribal governments. Unfortunately, this Advanced Notice of Proposed Rule Making (ANPRM) has caused these efforts to be called into question and further delay the ability to seek real, meaningful answers to issues that frustrate AI/AN children's well-being on a daily basis.

The regulations themselves, in response to the comments from tribes and states, describe the importance of the 2016 Final Rule changes. As stated in the December 2016 Final Rule, 81 Fed. Reg. 90524, 90527:

> Overall, tribes, organizations, states, and private citizens supported our mission to collect additional information related to Indian children as defined in ICWA. Moreover, some states, tribes, national organizations, and federal agencies have stated that ICWA is the ''gold standard'' of child welfare practice and its implementation and associated data collection will likely help to inform efforts to improve outcomes for all children and families in state child welfare systems.

In light of these comments and the recent passage of the Family First Prevention Services Act by Congress in February of 2018 (Division E of the Bipartisan Budget Agreement Act, H.R. 1892) where Congress is clearly expanding the purposes of the Title IV-E program to include not only placement activities, but also prevention services to families, we see even more relevance and need for the data elements for AI/AN children and families included in the 2016 Final Rule.

Some of the expected benefits from implementing the full set of data elements for AI/AN children contained in the 2016 Final Rule include, but are not limited to, the following:

1. provide data on core ICWA requirements such as ''active efforts'' to prevent removals of AI/AN children and success in securing appropriate placements, especially kinship care placements, that have been demonstrated to improve AI/AN children's connection to their family, culture, and tribal supports they need to succeed;

2. facilitate access to culturally appropriate services to AI/AN children and families to avoid out-of-home placement, keep children safe, and avoid unnecessary trauma to AI/AN children;

3. identify effective strategies to securing extended family and other tribal families who can serve as resources to AI/AN children and help address the shortage of AI/AN family placements for AI/AN children;

4. identify when tribes are being engaged to help support AI/AN children and families and trends related to how that engagement impacts outcomes for this population; and

5. provide avenues for collaboration between states and tribes that are more meaningful, and outcome driven, including improved policy development, technical assistance, training, and resource allocation as a result of having reliable data available.

The ANPRM is arbitrary and capricious where it seeks only information on burdens. This ANPRM arbitrarily focuses on collecting information about the burdens without considering the benefits. As required by law, the Final Rule conducted a careful analysis of the benefits and burdens, and appropriately amended the SNPRM to achieve a balanced Final Rule.

The Agency "determined in the final rule that the benefits outweigh the burden associated with collecting and reporting the additional data." 81 Fed. Reg. at 90528. The Agency explained how weighing of the benefits and burdens led it to make certain changes to its proposal. For example: as stated in the Final Rule at 81 Fed Reg. 90528:

> In response to state and tribal comments suggesting congruence with the BIA's final rule, we revised data elements in this final rule as appropriate to reflect the BIA's regulations including removing requirements that state title IV-E agencies report certain information only from ICWA-specific court orders. These changes should allow the state title IV-E agency more flexibility, alleviate some of the burden and other concerns identified by states, help target technical assistance to increase state title IV-E agency communication and coordination with courts, and improve practice and national data on all children who are in foster care.

There have been no significant changes justifying ACF's proposal to reexamine the 2016 Final Rule. ACF seems to rely upon the President's Executive Order (13777) for all federal agencies to identify regulations that are perceived as burdensome or unnecessary, but this is not a sufficient basis for ACF to act, as the Executive Order itself is arbitrary and unlawful where it provides an insufficient basis for reasonable decision-making relaying solely on an examination of the burden of regulations without the required balancing of benefits. Additionally, the Executive Order fails to provide justification to deviate from the statutory requirement for regulations.

Responses to the Questions for Comment provided in the ANPRM:

1. Identify the data elements, non-ICWA-related, that are overly burdensome for state and tribal title IV-E agencies and explain why. Please be specific in identifying the data elements and provide a rationale for why collecting and reporting this information is overly burdensome.

We believe that the new data elements provided in the 2016 Final Rule that address health assessments, educational achievement, siblings, mental health services, sex trafficking, sexual orientation, permanency planning, adoption, guardianship, and housing are important for AI/AN children and youth as well. Burdens to collecting this data for tribes and states are relatively small considering the benefits to improving outcomes for AI/AN children and families, especially given many of the data elements are correlated to some of the most vulnerable populations in child welfare systems and identification of risks associated to their well-being.

2. Previously, we received comments regarding burden and the system changes needed to report the ICWA-related data elements of the 2016 SNPRM. We would like to receive more detailed comments on the specific limitations that states will encounter in reporting the ICWA-related data elements in the final rule. Please be specific in identifying the data elements and provide a rationale for why this information is overly burdensome.

The 2016 Final Rule requests title IV-E states provide the number of children in foster care who are considered Indian children as defined in ICWA. This is data that is currently not collected or reported in any national child welfare data system and is the key to understanding other important issues that are unique to AI/AN children and federal law requirements under ICWA.

The current data in AFCARS only identifies AI/AN children through self-identification, which provides inaccurate and unreliable data. Relevant data measures in ICWA related to placement, engagement with the child's tribe, and efforts to avoid placement are not collected leaving federal agency, states, Congress, and tribes with little information to address pernicious issues impacting this population like foster care disproportionality. The 2016 Final Rule only requires states to collect the data elements in the 2016 Final Rule for AI/AN children that are ICWA eligible. Regardless of whether AFCARS data is collected all states are required by law to examine whether a child is ICWA eligible, so this effort is already required outside of AFCARS requirements. The 2016 Final Rule data specific to AI/AN children is not required to be collected for other non-Indian children so while there will be additional data collection for AI/AN children that are ICWA eligible, given the small number of AI/AN children in the vast majority of states this will not require a significant burden.

3. Previously, we received comments that particular data elements did not lend themselves to national statistics and were best assessed with qualitative methods such as case review. Please provide specific recommendations on which data elements in the regulation to retain that are important to understanding and assessing the foster care population at the national level. Also, provide a rationale for your suggestion that may include its relevance to monitor compliance with the title IV-B and IV-E programs or another strong justification for using the data at the national level.

All of the data elements for AI/AN children in the 2016 Final Rule are appropriate for a national data system like AFCARS. The activities related to the data are required by federal law, such as ICWA, and should be documented in any child welfare case file. The vast majority of the data would come from state agency activities with a few data elements coming in the form of state court orders, which should also be included in any well documented case file. To assume that some data may not be retrievable if it comes from judicial determinations is essentially saying that case files do not need to contain court orders, which would be out of alignment with nationally recognized standards in child welfare case management. In addition, not having this information in a case file poses risk that court orders are not being properly implemented and places children in jeopardy of not receiving the benefits of court oversight in child welfare.

Capturing AI/AN data through case file reviews or other qualitative methods would not provide the data that Congress, states, and tribes need on an ongoing basis to make necessary changes in policy, practice, and resource allocation to address the serious problems that have been impacting AI/AN children for over two decades. Existing qualitative methods, like case file reviews under the Child and Family Services Reviews, have demonstrated the limitations of this data for informing Congress on how best to address critical concerns for AI/AN children. Case file reviews in many states include only a handful of cases involving AI/AN children and the data retrieved does not lend itself to adequately informing local efforts to address serious concerns related to outcomes for this population, much less issues of national concern. AFCARS is much better suited to collecting the type of data required for AI/AN children and efforts to shift data collection to other less comprehensive data systems with less regular data collection and reporting will have a negligible effect on improving data for this population.

4. Previously we received comments noting concerns with variability in some of the data elements across states and within jurisdictions. Please provide specific suggestions to simplify data elements to facilitate the consistent collection and reporting of AFCARS data. Also, provide a rationale for each suggestion and how the simplification would still yield pertinent data.

In the absence of a national data reporting requirement, it is guaranteed the current variability in state data collection and reporting will continue as evidenced by only a few states collecting any data specific to AI/AN children, and the current AFCARS data questions that use self-identification as a determinant of whether a child is AI/AN, rather than the appropriate questions related to their citizenship in a tribal government. Even with appropriate questions related to whether an AI/AN child or their family are eligible for ICWA protections, linkages to other AFCARS data cannot be assumed to be sufficiently correlated for informing policymakers and child welfare agencies without the other data elements for AI/AN children in the 2016 Final Rule also being implemented. ACF as much as any stakeholder should have a strong interest in improving the availability of accurate and reliable data for this population, which they have dedicated significant amounts of their resources to in the form of technical assistance and training.

5. Previously we received comments questioning the utility, reliability, and purpose of certain data elements at the national level. Provide specific recommendations on which data elements in the regulation to remove because they would not yield reliable national information about children involved with the child welfare system or are not needed for monitoring the title IV-B and IV-E programs. Please be specific in identifying the data elements and provide a rationale for why this information would not be reliable or is not necessary.

Each of the ICWA-related data points are tied to existing federal law and regulation and are necessary to monitor and support title IV-B and IV-E programs. Each of the ICWA-related data points is critical. The Title IV-B plan requirement for states that requires that states consult with tribal governments on their plans to implement ICWA has so far relied primarily on anecdotal information that is not collected or tracked uniformly by ACF leading to uneven responses to concerns about poor outcomes for AI/AN children in different states. The data elements contained in the 2016 Final Rule are linked in terms of being able to provide a complete picture of how AI/AN children are doing, and by eliminating or streamlining some of these data elements ACF would be compromising the integrity of the data to confidently inform policymakers and other stakeholders as to the important data trends and explanations for these trends.

In addition, as was stated earlier in our general comments, ICWA has been viewed as the "gold standard" in child welfare practice by leading national child welfare organizations and now with the passage of the Family First Prevention Services Act we can see there is increased support and interest in capturing more information on how states and tribes can improve outcomes for children and families beyond just improving the placement experience. The 2016 Final Rule data elements specific to AI/AN children are aligned with these acknowledgements and will be significantly helpful to all stakeholders involved in improving services and outcomes for AI/AN children.

Conclusion

The experience of having little to no data collected for AI/AN children through AFCARS over the last two decades has resulted in not meaningful improvements in the safety and well-being for AI/AN children and could be argued as having contributed to the worsening conditions for this population. We know of no other federal child welfare law that does not have some form of basic data collection and certainly not one that is 40 years old as ICWA is. The AFCARS data elements for AI/AN children in the 2016 Final Rule have incredible potential to improve outcomes for this population, but only if the data elements are not heavily modified or eliminated. While there are burdens for states to collect this data, for the past 40 years it has primarily AI/AN children, their families, and tribal communities that have born the burden while little to no reliable data has been collected and the crisis of foster care disproportionality has worsened. The time has come to move forward with this critically important data collection for AI/AN children and families and end the delays for not collecting the data that is necessary to support and promote healing for this population.

Sincerely,

Kelly M. Driscoll
Partner at Montana Legal Justice, PLLC

Montana Legal Justice, PLLC

521 N. Orange Street
Missoula, MT 59802
(406) 356–6546
www.montanalegaljustice.com

June 12, 2018

Attn: Kathleen McHugh
United States Department of Health and Human Services
Administration for Children and Families
Policy Division
330 C Street SW
Washington, DC 20024

Submitted via electronic correspondence at: CBcomments@acf.hhs.gov

Re: RIN: 0970-AC72 **Adoption and Foster Care Analysis and Reporting System;** Advance Notice of Proposed Rulemaking (3/15/2018)

Dear Ms. McHugh:

I am an associate attorney at Montana Legal Justice, PLLC in Missoula, Montana and submit these comments regarding the Advance Notice of Proposed Rulemaking published in the *Federal Register* on March 15, 2018 (Volume 83, No. 51, page 11449). My comments pertain to data elements specific to American Indian and Alaska Native (AI/AN) children contained within the 2016 Adoption and Foster Care Analysis Reporting System (AFCARS) Final Rule published on December 14, 2016. The data elements we are commenting on address a number of relevant federal law requirements pertaining to the Indian Child Welfare Act (ICWA). We oppose any streamlining, modification, or elimination of these critical AFCARS data elements for AI/AN children.

It has been almost 25 years since the establishment of the AFCARS data collection system and 40 years since the enactment of ICWA. AI/AN children are still waiting to have basic data collected that describes their conditions, how relevant federal law under Title IV-B, Title IV-E, and ICWA is being implemented with respect to AI/AN children, and the identification of critical data that can inform local and national interventions to eliminate well-documented and long term foster care disproportionality and service disparities that AI/AN children face. Each year that data is not collected is another year AI/AN children will not see significant improvements to their well-being and policymakers and other government officials will not have

the data they need to make smart, effective changes that can address these very serious, long-term problems; this is an untenable situation. We also note that nothing has changed since the publication of the 2016 Final Rule that would change the need for this critical data for AI/AN children. Instead, Congress has made it clear with the passage of the Family First Prevention Services Act (Division E of the Bipartisan Budget Agreement Act of H.R. 1892) that they intend for Title IV-E to be expanded to focus on additional services and efforts, not just a narrow band of placement activities.

General Comments

The 2016 Final Rule is within ACF's Statutory Authority and Mission. Section 479 of the Social Security Act mandates the Department of Health and Human Services (DHHS) collect national, uniform, and reliable information on children in state foster care and adoptive care. The statutory language is expansive and suggests a broad collection of data for children under state care who are in foster care or adoption that includes their demographics, characteristics, and status while in care. Section 1102 of the act instructs the Secretary of DHHS to develop regulations necessary to carry out the functions for which DHHS is responsible under the act.

In addition, Section 422 of the Social Security Act requires DHHS to collect descriptions from states of a state's efforts to consult with tribes on the specific measures taken by a state to comply with ICWA. This provision has been in federal law since 1994 and DHHS has responded by asking states to provide this information, along with additional information related to ICWA implementation in state Annual Progress and Services Reports. DHHS also has a long history of collecting information, although limited, on ICWA implementation through their Child and Family Services Review process with states. These reports and reviews are authorized under the broad discretionary authority provided to DHHS under Titles IV-B and IV-E of the Social Security Act to collect data from states and review their progress against different federal child welfare requirements.

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The 2016 Final Rule was the product of a thorough and well-reasoned process that included opportunities for states, tribes, and other interested parties to comment. Issues related to the benefits for AI/AN children and families and burdens upon states to collect and report the data were thoroughly addressed in the Final Rule. While there was almost unanimous support provided to including the new data elements for AI/ANs, there was also very little concern expressed by states submitting comments specific to the addition of new data elements for AI/AN children and families. The few state comments that were received that expressed concern with the ICWA data elements were generally vague and expressed general concern regarding the burden of collecting new data of any type. Furthermore, as evidenced in the 2016 Final Rule discussion, ACF engaged in several discussions with states (6) regarding their perspectives on the proposed changes and as a result streamlined many of the data elements proposed in the SNPRM. The very thorough and well-thought out regulatory process used in developing the 2016 Final Rule evidences that no additional collection of information is necessary.

The data in the 2016 Final Rule is vital to the federal government, Congress, states, and tribes to effectively address the needs of AI/AN children and families. AI/AN children have been overrepresented in state foster care systems for over two decades, going back to the initial implementation of the AFCARS system. Prior to the 2016 Final Rule AFCARS only asked questions related to whether a child in state care and custody was self-identified as AI/AN. This self-identification does not provide necessary information to understand whether a child has a political relationship with a federally recognized tribe as a citizen of that tribe and whether other federal law requirements under ICWA are being implemented, especially those related to the placement of the child in substitute care and whether the child's tribe was engaged in supporting the child and family. As a result, AFCARS data has provided little help in understanding how to address chronic and persistent issues, such as foster care disproportionality, that are barriers to the well-being of AI/AN children and families—issues that not only affect the well-being of children, but also cost states and tribes considerable amounts of their finite resources.

Another practical implication for not implementing the data elements for AI/AN children in the Final Rule is it sends a message to states and tribes that the federal government does not consider data collection on this population a priority issue, which also disincentivize state and tribal efforts to address these issues at the federal and local level. As an example of how insufficient data collection can frustrate efforts to improve outcomes for AI/AN children, in the 2005 General Accountability Office (GAO) report on ICWA implementation (GAO-05-290) GAO indicated that they were hindered in their task to fully research and understand the questions submitted by a group of bi-partisan members of Congress because of insufficient data available from both state and federal data collection systems. At the local level, while states and tribes are increasingly partnering to improve ICWA implementation and improve outcomes for AI/AN children, data collection is a consistent concern and hampers efforts by states and tribes to demonstrate the need for additional policies and resources with state legislators. Since the publication of the Final Rule in December of 2016 a number of states have already begun work with tribes in their state on data system improvements and begun discussions of how the data would be supported and shared among state and tribal governments. Unfortunately, this Advanced Notice of Proposed Rule Making (ANPRM) has caused these efforts to be called into question and further delay the ability to seek real, meaningful answers to issues that frustrate AI/AN children's well-being on a daily basis.

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Responses to the Questions for Comment provided in the ANPRM:

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2. Previously, we received comments regarding burden and the system changes needed to report the ICWA-related data elements of the 2016 SNPRM. We would like to receive more detailed comments on the specific limitations that states will encounter in reporting the ICWA-related data elements in the final rule. Please be specific in identifying the data elements and provide a rationale for why this information is overly burdensome.

The 2016 Final Rule requests title IV-E states provide the number of children in foster care who are considered Indian children as defined in ICWA. This is data that is currently not collected or reported in any national child welfare data system and is the key to understanding other important issues that are unique to AI/AN children and federal law requirements under ICWA.

The current data in AFCARS only identifies AI/AN children through self-identification, which provides inaccurate and unreliable data. Relevant data measures in ICWA related to placement, engagement with the child's tribe, and efforts to avoid placement are not collected leaving federal agency, states, Congress, and tribes with little information to address pernicious issues impacting this population like foster care disproportionality. The 2016 Final Rule only requires states to collect the data elements in the 2016 Final Rule for AI/AN children that are ICWA eligible. Regardless of whether AFCARS data is collected all states are required by law to examine whether a child is ICWA eligible, so this effort is already required outside of AFCARS requirements. The 2016 Final Rule data specific to AI/AN children is not required to be collected for other non-Indian children so while there will be additional data collection for AI/AN children that are ICWA eligible, given the small number of AI/AN children in the vast majority of states this will not require a significant burden.

3. Previously, we received comments that particular data elements did not lend themselves to national statistics and were best assessed with qualitative methods such as case review. Please provide specific recommendations on which data elements in the regulation to retain that are important to understanding and assessing the foster care population at the national level. Also, provide a rationale for your suggestion that may include its relevance to monitor compliance with the title IV-B and IV-E programs or another strong justification for using the data at the national level.

All of the data elements for AI/AN children in the 2016 Final Rule are appropriate for a national data system like AFCARS. The activities related to the data are required by federal law, such as ICWA, and should be documented in any child welfare case file. The vast majority of the data would come from state agency activities with a few data elements coming in the form of state court orders, which should also be included in any well documented case file. To assume that some data may not be retrievable if it comes from judicial determinations is essentially saying that case files do not need to contain court orders, which would be out of alignment with nationally recognized standards in child welfare case management. In addition, not having this information in a case file poses risk that court orders are not being properly implemented and places children in jeopardy of not receiving the benefits of court oversight in child welfare.

Capturing AI/AN data through case file reviews or other qualitative methods would not provide the data that Congress, states, and tribes need on an ongoing basis to make necessary changes in policy, practice, and resource allocation to address the serious problems that have been impacting AI/AN children for over two decades. Existing qualitative methods, like case file reviews under the Child and Family Services Reviews, have demonstrated the limitations of this data for informing Congress on how best to address critical concerns for AI/AN children. Case file reviews in many states include only a handful of cases involving AI/AN children and the data retrieved does not lend itself to adequately informing local efforts to address serious concerns related to outcomes for this population, much less issues of national concern. AFCARS is much better suited to collecting the type of data required for AI/AN children and efforts to shift data collection to other less comprehensive data systems with less regular data collection and reporting will have a negligible effect on improving data for this population.

4. Previously we received comments noting concerns with variability in some of the data elements across states and within jurisdictions. Please provide specific suggestions to simplify data elements to facilitate the consistent collection and reporting of AFCARS data. Also, provide a rationale for each suggestion and how the simplification would still yield pertinent data.

In the absence of a national data reporting requirement, it is guaranteed the current variability in state data collection and reporting will continue as evidenced by only a few states collecting any data specific to AI/AN children, and the current AFCARS data questions that use self-identification as a determinant of whether a child is AI/AN, rather than the appropriate questions related to their citizenship in a tribal government. Even with appropriate questions related to whether an AI/AN child or their family are eligible for ICWA protections, linkages to other AFCARS data cannot be assumed to be sufficiently correlated for informing policymakers and child welfare agencies without the other data elements for AI/AN children in the 2016 Final Rule also being implemented. ACF as much as any stakeholder should have a strong interest in improving the availability of accurate and reliable data for this population, which they have dedicated significant amounts of their resources to in the form of technical assistance and training.

5. Previously we received comments questioning the utility, reliability, and purpose of certain data elements at the national level. Provide specific recommendations on which data elements in the regulation to remove because they would not yield reliable national information about children involved with the child welfare system or are not needed for monitoring the title IV-B and IV-E programs. Please be specific in identifying the data elements and provide a rationale for why this information would not be reliable or is not necessary.

Each of the ICWA-related data points are tied to existing federal law and regulation and are necessary to monitor and support title IV-B and IV-E programs. Each of the ICWA-related data points is critical. The Title IV-B plan requirement for states that requires that states consult with tribal governments on their plans to implement ICWA has so far relied primarily on anecdotal information that is not collected or tracked uniformly by ACF leading to uneven responses to concerns about poor outcomes for AI/AN children in different states. The data elements contained in the 2016 Final Rule are linked in terms of being able to provide a complete picture of how AI/AN children are doing, and by eliminating or streamlining some of these data elements ACF would be compromising the integrity of the data to confidently inform policymakers and other stakeholders as to the important data trends and explanations for these trends.

In addition, as was stated earlier in our general comments, ICWA has been viewed as the "gold standard" in child welfare practice by leading national child welfare organizations and now with the passage of the Family First Prevention Services Act we can see there is increased support and interest in capturing more information on how states and tribes can improve outcomes for children and families beyond just improving the placement experience. The 2016 Final Rule data elements specific to AI/AN children are aligned with these acknowledgements and will be significantly helpful to all stakeholders involved in improving services and outcomes for AI/AN children.

Conclusion

The experience of having little to no data collected for AI/AN children through AFCARS over the last two decades has resulted in not meaningful improvements in the safety and well-being for AI/AN children and could be argued as having contributed to the worsening conditions for this population. We know of no other federal child welfare law that does not have some form of basic data collection and certainly not one that is 40 years old as ICWA is. The AFCARS data elements for AI/AN children in the 2016 Final Rule have incredible potential to improve outcomes for this population, but only if the data elements are not heavily modified or eliminated. While there are burdens for states to collect this data, for the past 40 years it has primarily AI/AN children, their families, and tribal communities that have born the burden while little to no reliable data has been collected and the crisis of foster care disproportionality has worsened. The time has come to move forward with this critically important data collection for AI/AN children and families and end the delays for not collecting the data that is necessary to support and promote healing for this population.

Sincerely,

Lael Gabrian
Attorney at Montana Legal Justice, PLLC

As of: September 14, 2020
Received: June 11, 2018
Status: Posted
Posted: June 12, 2018
Tracking No. 1k2-93oc-8use
Comments Due: June 13, 2018
Submission Type: E-mail

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0041
Torres Martinez Desert Cahuilla Indians

Submitter Information

Name: Thomas Tortez
Address: 92274
Organization: Torres Martinez Desert Cahuilla Indians

General Comment

See attached

Attachments

Torres Martinez Desert Cahuilla Indians

THE TORRES MARTINEZ DESERT CAHUILLA INDIANS
P.O. Box 1160
Thermal, CA 92274
(760) 397-0300 – FAX (760) 397-8146

June 11, 2018

Attn: Kathleen McHugh
United States Department of Health and Human Services
Administration for Children and Families
Policy Division
330 C Street SW
Washington, DC 20024

Submitted via electronic correspondence at: CBcomments@acf.hhs.gov

Re: RIN: 0970-AC72 Adoption and Foster Care Analysis and Reporting System; Advance Notice of Proposed Rulemaking (3/15/2018)

Dear Ms. McHugh:

The Torres Martinez Desert Cahuilla Indians submits these comments regarding the Advance Notice of Proposed Rulemaking published in the Federal Register on March 15, 2018 (Volume 83, No. 51, page 11449). Our comments pertain to data elements specific to American Indian and Alaska Native (AI/AN) children contained within the 2016 Adoption and Foster Care Analysis Reporting System (AFCARS) Final Rule published on December 14, 2016. The data elements we are commenting on address a number of relevant federal law requirements pertaining to the Indian Child Welfare Act (ICWA). We oppose any streamlining, modification, or elimination of these critical AFCARS data elements for AI/AN children.

It has been almost 25 years since the establishment of the AFCARS data collection system and 40 years since the enactment of ICWA. AI/AN children are still waiting to have basic data collected that describes their conditions, how relevant federal law under Title IV-B, Title IV-E, and ICWA is being implemented with respect to AI/AN children, and the identification of critical data that can inform local and national interventions to eliminate well-documented and long term foster care disproportionality and service disparities that AI/AN children face. Each year that data is not collected is another year AI/AN children will not see significant improvements to their well-being and policymakers and other government officials will not have the data they need to make smart, effective changes that can address these very serious, long-term problems; this is an untenable situation.

We also note that nothing has changed since the publication of the 2016 Final Rule that would change the need for this critical data for AI/AN children. Instead, Congress has made it clear with the passage of the Family First Prevention Services Act (Division E of the Bipartisan Budget Agreement Act of H.R. 1892)

that they intend for Title IV-E to be expanded to focus on additional services and efforts, not just a narrow band of placement activities.

General Comments

The 2016 Final Rule is within ACF's Statutory Authority and Mission. Section 479 of the Social Security Act mandates the Department of Health and Human Services (DHHS) collect national, uniform, and reliable information on children in state foster care and adoptive care. The statutory language is expansive and suggests a broad collection of data for children under state care who are in foster care or adoption that includes their demographics, characteristics, and status while in care. Section 1102 of the act instructs the Secretary of DHHS to develop regulations necessary to carry out the functions for which DHHS is responsible under the act.

In addition, Section 422 of the Social Security Act requires DHHS to collect descriptions from states of a state's efforts to consult with tribes on the specific measures taken by a state to comply with ICWA. This provision has been in federal law since 1994 and DHHS has responded by asking states to provide this information, along with additional information related to ICWA implementation in state Annual Progress and Services Reports. DHHS also has a long history of collecting information, although limited, on ICWA implementation through their Child and Family Services Review process with states. These reports and reviews are authorized under the broad discretionary authority provided to DHHS under Titles IV-B and IV-E of the Social Security Act to collect data from states and review their progress against different federal child welfare requirements.

The Final Rule, which ACF developed under the statute, ensures the collection of necessary and comprehensive national data on the status of American Indian/Alaska Native (AI/AN) children to whom ICWA applies, and historical data on children in foster care. Thus, the Final Rule's data collection elements are necessary to ACF's statutory mission under the Social Security Act. In addition, there is no statutory requirement that all data elements must be specifically tied to Title IV-E or Title IV-B requirements only.

ACF provided ample notice and opportunities to comment on the 2016 Final Rule. On April 2, 2015, ACF issued a Supplemental Notice of Proposed Rulemaking (SNPRM) proposing changes to AFCARS data elements. A year later on April 7, 2016, ACF published another SNPRM proposing the addition of new AFCARS data elements related specifically to data concerning American Indian and Alaska Native (AI/AN) children and families. The proposed data was related to federal law requirements specific to ICWA and placements of AI/AN children. The Final Rule was published eight months later on December 14, 2016, and included the ICWA data elements.

The 2016 Final Rule was the product of a thorough and well-reasoned process that included opportunities for states, tribes, and other interested parties to comment. Issues related to the benefits for AI/AN children and families and burdens upon states to collect and report the data were thoroughly addressed in the Final Rule. While there was almost unanimous support provided to including the new data elements for AI/ANs, there was also very little concern expressed by states submitting comments specific to the addition of new data elements for AI/AN children and families. The few state comments that were received that expressed concern with the ICWA data elements were generally vague and expressed general concern regarding the burden of collecting new data of any type. Furthermore, as evidenced in the 2016 Final Rule discussion, ACF engaged in several discussions with states (6) regarding their perspectives on the proposed changes and as a result streamlined many of the data elements proposed in the SNPRM. The very thorough and well thought out regulatory process used in developing the 2016 Final Rule evidences that no additional collection of information is necessary.

The data in the 2016 Final Rule is vital to the federal government, Congress, states, and tribes to effectively address the needs of AI/AN children and families. AI/AN children have been overrepresented in state foster care systems for over two decades, going back to the initial implementation of the AFCARS system. Prior to the 2016 Final Rule AFCARS only asked questions related to whether a child in state care and custody was self-identified as AI/AN. This self-identification does not provide necessary information to understand whether a child has a political relationship with a federally recognized tribe as a citizen of that tribe and whether other federal law requirements under ICWA are being implemented, especially those related to the placement of the child in substitute care and whether the child's tribe was engaged in supporting the child and family. As a result, AFCARS data has provided little help in understanding how to address chronic and persistent issues, such as foster care disproportionality, that are barriers to the well-being of AI/AN children and families—issues that not only affect the well-being of children, but also cost states and tribes considerable amounts of their finite resources.

Another practical implication for not implementing the data elements for AI/AN children in the Final Rule is it sends a message to states and tribes that the federal government does not consider data collection on this population a priority issue, which also disincentivize state and tribal efforts to address these issues at the federal and local level. As an example of how insufficient data collection can frustrate efforts to improve outcomes for AI/AN children, in the 2005 General Accountability Office (GAO) report on ICWA implementation (GAO-05-290) GAO indicated that they were hindered in their task to fully research and understand the questions submitted by a group of bi-partisan members of Congress because of insufficient data available from both state and federal data collection systems.

At the local level, while states and tribes are increasingly partnering to improve ICWA implementation and improve outcomes for AI/AN children, data collection is a consistent concern and hampers efforts by states and tribes to demonstrate the need for additional policies and resources with state legislators. Since the publication of the Final Rule in December of 2016 a number of states have already begun work with tribes in their state on data system improvements and begun discussions of how the data would be supported and shared among state and tribal governments. Unfortunately, this Advanced Notice of Proposed Rule Making (ANPRM) has caused these efforts to be called into question and further delay the ability to seek real, meaningful answers to issues that frustrate AI/AN children's well-being on a daily basis.

The regulations themselves, in response to the comments from tribes and states, describe the importance of the 2016 Final Rule changes. As stated in the December 2016 Final Rule, 81 Fed. Reg. 90524, 90527:

> Overall, tribes, organizations, states, and private citizens supported our mission to collect additional information related to Indian children as defined in ICWA. Moreover, some states, tribes, national organizations, and federal agencies have stated that ICWA is the ''gold standard'' of child welfare practice and its implementation and associated data collection will likely help to inform efforts to improve outcomes for all children and families in state child welfare systems.

In light of these comments and the recent passage of the Family First Prevention Services Act by Congress in February of 2018 (Division E of the Bipartisan Budget Agreement Act, H.R. 1892) where Congress is clearly expanding the purposes of the Title IV-E program to include not only placement activities, but also prevention services to families, we see even more relevance and need for the data elements for AI/AN children and families included in the 2016 Final Rule.

Some of the expected benefits from implementing the full set of data elements for AI/AN children contained in the 2016 Final Rule include, but are not limited to, the following:

1. provide data on core ICWA requirements such as ''active efforts'' to prevent removals of AI/AN children and success in securing appropriate placements, especially kinship care placements, that have been demonstrated to improve AI/AN children's connection to their family, culture, and tribal supports they need to succeed;

2. facilitate access to culturally appropriate services to AI/AN children and families to avoid out-of-home placement, keep children safe, and avoid unnecessary trauma to AI/AN children;

3. identify effective strategies to securing extended family and other tribal families who can serve as resources to AI/AN children and help address the shortage of AI/AN family placements for AI/AN children;

4. identify when tribes are being engaged to help support AI/AN children and families and trends related to how that engagement impacts outcomes for this population; and

5. provide avenues for collaboration between states and tribes that are more meaningful, and outcome driven, including improved policy development, technical assistance, training, and resource allocation as a result of having reliable data available.

The ANPRM is arbitrary and capricious where it seeks only information on burdens. This ANPRM arbitrarily focuses on collecting information about the burdens without considering the benefits. As required by law, the Final Rule conducted a careful analysis of the benefits and burdens, and appropriately amended the SNPRM to achieve a balanced Final Rule.

The Agency "determined in the final rule that the benefits outweigh the burden associated with collecting and reporting the additional data." 81 Fed. Reg. at 90528. The Agency explained how weighing of the benefits and burdens led it to make certain changes to its proposal. For example: as stated in the Final Rule at 81 Fed Reg. 90528:

> In response to state and tribal comments suggesting congruence with the BIA's final rule, we revised data elements in this final rule as appropriate to reflect the BIA's regulations including removing requirements that state title IV-E agencies report certain information only from ICWA-specific court orders. These changes should allow the state title IV-E agency more flexibility, alleviate some of the burden and other concerns identified by states, help target technical assistance to increase state title IV-E agency communication and coordination with courts, and improve practice and national data on all children who are in foster care.

There have been no significant changes justifying ACF's proposal to reexamine the 2016 Final Rule. ACF seems to rely upon the President's Executive Order (13777) for all federal agencies to identify regulations that are perceived as burdensome or unnecessary, but this is not a sufficient basis for ACF to act, as the Executive Order itself is arbitrary and unlawful where it provides an insufficient basis for reasonable decision-making relaying solely on an examination of the burden of regulations without the required balancing of benefits. Additionally, the Executive Order fails to provide justification to deviate from the statutory requirement for regulations.

Responses to the Questions for Comment provided in the ANPRM:

1. Identify the data elements, non-ICWA-related, that are overly burdensome for state and tribal title IV-E agencies and explain why. Please be specific in identifying the data elements and provide a rationale for why collecting and reporting this information is overly burdensome.

We believe that the new data elements provided in the 2016 Final Rule that address health assessments, educational achievement, siblings, mental health services, sex trafficking, sexual orientation, permanency planning, adoption, guardianship, and housing are important for AI/AN children and youth as well. Burdens to collecting this data for tribes and states are relatively small considering the benefits to improving outcomes for AI/AN children and families, especially given many of the data elements are correlated to some of the most vulnerable populations in child welfare systems and identification of risks associated to their well-being.

2. Previously, we received comments regarding burden and the system changes needed to report the ICWA-related data elements of the 2016 SNPRM. We would like to receive more detailed comments on the specific limitations that states will encounter in reporting the ICWA-related data elements in the final rule. Please be specific in identifying the data elements and provide a rationale for why this information is overly burdensome.

The 2016 Final Rule requests title IV-E states provide the number of children in foster care who are considered Indian children as defined in ICWA. This is data that is currently not collected or reported in any national child welfare data system and is the key to understanding other important issues that are unique to AI/AN children and federal law requirements under ICWA. The current data in AFCARS only identifies AI/AN children through self-identification, which provides inaccurate and unreliable data. Relevant data measures in ICWA related to placement, engagement with the child's tribe, and efforts to avoid placement are not collected leaving federal agency, states, Congress, and tribes with little information to address pernicious issues impacting this population like foster care disproportionality. The 2016 Final Rule only requires states to collect the data elements in the 2016 Final Rule for AI/AN children that are ICWA eligible. Regardless of whether AFCARS data is collected all states are required by law to examine whether a child is ICWA eligible, so this effort is already required outside of AFCARS requirements. The 2016 Final Rule data specific to AI/AN children is not required to be collected for other non-Indian children so while there will be additional data collection for AI/AN children that are ICWA eligible, given the small number of AI/AN children in the vast majority of states this will not require a significant burden.

3. Previously, we received comments that particular data elements did not lend themselves to national statistics and were best assessed with qualitative methods such as case review. Please provide specific recommendations on which data elements in the regulation to retain that are important to understanding and assessing the foster care population at the national level. Also, provide a rationale for your suggestion that may include its relevance to monitor compliance with the title IV-B and IV-E programs or another strong justification for using the data at the national level.

All of the data elements for AI/AN children in the 2016 Final Rule are appropriate for a national data system like AFCARS. The activities related to the data are required by federal law, such as ICWA, and should be documented in any child welfare case file. The vast majority of the data would come from state agency activities with a few data elements coming in the form of state court orders, which should also be included in any well documented case file. To assume that some data may not be retrievable if it comes from judicial determinations is essentially saying that case files do not need to contain court orders, which would be out of alignment with nationally recognized standards in child welfare case management. In

addition, not having this information in a case file poses risk that court orders are not being properly implemented and places children in jeopardy of not receiving the benefits of court oversight in child welfare.

Capturing AI/AN data through case file reviews or other qualitative methods would not provide the data that Congress, states, and tribes need on an ongoing basis to make necessary changes in policy, practice, and resource allocation to address the serious problems that have been impacting AI/AN children for over two decades. Existing qualitative methods, like case file reviews under the Child and Family Services Reviews, have demonstrated the limitations of this data for informing Congress on how best to address critical concerns for AI/AN children. Case file reviews in many states include only a handful of cases involving AI/AN children and the data retrieved does not lend itself to adequately informing local efforts to address serious concerns related to outcomes for this population, much less issues of national concern. AFCARS is much better suited to collecting the type of data required for AI/AN children and efforts to shift data collection to other less comprehensive data systems with less regular data collection and reporting will have a negligible effect on improving data for this population.

4. Previously we received comments noting concerns with variability in some of the data elements across states and within jurisdictions. Please provide specific suggestions to simplify data elements to facilitate the consistent collection and reporting of AFCARS data. Also, provide a rationale for each suggestion and how the simplification would still yield pertinent data.

In the absence of a national data reporting requirement, it is guaranteed the current variability in state data collection and reporting will continue as evidenced by only a few states collecting any data specific to AI/AN children, and the current AFCARS data questions that use self-identification as a determinant of whether a child is AI/AN, rather than the appropriate questions related to their citizenship in a tribal government. Even with appropriate questions related to whether an AI/AN child or their family are eligible for ICWA protections, linkages to other AFCARS data cannot be assumed to be sufficiently correlated for informing policymakers and child welfare agencies without the other data elements for AI/AN children in the 2016 Final Rule also being implemented. ACF as much as any stakeholder should have a strong interest in improving the availability of accurate and reliable data for this population, which they have dedicated significant amounts of their resources to in the form of technical assistance and training.

5. Previously we received comments questioning the utility, reliability, and purpose of certain data elements at the national level. Provide specific recommendations on which data elements in the regulation to remove because they would not yield reliable national information about children involved with the child welfare system or are not needed for monitoring the title IV-B and IV-E programs. Please be specific in identifying the data elements and provide a rationale for why this information would not be reliable or is not necessary.

Each of the ICWA-related data points are tied to existing federal law and regulation and are necessary to monitor and support title IV-B and IV-E programs. Each of the ICWA-related data points is critical. The Title IV-B plan requirement for states that requires that states consult with tribal governments on their plans to implement ICWA has so far relied primarily on anecdotal information that is not collected or tracked uniformly by ACF leading to uneven responses to concerns about poor outcomes for AI/AN children in different states. The data elements contained in the 2016 Final Rule are linked in terms of being able to provide a complete picture of how AI/AN children are doing, and by eliminating or streamlining some of these data elements ACF would be compromising the integrity of the data to confidently inform policymakers and other stakeholders as to the important data trends and explanations for these trends.

In addition, as was stated earlier in our general comments, ICWA has been viewed as the "gold standard" in child welfare practice by leading national child welfare organizations and now with the passage of the Family First Prevention Services Act we can see there is increased support and interest in capturing more information on how states and tribes can improve outcomes for children and families beyond just improving the placement experience. The 2016 Final Rule data elements specific to AI/AN children are aligned with these acknowledgements and will be significantly helpful to all stakeholders involved in improving services and outcomes for AI/AN children.

Conclusion

The experience of having little to no data collected for AI/AN children through AFCARS over the last two decades has resulted in not meaningful improvements in the safety and well-being for AI/AN children and could be argued as having contributed to the worsening conditions for this population. We know of no other federal child welfare law that does not have some form of basic data collection and certainly not one that is 40 years old as ICWA is. The AFCARS data elements for AI/AN children in the 2016 Final Rule have incredible potential to improve outcomes for this population, but only if the data elements are not heavily modified or eliminated. While there are burdens for states to collect this data, for the past 40 years it has primarily AI/AN children, their families, and tribal communities that have born the burden while little to no reliable data has been collected and the crisis of foster care disproportionality has worsened. The time has come to move forward with this critically important data collection for AI/AN children and families and end the delays for not collecting the data that is necessary to support and promote healing for this population.

Sincerely,

Thomas Tortez, Jr
Tribal Chairman

TT/cq

As of: September 14, 2020
Received: June 11, 2018
Status: Posted
Posted: June 12, 2018
Tracking No. 1k2-93oc-miio
Comments Due: June 13, 2018
Submission Type: E-mail

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0042
Connecticut Alliance of Foster & Adoptive Families

Submitter Information

Name: Margaret Doherty
Address: 06067
Organization: Connecticut Alliance of Foster & Adoptive Families

General Comment

See attached

Attachments

Connecticut Alliance of Foster & Adoptive Families

CAFAF
CONNECTICUT ALLIANCE OF FOSTER & ADOPTIVE FAMILIES

2189 Silas Deane Highway, Suite 2 • Rocky Hill, Connecticut 06067
860.258.3400 tel • 800.861.8838 Toll-free • 860.258.3410 fax
www.cafafct.org

June 13, 2018

Kathleen McHugh
U.S. Department of Health and Human Services
Administration for Children and Families
Director, Policy Division
330 C Street SW
Washington, D.C. 20024

RE: Proposed rulemaking for Adoption and Foster Care Analysis and Reporting System (AFCARS) data elements, 45 CFR 1355 (Mar. 15, 2018) [RIN 0970-AC72]

Submitted via email to CBComments@acf.hhs.gov.

Dear Ms. McHugh:

On behalf of Connecticut Alliance of Foster and Adoptive Families (CAFAF) please accept the following comments regarding the Notice of Proposed Rulemaking at 83 Fed. Reg. 11449 ("Proposed Rule") proposing to streamline the Adoption and Foster Care Analysis and Reporting System (AFCARS) data elements and request comments regarding whether new data elements are overly burdensome. CAFAF requests that U.S. Department of Health and Human Services, Administration for Children and Families ("ACF"), Administration on Children Youth and Families ("ACYF"), Children's Bureau ("Children's Bureau") maintain the current data elements in the December 14, 2016 AFCARS Final Rule ("Final Rule"), including those related to sexual orientation, gender identity, and gender expression. The data elements in the Final Rule previously went through a thorough notice and comment period, during which comments on the burden of data elements were addressed and the data elements adjusted as described in the Final Rule.

CAFAF actively recruits foster and adoptive families, including members of the Lesbian, Gay, Bisexual, Transgender and Questioning (LGBTQ) community to become foster and adoptive parents and does so in coordination and with the support of Connecticut Department of Children and Families, our state child welfare agency.

A. The Data Elements in the Final Rule are Not Overly Burdensome and Have Already Been Streamlined through Numerous Comment Periods

We recommend that the data elements in the Final Rule be retained and not further streamlined. The 2016 Final Rule represents a "streamlining" of the original proposed rule (2015 NPRM and 2016 SNPRM) and the burdens identified by commenters were addressed in the Final Rule. In fact, states and tribal entities and other stakeholders have had numerous opportunities to provide public comments on AFCARS data elements including in 2003,

2008, 2010, 2015, and 2016. The Final Rule data elements reflect those numerous public comments, are not overly burdensome and will provide nationwide information regarding children and families whose existence and experiences have remained officially invisible. Any burden involved in implementing new data elements is outweighed by the benefit of more informed state and federal policy resulting in improved outcomes for some of the most marginalized children in the child welfare system and reduced systemic costs.

Because AFCARS has not been updated since 1993, data elements added in the Final Rule reflect significant advances in child welfare policy and practice and include statutorily required data from the *Preventing Sex Trafficking and Strengthening Families Act* (P.L. 110-351) and changes in foster care services and oversight in the *Fostering Connections to Success and Increasing Adoptions Act of 2008* (P.L.110-351), and the *Child and Family Services Improvement and Innovation Act* (P.L. 112-34). Critically, the Final Rule will also provide data to ensure implementation and oversight of the *Indian Child Welfare Act* (P.L. 95-608), improving outcomes for tribal youth. The burden on states of implementing new data element collection will be reduced with the current development of the new Comprehensive Child Welfare Information System (CCWIS), and many of the data elements will assist states in implementing the recently passed *Family First Prevention Services Act* ("Family First," P.L 115-123), as described in examples below.

B. Removal of Data Elements Related to Foster Youth Sexual Orientation and Gender Identity and Expression ("SOGIE") Would Negatively Impact the Safety, Permanency, and Well-being of LGBTQ Children and Eliminate Cost Savings

HHS should maintain the data elements in the AFCARS Final Rule related to sexual orientation, gender identity, and gender expression so that states and tribes can improve outcomes, identify and fund needed resources, and reduce disparities experienced by LGBTQ foster children. LGBTQ youth are disproportionately overrepresented in foster care and suffer worse safety, permanency, and well-being outcomes than their non-LGBTQ peers. Data on these youth at the state level is urgently needed to improve outcomes, reduce costs, and reduce disparities; data at the national level is necessary to inform federal law, policy and funding determinations, to identify best practices for replication and, critically, to enhance the Administration on Children and Families' efforts to prevent removal and allow to children to remain safely at home with their families.

The core objectives of safety, permanency, and well-being apply to all children in the custody of state and tribal child welfare systems, including LGBTQ children, and the Social Security Act requires collection of data regarding characteristics of all children in care.[1] In April 2011, ACF confirmed and reiterated "the fundamental belief that every child and youth who is unable to live with his or her parents is entitled to safe, loving and affirming foster care placement, irrespective of the young person's sexual orientation, gender identity or gender expression."[2] ACF further acknowledged that LGBTQ youth are overrepresented in the population served by the child welfare system and in the population of youth experiencing homelessness.[3] Yet, LGBTQ youth will be inadequately served until states and tribes have more information about these youth and their experiences and outcomes, and how institutions can better respond to their individual needs.

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[1] https://www.ssa.gov/OP_Home/ssact/title04/0479.htm

[2] Administration for Children and Families, *ACYF-CB-IM-11-03, Lesbian, Gay, Bisexual, Transgender and Questioning Youth in Foster Care* (April 6, 2011) https://www.acf.hhs.gov/sites/default/files/cb/im1103.pdf

[3] *Ibid.*

Disproportionate representation of LGBTQ youth in care and the poor outcomes they experience were confirmed in a 2013 study conducted in connection with the R.I.S.E. Project, a five-year, $13.3 million demonstration grant funded by ACYF to create a model program to support LGBTQ youth in the foster care system.[4] The purpose of the study was to determine the percentage of Los Angeles County foster youth who identify as LGBTQ, and whether their experiences in foster care were different from those of their peers. The study found that 19 percent of youth ages 12-21 in foster care self-identify as LGBTQ, which is 1.5 to 2 times the number of LGBTQ youth estimated to be living outside of foster care. 13.6 percent of participants identified as lesbian, gay, bisexual or questioning ("LGBQ"); eleven percent of the participants identified as gender-nonconforming, and 5.6% identified as transgender. Other studies have estimated even higher numbers of LGBTQ youth in foster care, including a forthcoming study which estimates that 22.8% of youth in out of home care identify as LGBQ.[5] Using the estimates from the studies cited above, the number of foster youth in the United States over the age of 14 who identify as having a sexual orientation other than "straight" are 14,300 to 24,000.[6] 57% of the foster youth over 14 who identify as LGBQ, or between 8,100 and 11,300 youth, are youth of color.[7]

In addition to being disproportionately represented in the system, LGBTQ youth experience worse conditions and outcomes in foster care. The federally-funded R.I.S.E. study confirmed that LGBTQ youth have a higher number of foster care placements and are more likely to be living in a group home.[8] Over twice as many LGBTQ youth reported being treated poorly by the foster care system compared to non-LGBTQ youth, and LGBTQ youth are more likely to be hospitalized for emotional reasons and have higher incidences of juvenile justice involvement.[9] They were also more likely to have become homeless, with many citing lack of acceptance in foster care as the reason they experienced homelessness.[10] States and tribes will continue to be stymied in their ability to improve outcomes and reduce costs for LGBTQ foster youth until sexual orientation and gender identity data is available. Collecting this data nationally will allow the Children's Bureau, states and tribes to identify successes and best practices in improving outcomes for LGBTQ foster youth and to replicate them to address disparities.

We also oppose eliminating data elements relating to the Indian Child Welfare Act ("ICWA"). States and tribal entities will only be required to report most of the ICWA-related data elements if ICWA applies in a child's case, greatly reducing any burden associated with collecting and reporting these elements. Eliminating the collection of demographic information regarding American Indian and Alaska Native youth not only negatively impacts another vulnerable population with poor outcomes, but inhibits the ability to learn more about the specific experiences of LGBTQ-identified American Indian and Alaska Native youth.

The Children's Bureau should retain the voluntary sexual orientation question for foster youth over the age of 14

All of the poor outcomes documented for LGBTQ foster youth, including a greater number

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[4] Bianca D.M. Wilson, Khush Cooper, Angel Kastanis, Sheila Nezhad, *New Report: Sexual and Gender Minority Youth in Foster Care*, WILLIAMS INST. (Aug. 2014), https://www.acf.hhs.gov/sites/default/files/cb/pii_rise_lafys_report.pdf

[5] *See for example* Center for the Study of Social Policies, *Out of the Shadows: Supporting LGBTQ Youth in Child Welfare through Cross-System Collaboration*, 2016 https://www.cssp.org/pages/body/Out-of-the-shadows-current-landscape.pdf

[6] AFCARS data shows that 105,182 foster youth in 2016 were 14 or older; these estimates utilize the 13.6 % and 22.8% numbers for LGBQ foster youth from the studies cited under (4) and (5) above.

[7] Same as 5 above.

[8] Same as 4 above.

[9] *Ibid.*

[10] *Ibid.*

of foster care placements, overrepresentation in congregate care, and hospitalization for emotional reasons, carry substantial costs to state and tribal child welfare systems. Identifying LGBQ foster youth through the voluntary sexual orientation question and implementing effective interventions to reduce instability, minimize costly stays in group homes, hospitals and juvenile justice facilities and improve permanency in family home settings would provide tremendous cost savings. We therefore urge the Children's Bureau to retain the voluntary question in the Final Rule related to sexual orientation of foster youth over the age of 14 because the many benefits resulting from information related to the new data elements outweigh any labor and cost associated with implementation.

For example, the average annual cost of foster care maintenance payments under Title IV-E and administrative costs for children in foster care in FY10 was $25,782.[11] That same year, adoption subsidies for children whose parents received subsidies and administrative costs for an adopted child averaged IV-E agencies $10,302 in costs.[12] Thus, identifying an affirming, supportive family for an LGBQ child leading to adoption – which would be impossible to do if the child's sexual orientation was unknown – would lead to an annual cost savings of $15,480 per child. Further, congregate care (in which LGBQ foster youth are overrepresented) including group homes, residential treatment facilities, psychiatric institutions and emergency shelters costs state governments 3-5 times more than family foster care.[13] Based on average annual foster care maintenance payments per child of $19,107 in FY2010,[14] placing an LGBQ child with an affirming, supportive foster family rather having her remain in congregate care would save a minimum of $38,214 per child per year.

It should be noted that all costs are not easily quantified, such as the well-being of youth receiving affirming care, or the long-term health benefits of a youth exiting sooner to a permanent family, and the cost savings to states and tribes estimated above are simply those within the foster care system itself. For example, studies indicate that LGBTQ youth exit foster care to homelessness and are commercially sexually exploited and victimized at higher rates than their non-LGBTQ peers in care. Costs associated with these negative outcomes are significant although challenging to quantify.

The Children's Bureau should retain the data element related to the reason for removal of a child from a family home due to "family conflict related to child's sexual orientation, gender identity, or gender expression."

Data regarding the degree to which family conflict impacts removal can drive needed funding for family acceptance work leading to family preservation, a priority of the current ACF administration. Helping a child remain with their family of origin through targeted supportive services related to this source of family conflict will provide enormous cost savings for states and tribes. Utilizing the FY10 foster care maintenance payments costs described above, cost savings would amount to $19,107 per child per year for each child not placed in a foster home; the annual savings would be 3-5 times greater for each child not placed in congregate care.

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[11] Zill, E. *Better Prospects, Lower Cost: The Case for Increasing Foster Care Adoption,* Adoption Advocate (35), May 2011, National Council for Adoption http://www.adoptioncouncil.org/images/stories/NCFA_ADOPTION_ADVOCATE_NO35.pdf

[12] *Ibid.*

[13] National Conference of State Legislatures, *Congregate Care, Residential Treatment and Group Home State Legislative Enactments 2009-2013,* February 2017 http://www.ncsl.org/research/human-services/congregate-care-and-group-home-state-legislative-enactments.aspx

[14] Same as 11 above.

Given that an estimated 19% of foster youth identify as LGBTQ[15], this data element will be crucial to successfully implementing Family First prevention funding aimed at keeping children with their families of origin rather than entering foster care. Removing this data point would harm the ability of states and tribes to further efforts to reduce the over-representation of LGBTQ youth in care, in general, and LGBTQ youth of color, in particular. In addition, research indicates that reducing the severity of family rejection based on SOGIE results in a reduction in suicidal ideation and self-harm, depression, substance use and sexually transmitted infections. All of these negative public health outcomes are costly not only to children personally, but to the child welfare system and our communities as a whole. This data element related to family rejection will help drive effective case planning and services resulting in better outcomes for youth and families and cost savings to states and tribes.

A. The Children's Bureau Should Retain the Voluntary Sexual Orientation Question for Adoptive and Foster Parents and Guardians.

The LGBTQ community is a significant untapped resource in the effort to find permanent families for all children and youth in foster care. Gay and lesbian foster parents are raising six percent of foster children in the United States, and same-sex couples are six times more likely to be serving as foster parents than their different-sex counterparts.[16] National surveys tell us that nearly 2 million lesbian, gay and bisexual adults are interested in adopting children.[17] Data resulting from the voluntary sexual orientation question for adoptive and foster parents and guardians will help states and tribes recruit and support LGBQ caregivers, increasing the pool of available homes for foster children, and help identify states and agencies which can do better in recruitment of LGBQ resource families.

In its April 2011 guidance, ACF confirmed that "LGBT parents should be considered among the available options for states and jurisdictions to provide timely and safe placement of children in need of foster or adoptive homes."[18] Almost forty years of research has overwhelmingly concluded that children raised by same-sex couples are just as healthy, socially adjusted, and psychologically fit as children with heterosexual parents.[19] Recruitment of LGBQ families could provide a source of affirming, supportive homes for LGBTQ foster youth, reducing the costs detailed above that are associated with the placement instability and overrepresentation in congregate care that these youth experience.

B. The Children's Bureau Should Add Voluntary Gender Identity Questions for Foster Youth Over the Age of 14 and Foster and Adoptive Parents and Guardians Because this Information is Important and it is Efficient to Collect this Information Along with Current Data Elements.

A forthcoming study found that "[y]outh who are transgender and/or gender-expansive often have a difficult time in child welfare systems; violence enacted upon people who are LGBTQ is often not because they are "out" as LGBTQ, but because service providers, caretakers, and

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[15] Same as 4 above.
[16] Gary Gates, LGBT Parenting in the United States, The Williams Institute, UCLA School of Law, February 2013, http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/lgbt-parenting-in-the-united-states/
[17] The Williams Institute & The Urban Institute, Foster and Adoptive Parenting by Gay and Lesbian Parents in the United States, (2007). https://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/lgbt-parenting-in-the-united-states/
[18] Same as 2 above.
[19] *ECDF Act Facts*, Family Equality Council (2017), https://www.familyequality.org/get_informed/advocacy/ecdf/ecdf-facts/

peers are policing the youth's gender behaviors."[20] Because of the particular challenges faced by transgender foster youth, adding gender identity questions for both foster youth and foster and adoptive parents and guardians will help states and tribes save costs by identifying affirming placements and reducing placement instability. Collecting gender identity data as well as sexual orientation data will help states and tribes develop streamlined comprehensive services with no gaps. Collecting gender identity data will be especially useful as new programs are developed with Family First funding, and Title IV-E agencies will benefit from and save money by adding these data elements now in conjunction with the new Comprehensive Child Welfare Information System (CCWIS).

A. The sexual orientation and gender identity and expression data elements of foster youth can be administered safely, and the Children's Bureau should provide training and resources to states and tribes to do so.

The child welfare profession has acknowledged the importance of collecting sexual orientation and gender identity ("SOGI") information about children, along with other critical information about the child's circumstances, in order to tailor an individualized case plan. In 2013, the Center for the Study of Social Policy, Legal Services for Children, the National Center for Lesbian Rights, and Family Builders by Adoption issued a set of professional guidelines addressing all aspects of managing SOGI information in child welfare systems.[21] The guidelines address the need to collect SOGI information in order to develop case plans and track outcomes in individual cases, and to engage in agency planning and assessment.

As a means of assessing risk and tracking disparities and outcomes, many public agencies already collect SOGI information on youth. Sexual orientation questions have been included on school-based surveys of adolescents since the mid-1980s through versions of the Youth Risk Behavior Survey (as noted in Children's Bureau comments to the Final Rule) and SOGI information is collected by many health care providers. Researchers have surveyed LGBTQ youth in the juvenile justice system, significantly increasing the profession's understanding of the disproportionate numbers of LGBTQ youth in detention, as well as differences in offense and detention patterns.[22] The regulations promulgated under the Prison Rape Elimination Act ("PREA") require youth and adult correctional officers to collect SOGI information as part of the initial screening process to identify residents and inmates who may be vulnerable to sexual assault while incarcerated.[23] Increasing numbers of state and local child welfare and juvenile justice agencies, as well as providers serving youth experiencing homelessness, have developed policies requiring the collection of SOGI data as part of the initial intake and assessment.

In the Final Rule, the Children's Bureau summarized its well supported rationale for collecting information regarding the sexual orientation of youth 14 years old and older. The Final Rule stated that "[i]nformation on sexual orientation should be obtained and maintained

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[20] Robinson, Brandon Andrew. Forthcoming. "Child Welfare Systems and LGBTQ Youth Homelessness: Gender Segregation, Instability, and Intersectionality." *Child Welfare*. Robinson further states that "mental health treatments and other behavior modifications may be used against youth who are transgender and gender-expansive as a way to try to modify their gender expression (Mallon & DeCrescenzo, 2006; Marksamer, 2011). Youth of color who are transgender and gender expansive face compounding stressors and experiences of discrimination within child welfare systems, whereby racism and racial profiling can shape how some youth's behaviors, including their gender behaviors, are monitored and disciplined (Mallon & DeCrescenzo, 2006)."

[21] Shannan Wilber, *Guidelines for Managing Information Related to the Sexual Orientation and Gender Identity and Expression of Children in Child Welfare Systems*, FAMILY BUILDERS BY ADOPTION (2013), http://cssr.berkeley.edu/cwscmsreports/documents/Information%20Guidelines%20P4.pdf

[22] Angela Irvine, *"We've Had Three of Them": Addressing the Invisibility of Lesbian, Gay, Bisexual and Gender Non-Conforming Youths in the Juvenile Justice System*, 19 COLUM. J. OF GENDER & L. 675 (2012).

[23] National Standards to Prevent, Detect and Respond to Rape, 28 CFR § 115 (2012).

in a manner that reflects respectful treatment, sensitivity, and confidentiality." Additionally, the rule directed agencies to guidance and recommended practices developed by "state and county agencies, advocacy organizations and human rights organizations."

A. Conclusion

For the reasons outlined above, we urge the U.S. Department of Health and Human Services, ACYF, ACF, Children's Bureau to retain all of the data elements in the 2016 AFCARS Final Rule, including the data elements related to sexual orientation and gender identity and expression. We appreciate the opportunity to comment on the benefits of these data elements outlined in the Final Rule.

Sincerely,

Margaret Doherty
Executive Director

As of: September 14, 2020
Received: June 11, 2018
Status: Posted
Posted: June 12, 2018
Tracking No. 1k2-93oc-8bpg
Comments Due: June 13, 2018
Submission Type: E-mail

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0043
Pueblo of Isleta

Submitter Information

Name: J. Robert Benavides
Organization: Pueblo of Isleta

General Comment

See attached

Attachments

Pueblo of Isleta

OFFICE OF THE GOVERNOR

505-869-3111
505-869-7596

PUEBLO OF ISLETA

June 11, 2018

By E-MAIL: *CBComments@acf.hhs.gov*

Ms. Kathleen McHugh
Director, Policy Division
Department of Health and Human Services
Administration for Children and Families
330 C Street S.W.
Washington, D.C. 20024

Re: RIN 0970-AC72; Advanced Notice of Proposed Rulemaking, Adoption and Foster Care Analysis Reporting System.

On behalf of the Pueblo of Isleta ("Pueblo"), we appreciate this opportunity to comment on the Advanced Notice of Proposed Rulemaking ("ANPRM") regarding the Adoption and Foster Care Automated Reporting System ("AFCARS") data elements related to the Indian Child Welfare Act of 1978 ("ICWA"). The Final AFCARS Rule ("Final Rule") was published in the Federal Register on December 14, 2016, and requires collection of state-level data on American Indian and Alaska Native children in state child welfare systems. The Final Rule is a significant and positive step forward in ensuring that the federal government fulfills its trust responsibility to Indian tribes and recognizing the agency's role with respect to ICWA compliance.

The Pueblo is deeply concerned that for a second time since the Final Rule was promulgated, the Administration for Children and Families ("ACF") is seeking comments on the inclusion of the ICWA Data Elements in AFCARS. Given how the Federal Register notices related to the Final Rule have been drafted there appears to be a focused effort to obtain public comments that would justify eliminating the ICWA Data Elements as overly burdensome and/or outside of ACF's authority. For example, the Federal Register Notice issued by ACF seeking to delay implementation of the Final Rule—which was issued the same day as the ANPRM—states that

> [t]he scope and complexity of data elements related to ICWA was also a concern. We note that most of the ICWA-related data elements in the [Final Rule] are also not tied to statutory reporting requirements in title IV-E or IV-B. Rather, they were finalized to be consistent with the Department of the Interior's Final Rule on ICWA . . . .

See Adoption and Foster Care Analysis and Reporting System, 83 Fed. Reg. 11449 (Mar. 15, 2018) (to be codified at 45 CFR pt. 1355).

Adoption and Foster Care Analysis and Reporting System, 81 Fed. Reg. 90524 (Dec. 14, 2016) (to be codified at 45 C.F.R. pt. 1355).

Adoption and Foster Care Analysis and Reporting System, 83 Fed. Reg. 11450, 11451 (Mar. 15, 2018) (to be codified at 45 C.F.R. pt. 1355).

The current effort by ACF to undermine the Final Rule is not supported by the record in the Final Rule and completely ignores the efforts that ACF undertook to not only examine its legal authority but also seek public comment and consult with Indian tribes before issuing the Final Rule.

Congress enacted ICWA in response to "an alarmingly high percentage of Indian families [that] are broken up by the removal, often unwarranted of their children . . . an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions."[4] Unfortunately, since ICWA's enactment over 35 years ago, Indian children are still disproportionally represented in state foster care and adoptive proceedings across the country. Although comprehensive data is still lacking, 2007 Pew survey found the presence of Indian children in foster care is 1.6 times greater than the expected rate. More significantly, states with large Native American populations have even higher disproportional representation of Indian children in foster care.[5] In order to fully appreciate this disproportionality we must have better data relating to Indian children in state systems. Requiring states to report on specific ICWA data elements can also have a positive impact on ensuring ICWA compliance and consistency across state agencies.

As discussed below, the Pueblo requests that ACF move forward with implementation of the Final Rule without changes to ICWA data collection.

I. ACF has the authority to include ICWA data elements in AFCARS.

Section 479 of the Social Security Act ("SSA") and foundational Indian law principles clearly support ACF's authority to collect ICWA related data as part of AFCARS. The Final Rule reflects a recognition that the absence of data relating to ICWA may adversely impact the proper implementation of ICWA by state agencies and courts. In re-examining this matter, ACF has exercised its authority in a considered manner based on established legal principles.[6] The inclusion of ICWA data in AFCARS is also timely given that the Department of the Interior published regulations implementing ICWA in 2016.[7] It is also worth noting that during the webinar held on

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[4] 25 U.S.C. § 1901(4).

[5] "Time for Reform, A Matter of Justice for American Indian and Alaska Native Children," at 5 NICWA (accessed May 31, 2018), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/foster_care_reform/nicwareportpdf.pdf.

[6] The Administrative Procedures Act ("APA") explicitly contemplates changes over time in Federal agency rules, by stating that "'rulemaking'" means agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). And in accordance with the APA, only a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy. *See e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (". . . we fully recognize that '[regulatory] agencies do not establish rules of conduct to last forever' . . .and that an agency must be given ample latitude to 'adapt their rules and policies to the demands of changing circumstances. *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968).)'". *See also, FCC v. Fox TV Stations*, 556 U.S. 502 (2009) (involving a change to a 25-year old FCC policy, the Court noted that the APA requires no heightened review—beyond the usual "arbitrary and capricious" review—for an agency's change in policy.).

[7] Indian Child Welfare Proceedings, 81 Fed. Reg. 38778 (Jun. 14, 2016) (to be codified at 25 C.F.R. pt. 23).

April 25, 2018, ACF representatives stated that ACF has broad authority to collect any data on children under the IV-E program.[8]

Pursuant to Section 479 of SSA, the Secretary of the Department of Health and Human Services ("Secretary") is required to promulgate final regulations to collect data from states related to adoptive and foster care children in order for states to receive federal funding for title IV-E eligible programs.[9] The resulting AFCARS regulations requires states to report on a multitude of data elements relating to a child's foster and adoptive care placements by state agencies,[10] but until 2016 were silent with respect to the collection of ICWA specific information. Although some states voluntarily collect information related to race (i.e., whether a child involved in a custody proceeding is an Indian child) this classification deviates from existing Federal law relating to Indians and results in inconsistent, inaccurate, and incomplete reporting across states on the number of Indian children in state custody and little to no reporting on whether states have complied with the statutory mandates of ICWA for Indian children.

Nothing in Section 279 of the SSA precludes the agency from including ICWA specific data elements in AFCARS. Rather, Congress directed and gave the Secretary specific authority to determine how to reliably and consistently collect "comprehensive national information with respect to . . . the demographics of adoptive and foster children and their biological and adoptive or foster parents," including the number, status and characteristics of such children placed in or removed from foster care or adoptive placements in and out of state, and who are victims of sex trafficking.[11] And, in implementing Congress' directive it is appropriate and within the Secretary's discretion to determine what statutory terms like "demographics" and "characteristics" mean "with respect to adoptive and foster children and their biological and adoptive or foster parents."

In determining the meaning of these terms, the Secretary must take into account the special relationship between the United States and Indian tribes and ICWA, an existing Federal law, that requires states to follow specific processes and procedures for Indian children in foster care or who will be put in adoptive placements. The United States Supreme Court has long recognized that "Indian tribes are 'distinct, independent political communities'"[12] in which it is "undisputed" that a trust relationship exists between the United States and Indian tribes.[13] Congress has "plenary

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[8] Three limitations or constraints to the collection of data were provided verbally by ACF presenters—that the data collection (1) cannot divert resources unnecessarily, (2) needs to be reliable and (3) needs to be capable of being reported consistently. As discussed throughout this submission, the ICWA Data elements do not unnecessarily divert resources because it will help the federal government, tribes and states monitor ICWA compliance to improve services to ensure compliance with Congressional mandate to protect Indian children. In addition, the data elements are broken down into discrete questions, rather than broad categories, to ensure that the reporting is reliable and consistent.

[9] 42 U.S.C. § 679(c).

[10] 45 C.F.R. § 1355.40 and appendices.

[11] 42 U.S.C. § 679(c)(3).

[12] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

[13] *See United States v. Long* 324 F.3d 475, 479-80 (7th Cir. 2003) ("[c]ourts have attributed Congress's plenary powers over Indian relations to the Indian Commerce Clause . . . and to Congress's protectorate or trust relationship with the Indian tribes") (citing *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989), and *United States v. Kagama*, 118 U.S. 375, 383-84 (1886)); *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2324-2325 (2011) ("We do

power" to deal with Indians tribes and that includes the plenary authority to legislate with regard to individual Indians.[14] And, "[o]n numerous occasions [the Supreme] Court specifically has upheld legislation that singles out Indians for particular and special treatment."[15] For example, in *Morton v. Mancari*, the Supreme Court held that a statute providing a hiring preference and a policy providing a promotion preference at the Bureau of Indian Affairs to members of federally recognized Indian tribes did not violate either the Equal Employment Opportunity Act of 1972 or the Due Process Clause of the Fifth Amendment, because such a preference was not racial, but rather it turned on the special legal and political status of Indians[16] and was both "reasonable and rationally designed to further Indian self-government."[17]

Since *Mancari*, the Supreme Court has consistently rejected challenges to statutes that singled out Indians for special treatment.[18] In *United States v. Antelope*, the Court established that *Mancari* stands more broadly for "the conclusion that federal regulation of Indian affairs is not based on impermissible racial classifications," but is instead "rooted in the unique status of Indians as a separate people with their own political institutions."[19] Applicable here, in 1978 Congress enacted ICWA to protect Indian children in foster and adoptive care. As noted above, ICWA requires specific processes and procedures that must be followed for "Indian child[ren]"[20] involved in a state "child custody proceeding."[21] These include for example, special placement preferences for foster care or adoption, provisions that require notification to parents and Indian tribes, heightened standards for ensuring reunification and termination of parental rights. ICWA's protections for Indian children and families are now widely considered the "gold standard" among national child welfare organizations. *See* Brief of Casey Family Programs, *et al.* as *Amici Curiae*

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not question 'the undisputed existence of a general trust relationship between the United States and the Indian people'" (citation omitted)).

[14] *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 837 (1982); *see also United States v. Lara*, 541 U.S. 193, 200 (2004) ("The central function of the Indian Commerce Clause, we have said, is to provide Congress with plenary power to legislate in the field of Indian affairs" (internal quotation and citation omitted)).

[15] *Mancari*, 417 U.S. at 554-55 (collecting cases).

[16] *See generally Morton v. Mancari*, 417 U.S. 535 (1974).

[17] *Id.* at 555.

[18] *See, e.g., Fisher v. Dist. Ct. of Sixteenth Jud. Dist. of Mont.*, 424 U.S. 382, 390-91 (1976) (holding that exclusive tribal court jurisdiction over adoption proceedings involving Indians is not racial discrimination); *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 579-80 (1976) (holding that tax immunity for reservation Indians is not racial discrimination); *United States v. Antelope*, 430 U.S. 641, 646 (1977) (holding that statute bringing crimes committed by Indians on Indian reservations under Federal jurisdiction did not violate due process or equal protection).

[19] *Antelope*, 430 U.S. at 646 (internal quotation and citation omitted).

[20] 25 U.S.C. § 1903(4), "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.

[21] *See id.* at 1903(1) "child custody proceeding" shall mean and include—(i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated; (ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship; (iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and (iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Supporting Respondent, Adoptive Couple v. Baby Girl, 133 S. Ct. 2552 (2013), 2013 WL 1279468 at *1 (filed Mar. 28, 2013) ("[I]n the Indian Child Welfare Act, Congress adopted the gold standard for child welfare policies and practices that should be afforded to all children . . . [I]t would work serious harm to child welfare programs nationwide . . . to curtail the Act's protections and standards.").

In order for the Secretary to collect "comprehensive information" with respect to the "demographic characteristics" of adoptive and foster children and "their biological and adoptive or foster parents," there must be specific data elements that incorporate the unique mandates of ICWA as applied to Indian children. And, as discussed above, Federal law supports and permits the Secretary to create and include specific data elements in AFCARS that relate to Indian children and implementation of ICWA. Retaining ICWA data elements in AFCARS also brings the agency's oversight and integration of ICWA full circle. In 1994 Congress amended Section 422 of the SSA to require all title IV-B state plans to "contain a description, developed after consultation with tribal organizations . . . in the State, of the specific measures taken by the State to comply with the [ICWA]."[22] Most state agencies that receive title IV-E funding for children receiving foster care and adoptive care also receive title IV-B funding. Title IV-B funding assists states in developing programs aimed to support reunification efforts to keep families together. As a child moves through the state system, states are often accessing state programs that receive title IV-B and or title IV-E funding. Thus, title IV-B and title IV-E can be and often are interconnected.[23] The Final Rule will help streamline and strengthen states' ability to comply with ICWA and their title IV-B approved plans.

II. There is no need to question the accuracy of the estimated burden for the collection of information in the Final Rule.

The Final Rule's inclusion of ICWA data elements into AFCARS is not only a positive achievement but necessary to allow ACF to properly carry out its statutory responsibilities and trust obligations. The Final Rule acknowledges that in order for the Secretary to collect "comprehensive information" with respect to the "demographic characteristics" of adoptive and foster children and "their biological and adoptive or foster parents," specific data elements that incorporate the unique mandates of ICWA, as applied to Indian children, must be included. Moreover, the Final Rule thoroughly responded to comments on both the benefits and burdens of the proposed regulatory action.

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[22] 42 U.S.C. § 622(b)(9).

[23] Incorporating ICWA data elements into AFCARS maintains consistency in Congress' statutory schemes governing children in foster and adoptive care and avoids absurd results. Given the lack of legislative history relating to the 1994 amendment of title IV-B, it is reasonable for the Secretary to infer that Congress desired states to adhere to ICWA when implementing title IV-B. Moreover, it does not follow that Congress would intend states to follow ICWA only for purposes of reunification efforts under title-IV-B and ignore ICWA when receiving funding for foster or adoptive placements programs until title IV-E. ICWA is intended to provide statutory protections not only for reunifications of Indian families, but also when Indian children are placed in foster or adoptive care placements. To give one aspect of ICWA more emphasis than another aspect would be absurd. *See United States v. American Trucking Assns., Inc.*, 310 U.S. 534, 542–543 (1940) (holding that interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.).

As with any new rule or requirement, there will always be a heavier burden initially when a rule requires the collection of information that has not been previously required, but this burden will be reduced significantly once states and tribes are able to modify their case collection systems to report the new data. In the 2015 NPRM and 2016 SNPRM various interested parties submitted comments regarding the accuracy of burden estimates associated with AFCARS data collection. In response, the Final Rule created and explained a new estimate for the burdens associated with changing data systems and collecting and reporting data. The new burden estimates are sufficient and reasonable. For ACF to solicit information relating solely to the potential burden of the regulations without also soliciting information and comments on its potential benefits is also arbitrary, capricious, an abuse of discretion, and not in accordance with the AFCARS authorizing statute.

In any event, a number of states have enacted state companions to ICWA and already collect much of the information being sought by the Final Rule even if their electronic case file systems may need to be updated so that the information can be electronically pulled for AFCARS purposes. *See, e.g.,* Minn. Stat. §§260.751-260.835 (2015); Neb. Rev. Stat. §§43-1501-43-1517 (2015); Iowa Code Ann. §§232B.1-232B.14 (2003). Other states have enacted laws that clearly reflect the voluntary adoption of ICWA as official state policy. *See, e.g.,* Ind. Code Ann. § 31-28-6-1 (2012) (stating "[t]he public child placing agency in the sending state shall oversee compliance with the provisions of the Indian Child Welfare Act"); La. Child. Code Ann. art. 1629 (2010) (same); Ohio Rev. Code Ann. § 5103.20 (2006) (same). As such, for many states the overall burden of collecting the ICWA data elements will not be high. For those states that do not have state based ICWA policies, the data elements will assist not only in ensuring consistent and uniform reporting, but in complying with the mandates of ICWA.

III. The ICWA data elements are necessary for consistency and to allow the agency to properly carry out its functions.

The ICWA data elements are critical to ensuring that states are consistently and uniformly implementing the statutory mandates of ICWA. ACF received comments for both the 2015 NPRM and the 2016 SNPRM regarding the specific data elements to ensure quality data collection in keeping with the AFCARS authorizing statute. As discussed above and documented in prior comments, the data to be collected ensures that ACF is implementing its statutory obligations consistent with ICWA and the trust responsibility. The Final Rule will produce necessary information, previously missing from AFCARS, which will guide, clarify, and improve outcomes for Indian children and families in state child welfare systems.

Any reporting on Indian children and ICWA compliance is currently voluntary. Until the Final Rule is implemented, there are not any standards for reporting on ICWA compliance. In a 2005 Report, the General Accountability Office found that to improve the usefulness of data and information collected regarding ICWA in Child and Family Review Services reports submitted by states, ACF should require states to provide more reporting on ICWA.[24] The Final Rule, which

[24] Indian Child Welfare Act, *Existing Information on Implementation Issues Could be Used to Target Guidance and Assistance to States,* GAO 05-290 at 5 (2005) (accessed May 31, 2018) https://www.gao.gov/new.items/d05290.pdf

reflects the Department of the Interior's national standards for ICWA compliance, will aid in ensuring consistent ICWA reporting by all 50 states. Thus, the ICWA data elements will comport with AFCARS goal of providing "[n]ational standards . . . for each statewide data indicator. [And b]y measuring state performance against national standards on statewide data indicators, the Children's Bureau can assist states in continuously monitoring their performance on child outcomes and better understand the entirety of their child welfare systems."[25]

IV. ACF can minimize the burden of the collection of information by providing technical assistance.

Rather than change the Final Rule, ACF should aggressively promote and provide technical assistance to state agencies that need assistance in implementing the Final Rule. ACF could also conduct an evaluation of state case management systems to determine if there are technological improvements or alternative mechanisms that would allow for a streamlined approach to data sharing between states and ACF. Lastly, ACF could provide limited grant funding to aid state agencies in updating their case management systems to allow for ICWA data collection.

V. Conclusion.

When ICWA was passed in 1978, it restored hope that tribes would have a greater role in the protection of their children, their greatest resource for the future. The Final Rule will close the gap on much needed data relating to national implementation and compliance with ICWA. Requiring comprehensive information across states on Indian children will lead to better practices and ultimately greater compliance with this ICWA. With this data federal, state and tribal governments can better understand how many Indian children, and at what stage in their case, are receiving ICWA protections. By understanding how and when ICWA is utilized, appropriate steps can be taken to reduce disproportionality and to achieve greater permanence for Indian children, their families and tribes. As such, the Pueblo opposes any changes to the Final Rule that would modify or eliminate the ICWA data elements.

Thank you for consideration of these written comments.

Sincerely,

Pueblo of Isleta
J. Robert Benavides
Governor

[25] Child and Families Services Reviews, Procedures Manual at 5 (Nov. 2005), (accessed May 31, 2018 TIME) https://www.acf.hhs.gov/sites/default/files/cb/round3_procedures_manual.pdf

As of: September 14, 2020
Received: June 11, 2018
Status: Posted
Posted: June 12, 2018
Tracking No. 1k2-93nz-mzxo
Comments Due: June 13, 2018
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0044
Comment on FR Doc # 2018-05042

Submitter Information

Name: Mary Mynatt
Address: 43123
Email: Marymynatt@me.com

General Comment

Questions about gender identity are very important to collect so that children can be placed appropriately with the full knowledge and cooperation of foster parents. Children should be supported and helped in their journey to adulthood and must be able tp be placed in homes where they are not discriminated against.

As of: September 14, 2020
Received: June 12, 2018
Status: Posted
Posted: June 12, 2018
Tracking No. 1k2-93o6-v03s
Comments Due: June 13, 2018
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0045
Comment on FR Doc # 2018-05042

Submitter Information

Name: Anonymous Anonymous

General Comment

LGBTQ children are more likely to attempt suicide than other children. Their special needs must be taken into account when considering adoption and foster care

As of: September 14, 2020
Received: June 11, 2018
Status: Posted
Posted: June 12, 2018
Tracking No. 1k2-93o0-1ove
Comments Due: June 13, 2018
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0046
Comment on FR Doc # 2018-05042

Submitter Information

Name: Kathy Boggs

General Comment

I urge HHS to keep asking if children were removed from their home due to family conflict related to child's sexual orientation, gender identity, or gender expression. I also urge HHS to retain voluntary sexual orientation questions for foster youth & foster or adoptive parents.

As of: September 14, 2020
Received: June 11, 2018
Status: Posted
Posted: June 12, 2018
Tracking No. 1k2-93o0-4ohj
Comments Due: June 13, 2018
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0047
Comment on FR Doc # 2018-05042

Submitter Information

Name: Paula Casagrande
Address: 21078
Email: paula@bighousesigns.com
Organization: Paula Casagrande

General Comment

Pleas, I urge HHS to keep asking if children were removed from their home due to family conflict related to child's sexual orientation, gender identity, or gender expression. I also urge HHS to retain voluntary sexual orientation questions for foster youth & foster or adoptive parents. Don't disappear them, please.

As of: September 14, 2020
Received: June 11, 2018
Status: Posted
Posted: June 12, 2018
Tracking No. 1k2-93nx-njhm
Comments Due: June 13, 2018
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0048
West Virginia

Submitter Information

Name: Michael Johnson
Email: michael.d.johnson@wv.gov
Organization: West Virginia

General Comment

See attached file(s)

Attachments

West Virginia

State Response on ACF call to states regarding the proposed AFCARS modifications

ACF issued the following: "ACF is seeking public suggestions, in particular from state and tribal title IV-E agencies and Indian tribes and tribal consortiums and other stakeholders, for streamlining the Adoption and Foster Care Analysis and Reporting System (AFCARS) data elements and removing any undue burden related to reporting AFCARS."

"The Children's Bureau proposes to delay the compliance and effective dates in the Adoption and Foster Care Analysis and Reporting System (AFCARS) 2016 final rule for title IV-E agencies to comply with agency rules for an additional two fiscal years. We propose to delay the compliance and effective dates at the same time we seek public comment through an Advance Notice of Proposed Rulemaking (ANPRM), published elsewhere in this issue of the Federal Register, on suggestions to streamline the AFCARS data elements and remove any undue burden related to reporting AFCARS."

Response from West Virginia SACWIS/CCWIS Director

Like many states that have limited to no Native American involvement, I find the inclusion of all those ICWA data elements to be questionable in the larger context of child welfare. But from a big picture I can see the rationale, (even if I don't clearly see the value in all of that data) if you have that touch point with Native American Indian Tribes and are dealing with tribal law and authority in a particular case. However, this is where I see the undue burden, if you are not involved with an ICWA related case and have ruled out all indication of tribal affiliation, what possible benefit would any of us get from forcing states to collect, store and submit that data? Given the strict prohibition of defaulting any AFCARS element, it forces an already overloaded, overburdened, social worker to document each one of those 64 or so ICWA related data elements for each child to no discernible end, it forces the systems to include, support and pay for functionality to facilitate the collection, mapping and storage of the data in the transactional databases, it forces the state and even the fed to create and pay for additional storage and backup to hold all that non applicable, useless negative data. What is the benefit and how would anyone justify a CBA on this?

Now let's look at it from the practical stand point of worker management and getting social work staff to complete data for compliance reporting. The reality is that caseworkers are very, very busy people. The job has enormous stress at best and at times can be trauma inducing. They are barely getting the really important stuff documented accurately, reliably and timely. Throwing non-applicable, unnecessary busy work at them not only takes away valuable time and effort, it only reinforces their belief the entire exercise is useless and ultimately takes valuable time away from the important value added casework and documentation. That concept of wasted effort will percolate clean through the chain of command thus corrupt the very intent of trying to gather this kind of information in the first place; to inform policy and practice. I can just picture the supervisor telling new staff: "don't worry about any of this stuff I'll have the intern go through and hit no on all of it later."

As for the technology waste, the costs are tangible and can be measured. A CBA should be done to justify why an information system (meaning the actual IT system, the databases, data backups, stored extraction files, etc) should hold the superfluous data, if it doesn't meet a certain delta, how can any agency or government warrant that cost to their constituents? The solution here is to allow certain AFCARS elements, ICWA in particular, to be defaulted at a minimum so that when no tribal affiliation is indicated the elements can be left blank as not applicable. Better yet provided only when they are applicable; think of something like an ICWA addendum used and included as a separate reporting when

the tribal affiliation flag is set. It can have the same client identifier, submission and period indicator to allow it to link appropriately and consistently to the master file. This would be a much more efficient use of the all the limited resources, in my opinion. Sorry Arizona, Oklahoma and Montana you still have to do a good bit of the reporting but at least they wouldn't have to do it with their entire FC/AS population. Could even incentivize tribal participation in the collection and documentation by giving Tribes and Reservations a financial stake in it.

And while we are at it why not take a hard look at the structure of the rest of the elements, how they are collected or in some cases not collected. It is my belief that the more abstracted AFCARS has become from the case records which the data is culled the less accurate and less engaged the workers, supervisors and mangers are in collecting it. A perfect example would be the way removal dates are calculated or the deliberate omission of title XIX placements. How many drug addicted infants are removed and immediately placed in family setting? None. AFCARS isn't showing you this and the caseworkers who are documenting their records are confused and burdened by trying to maintain the real record and a manufactured view of that record and the only good reason given is that they must satisfy a federal compliance report. Even this carries little weight because it's only one of many federal, or state compliance reports and they are often not consistent. Even federal Title IV-E eligibility and Medicaid reporting are not consistent and have led to caseworker confusion and documentation inaccuracies.

True story from the field: I was approached by a tenured supervisor of decent reputation and good practice, after the SACWIS and data analytics team had led a discussion on documenting Title IV-E eligibility, Title XIX compliance, AFCARS and NYTD is foster care records. She told me that it was impossible to teach and reinforce such variance and nuance to a young and learning workforce that typically only stay in these high burnout positions for 18 -24 months. She with all sincerity asked if there was a way to let caseworkers document assessment in mostly narrative, services in mostly narrative, contacts in mostly narrative, placement in mostly narrative, etc., and have the system identify through character recognition and language patterns the necessary data elements, then present them back to a worker or their supervisor to refine, add dates, tweak enough to satisfy the need for information and understanding. Now of course that kind of deep data decoding of unstructured data isn't feasible even for an IBM Watson at this time but perhaps some day it can be. In the mean time it is imperative on all of us trying to glean understanding out of human stories that are intrinsically narrative, sequential and fluid by nature, to work with that process and not become a barrier and burden to it. In our zest for information for accountability, informed evidence and statistically valid projections we have made the already difficult job of human services documentation impenetrable, unreliable and unknowable to those we rely upon to deliver it. We then bombard them with notifications, alerts, ticklers, reminders and prompts to produce it at all costs, expecting accuracy, reliability, consistency, timeliness, relevancy and conformity. I can't help but think we as the data professional need to do a better job at making the collection of data less about our job and more about theirs. After all isn't that why we are doing it in the first place?

As of: September 14, 2020
Received: June 11, 2018
Status: Posted
Posted: June 12, 2018
Tracking No. 1k2-93nx-v4n5
Comments Due: June 13, 2018
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0049
North Carolina Department of Health and Human Services

Submitter Information

Name: Alycia Blackwell Pittman
Address: 27603
Organization: North Carolina Department of Health and Human Services

General Comment

See attached file(s)

Attachments

North Carolina Department of Health and Human Services

STATE OF NORTH CAROLINA
DEPARTMENT OF HEALTH AND HUMAN SERVICES

ROY COOPER
GOVERNOR

MANDY COHEN, MD, MPH
SECRETARY

June 11, 2018

Kathleen McHugh, Policy Director
United States Department of Health and Human Services
Administration for Children and Families
330 C Street SW
Washington, DC 20024

Re: RIN 0970-AC72 Adoption and Foster Care Analysis Reporting System (AFCARS) December 2016 Final Rule Comments

Ms. McHugh:

Thank you for the opportunity to provide additional comments related to the proposed implementation of new AFCARS data elements. North Carolina understands the importance of quality data collection in child welfare services, and we have reviewed the proposed indicators closely. We support the collection of data that represents the diverse backgrounds and experiences of children and families served. However, this interest must be balanced with programmatic, administrative, technological, and fiscal impacts that would create burdensome challenges for North Carolina's child welfare system.

Programmatic Impacts

Child welfare social workers currently have the burden of collecting existing federally-required data, as well as data required for state and local social services agencies. Diversifying the data collected on families and children would give greater insight into their unique needs. However, the newly proposed data elements would add to the extensive documentation requirements, as well as extend the time needed with clients to collect information. Some elements may require additional or recurring follow up which would require an additional burden on social workers' time. If these elements are implemented, it would be reasonable for questions to be non-duplicative and capture only what is necessary to improve outcomes for children and families. It would also be helpful to have guidance from ACF regarding best practices for navigating questions and conversations regarding sensitive topics such as those addressing gender identity and sexual orientation.

Administrative Impacts

The newly imposed data elements would necessitate the development and coordination new policies and practice guidance. Thereafter, training initiatives would need to be developed, geared toward educating thousands of statewide front-line social workers, supervisory, and administrative staff. Additionally, there is at least one data element that would require a statutory change in how we define certain categories of child maltreatment.

Data reliability is another issue. At least one of the data indicators are vague (e.g. drawing the distinction between a runaway and a child whose whereabouts are unknown) and could possibly result in incorrect data collection thus creating a data reliability issue. Another category that may yield unreliable data are the new sex trafficking elements. There is no new element for human trafficking and therefore, data regarding human trafficking may be incorrectly collected as sex trafficking.

Technological Impacts

North Carolina utilizes an electronic, statewide data collection system that captures information of those receiving child welfare and other social services across the state. North Carolina has an extremely low percentage of children and families in which ICWA is applicable. While we see value in collecting additional ICWA data, adding the 65 new data elements to our child welfare data collection systems would create a significant cost for tracking data on such a small number of children and families. New elements should be limited to those absolutely necessary in tracking and improving outcomes for children and families.

There are some newly proposed data elements that North Carolina currently collects as part of state and county data. However, there are costs associated with changes to our data collection system that would require modification of our current processes to accommodate the data collection for AFACRS purposes. In sum, any proposed changes to existing data elements, or the addition of new data elements related to the 2016 Final Rule would require labor and production costs that would easily exceed $1,000,000 in addition to annual ongoing maintenance and programming costs.

Fiscal Impacts

The cumulative cost of modifying or adding data elements would have a significant impact on North Carolina's fiscal resources. Programmatic costs related to the administrative burden of collecting data include an increase in social worker time needed for administrative purposes and/or increase the amount of time needed with families for data collection purposes. This may cause a further burden on social workers' time and agency resources to meet the growing demands of data collection, and detract from direct service provision. There are costs associated with developing new statewide polices and guidance related to the data collection, as well as costs associated with development and delivery of training. Of equal importance are the costs related to the technological changes needed to collect the data. In sum, the collective fiscal impact of implementing these new changes could exceed $3,000,000. Additional annual training and data collection costs would also have to be considered.

Conclusions

North Carolina understands the importance of collecting information on children and families served in our child welfare system. We must also balance this need with the fiscal, administrative, technological, and programmatic impacts increased data collection may have on our system, staff, resources, and most importantly, the children and families served. Resources that could be used for direct services to children and families may be diverted to manage the administrative and technological needs of implementing the newly proposed AFCARS data elements. As a result, we would respectfully ask ACF to consider refining the data elements and provide a more cost-efficient proposal for data elements that increase positive outcomes for children and families that do not result in burdensome data collection processes for the state and county child welfare systems of North Carolina.

Sincerely,

Michael Becketts

Michael Becketts
Assistant Secretary for Human Services

As of: September 14, 2020
Received: June 11, 2018
Status: Posted
Posted: June 12, 2018
Tracking No. 1k2-93nx-c7a7
Comments Due: June 13, 2018
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0050
Comment on FR Doc # 2018-05042

Submitter Information

Name: Karina Walsh
Address: 92126
Email: cinerina@gmail.com

General Comment

I understand the need for collecting demographic information, but you need to remain neutral when reporting same sex couples who are fostering or adopting. Same-sex couples are just as stable and loving as heterosexual ones - and because of the many battles they have had to face in being same-sex in this conservative country, they tend to be more empathetic, kind, and accepting of others, including their children who may have had difficult experiences prior to adoption. The last thing we need is to restrict the number of welcoming homes for children in need. Please stop discrimination based on antiquated and hateful religious precepts.

As of: September 14, 2020
Received: June 11, 2018
Status: Posted
Posted: June 12, 2018
Tracking No. 1k2-93nx-oza3
Comments Due: June 13, 2018
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0051
Comment on FR Doc # 2018-05042

Submitter Information

Name: Anonymous Anonymous

General Comment

I am requesting that HHS keep asking if children were removed from their home due to family conflict related to child's sexual orientation, gender identity, or gender expression. I also urge HHS to retain voluntary sexual orientation questions for foster youth & foster or adoptive parents. Please do the right thing for at risk youth.

As of: September 14, 2020
Received: June 11, 2018
Status: Posted
Posted: June 12, 2018
Tracking No. 1k2-93nx-rqk1
Comments Due: June 13, 2018
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0052
Comment on FR Doc # 2018-05042

Submitter Information

Name: Amy Anonymous

General Comment

I urge HHS to keep asking if children were removed from their home due to family conflict related to child's sexual orientation, gender identity, or gender expression. I also urge HHS to retain voluntary sexual orientation questions for foster youth & foster or adoptive parents.The children's welfare is what matters here.

As of: September 14, 2020
Received: June 11, 2018
Status: Posted
Posted: June 12, 2018
Tracking No. 1k2-93nz-33b2
Comments Due: June 13, 2018
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0053
Comment on FR Doc # 2018-05042

Submitter Information

Name: Lisa Marie Hale
Address: 47630
Email: LisaMarieHale@mac.com

General Comment

Removing information regarding gender/sexual identity should NOT happen. This is very important to ensure the protection of LGBTQIA.

As of: September 14, 2020
Received: June 11, 2018
Status: Posted
Posted: June 12, 2018
Tracking No. 1k2-93ny-32tx
Comments Due: June 13, 2018
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0054
Comment on FR Doc # 2018-05042

Submitter Information

Name: Denice Romero

General Comment

I urge HHS to keep asking if children were removed from their home due to family conflict related to child's sexual orientation, gender identity, or gender expression. I also urge HHS to retain voluntary sexual orientation questions for foster youth & foster or adoptive parents. We must not alienate these children and further.

As of: September 14, 2020
Received: June 11, 2018
Status: Posted
Posted: June 12, 2018
Tracking No. 1k2-93o0-n0pm
Comments Due: June 13, 2018
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0055
Comment on FR Doc # 2018-05042

Submitter Information

Name: JoAnne O'Bar Legat
Address: 35903
Email: joanneobar@gmail.com

General Comment

I urge HHS to keep asking if children were removed from their home due to family conflict related to child's sexual orientation, gender identity, or gender expression. I also urge HHS to retain voluntary sexual orientation questions for foster youth & foster or adoptive parents.

As of: September 14, 2020
Received: June 11, 2018
Status: Posted
Posted: June 12, 2018
Tracking No. 1k2-93ny-fpls
Comments Due: June 13, 2018
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0056
Comment on FR Doc # 2018-05042

Submitter Information

Name: William Stern
Address: 19143
Email: avatarofwill13@gmail.com

General Comment

I believe that those who are most vulerable must be protected. To adiquetly know if they are being protected it is important to measure how many are affected.

So would you kindly command HHS to keep asking if children were removed from their home due to family conflict related to child's sexual orientation, gender identity, or gender expression. Would you kindly also command HHS to retain voluntary sexual orientation questions for foster youth & foster or adoptive parents.

As of: September 14, 2020
Received: June 11, 2018
Status: Posted
Posted: June 12, 2018
Tracking No. 1k2-93o0-seac
Comments Due: June 13, 2018
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0057
Comment on FR Doc # 2018-05042

Submitter Information

Name: Hope Ransom
Address: 34135
Email: starsoulers2@gmail.com

General Comment

I'm a female, disabled veteran and I urge HHS to keep asking if children were removed from their home due to family conflict related to child's sexual orientation, gender identity, or gender expression. I also urge HHS to retain voluntary sexual orientation questions for foster youth & foster or adoptive parents. Protections for LGBTQ Children and Foster Parents must remain in place. Discrimination of anyone has no place in the U.S. and the world. We are better than that.
Thank you for your time and prompt attention to this matter.

As of: September 14, 2020
Received: June 11, 2018
Status: Posted
Posted: June 12, 2018
Tracking No. 1k2-93o1-t6gc
Comments Due: June 13, 2018
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0058
Comment on FR Doc # 2018-05042

Submitter Information

Name: Anonymous Anonymous

General Comment

I urge HHS to keep asking if children were removed from their home due to family conflict related to child's sexual orientation, gender identity, or gender expression. I also urge HHS to retain voluntary sexual orientation questions for foster youth & foster or adoptive parents.

As of: September 14, 2020
Received: June 11, 2018
Status: Posted
Posted: June 12, 2018
Tracking No. 1k2-93o1-k7r8
Comments Due: June 13, 2018
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0059
Comment on FR Doc # 2018-05042

Submitter Information

Name: Carole Roberts
Address: 48872
Email: cookropi@gmail.com

General Comment

I urge HHS to keep asking if children were removed from their home due to family conflict related to child's sexual orientation, gender identity, or gender expression. I also urge HHS to retain voluntary sexual orientation questions for foster youth & foster or adoptive parents. We need these questions to protect our youth in foster care and adoption situations. If there is bias towards LBGTQ children, it is important to know that foster parents and/or adoptive parents respect a child's right to be who they are and not be punished for such a choice..

As of: September 14, 2020
Received: June 11, 2018
Status: Posted
Posted: June 12, 2018
Tracking No. 1k2-93ny-81dz
Comments Due: June 13, 2018
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0060
Comment on FR Doc # 2018-05042

Submitter Information

Name: July Wolfe
Address: 24018
Email: julywolfe@gmail.com

General Comment

Certainly a large enough segment of our population identifies as LGBQT that we should identify and protect these children as well as their prospective foster parents. Please ask and allow this tolerance and the opportunity for loving families.

As of: September 14, 2020
Received: June 11, 2018
Status: Posted
Posted: June 12, 2018
Tracking No. 1k2-93o1-tgg8
Comments Due: June 13, 2018
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0061
Comment on FR Doc # 2018-05042

Submitter Information

Name: Matthew Martin

General Comment

I urge HHS to keep asking if children were removed from their home due to family conflict related to child's sexual orientation, gender identity, or gender expression. I also urge HHS to retain voluntary sexual orientation questions for foster youth & foster or adoptive parents.

As of: September 14, 2020
Received: June 11, 2018
Status: Posted
Posted: June 12, 2018
Tracking No. 1k2-93nx-zqt5
Comments Due: June 13, 2018
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0062
Comment on FR Doc # 2018-05042

Submitter Information

Name: Mj Haupt

General Comment

I urge HHS to keep asking if children were removed from their home due to family conflict related to child's sexual orientation, gender identity, or gender expression. I also urge HHS to retain voluntary sexual orientation questions for foster youth & foster or adoptive parents.

Protecting the most vulnerable citizens is imperative to our ideology as a nation & must be a priority.

As of: September 14, 2020
Received: June 11, 2018
Status: Posted
Posted: June 12, 2018
Tracking No. 1k2-93o1-7fd5
Comments Due: June 13, 2018
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0063
Comment on FR Doc # 2018-05042

Submitter Information

Name: Barbara Carlock
Address: 60010
Email: bcarlock@gmail.com

General Comment

As the proud mother of a LGBTQ child, I urge HHS to keep asking if children were removed from their home due to family conflict related to child's sexual orientation, gender identity, or gender expression. I also urge HHS to retain voluntary sexual orientation questions for foster youth & foster or adoptive parents.

As of: September 14, 2020
Received: June 11, 2018
Status: Posted
Posted: June 12, 2018
Tracking No. 1k2-93o3-f4h1
Comments Due: June 13, 2018
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0064
Comment on FR Doc # 2018-05042

Submitter Information

Name: Bre P

General Comment

I urge HHS to keep asking if children were removed from their home due to family conflict related to child's sexual orientation, gender identity, or gender expression. I also urge HHS to retain voluntary sexual orientation questions for foster youth & foster or adoptive parents.

As of: September 14, 2020
Received: June 11, 2018
Status: Posted
Posted: June 12, 2018
Tracking No. 1k2-93o2-mon5
Comments Due: June 13, 2018
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0065
Comment on FR Doc # 2018-05042

Submitter Information

Name: Tiffany Smith

General Comment

Questions regarding orientation and how that may have affected foster youth should be included. They provide valuable data for improving outcomes and addressing current care.

As of: September 14, 2020
Received: June 11, 2018
Status: Posted
Posted: June 12, 2018
Tracking No. 1k2-93nz-djtd
Comments Due: June 13, 2018
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0066
Comment on FR Doc # 2018-05042

Submitter Information

Name: Anonymous Anonymous

General Comment

I urge HHS to keep asking if children were removed from their home due to family conflict related to child's sexual orientation, gender identity, or gender expression. I also urge HHS to retain voluntary sexual orientation questions for foster youth & foster or adoption.

As of: September 14, 2020
Received: June 11, 2018
Status: Posted
Posted: June 12, 2018
Tracking No. 1k2-93nz-o6k1
Comments Due: June 13, 2018
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0067
Comment on FR Doc # 2018-05042

Submitter Information

Name: Peter Anonymous

General Comment

I urge HHS to keep asking if children were removed from their home due to family conflict related to child's sexual orientation, gender identity, or gender expression. I also urge HHS to retain voluntary sexual orientation questions for foster youth & foster or adoptive parents.

As of: September 14, 2020
Received: June 12, 2018
Status: Posted
Posted: June 12, 2018
Tracking No. 1k2-93oc-g2p6
Comments Due: June 13, 2018
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0068
Comment on FR Doc # 2018-05042

Submitter Information

Name: Mary Corbin

General Comment

See attached file(s)

Attachments

AFCARS_2.0_Comments

AFCARS 2.0 is a complete rewrite of AFCARS 1.0. Even the remaining foster care elements will require recoding.

The level of detail required for each placement/living arrangement/foster parent within each removal is a major undertaking both from a coding as well as a data validation standpoint. Some elements listed in AFCARS 2.0 do not exist in our system and are not currently being collected. Given the workforce issues that we are currently experiencing below are our suggestions for what would help eliminate some of the burden.

- Move the ICWA elements completely out of AFCARS 2.0 for this round.
- Allow states that have no recognized tribal association such as ours to auto populate the ICWA related elements with a negative or null response.
- Suspend the level of detail required for each placement/living arrangement/foster parent(s)/guardian within each removal for this round.
- Leave the disability conditions categories as they appear in AFCARS 1.0. Add diagnosis codes such as Autism to already existing disability categories for this round rather than re-categorize.

As of: September 14, 2020
Received: June 11, 2018
Status: Posted
Posted: June 12, 2018
Tracking No. 1k2-93nz-33b2
Comments Due: June 13, 2018
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0069
Comment on FR Doc # 2018-05042

Submitter Information

Name: Lisa Marie Hale
Address: 47630
Email: LisaMarieHale@mac.com

General Comment

Removing information regarding gender/sexual identity should NOT happen. This is very important to ensure the protection of LGBTQIA.

As of: September 14, 2020
Received: June 12, 2018
Status: Posted
Posted: June 12, 2018
Tracking No. 1k2-93od-mcpt
Comments Due: June 13, 2018
Submission Type: E-mail

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0070
Sault Ste. Marie Tribe of Chippewa Indians

Submitter Information

Address: 49783
Organization: Sault Ste. Marie Tribe of Chippewa Indians

General Comment

See Attached

Attachments

Sault Ste. Marie Tribe of Chippewa Indians

Aaron A. Payment, MPA, MEd, EdD

Tribal Chairperson

Address:
523 Ashmun St.
Sault Ste. Marie,
MI 49783

Phone:
906.440.5937

Email
aaronpayment@saulttribe.net

FaceBook
'Aaron Payment'

June 12, 2018

Attn: Kathleen McHugh
United States Department of Health and Human Services
Administration of Children and Families, Policy Division
330 C Street SW
Washington, DC 20024

Via electronic correspondence at: CBComments@acf.hhs.gov

Re: RIN 0970-AC72 Adoption and Foster Care Analysis and Reporting System, Advance Notice of Proposed Rulemaking (3-15-2018)

Dear Sir or Madam:

Sault Ste. Marie Tribe of Chippewa Indians (Sault Tribe) submits these comments on Advance Notice of Proposed Rulemaking (ANPRM) regarding Adoption and Foster Care Analysis Reporting System (AFCARS) for Title IV-B and Title IV-E as they relate to the Indian Child Welfare Act of 1978 (ICWA). Data points specific to ICWA were incorporated into AFCARS as detailed in the Final Rule published on December 14, 2016.

The ANPRM is specifically requesting tribes to submit suggestions for streamlining AFCARS data elements and removing any undue burden related to reporting AFCARS. The ANPRM states: "We are specifically soliciting comments on the data elements and their associated burden through this ANPRM."

Sault Tribe provided comments to 45 CFR 1355 in May 2016 on the SNPRM regarding then Proposed AFCARS data elements. Those comments are attached and incorporated here by reference. Since May 2016, there has been little change in consistency and accuracy of state data provided to Sault Tribe.

Sault Tribe has spent significant resources attempting to get more access to reliable state data regarding its children that are or may be under state jurisdiction. We find that many cases involving Indian children where the state has substantiated abuse or neglect do not receive active efforts and the Indian tribe, even though known, is not being engaged at all, by design, until after the removal petition has been filed, thus compromising active efforts. In many jurisdictions, ICWA is not treated respectfully—as a valid law—by many agencies, departments and courts. Tribes have relatively few resources to devote to monitoring the states' ICWA compliance. There have historically been no repercussions when the legal requirements were ignored. The tribes know, and Congress knew but attempted to prevent, that by state actors not following ICWA, there are lifelong devastating consequences for Indian children, their families and tribes.

Data collection requirements of the Final Rule promote consistent and accurate data.

Collection of ICWA data elements required by the Final Rule are consistent with HHS's, ACF's, and the Children's Bureau's statutory missions. Such a collection will promote more consistent and accurate data regarding Indian children who are in the care of and within the jurisdiction of the state courts, agencies, and departments throughout the United States, thereby improving identification of, knowledge regarding and outcomes for Indian children in foster care. This is especially true in jurisdictions where that information is shared with the Indian children's tribes as soon as it is determined the child may be an Indian child. It would be especially useful for the tribes to consistently have access to information regarding their children with whom the states' child welfare systems are involved.

There is no "undue burden."

Requiring ICWA data elements to be captured will identify problem areas of non-compliance; and, having that information far outweighs the burden of collecting it. In many cases, these are children who become lost to their tribes forever. There may be an additional cost/burden involved with requiring more consistent and better data for children in general and Indian children, specifically; however, to avoid the loss of Indian children, tribes and tribal families, the burden is not an "undue" burden.

There would be a burden to the states to upgrade their reporting/data/computer systems regardless of the ICWA data elements. How quickly the states/agencies are able to transition to recording/reporting new data elements is more impacted by their updating their system than the data elements themselves, thus technological in nature. Since these regulations have been effective for approximately fifteen months, all states should be well into the process of implementing them, now. At this stage, any modification of the data collection requirements would be a waste of resources, itself creating a new burden. Additionally, the final rule indicates repeatedly that the ACF will provide ongoing technical assistance to address some of the perceived burdens.

Many agencies state the burden outweighs the benefit of the information to be collected. The burden for many of these agencies is likely the burden of having to record the responses to the questions these agencies should have though have not been asking since ICWA was enacted. Thus, the specific, probably unspoken, "burden" is that some agencies are not consistently asking the ICWA related questions they should be, and, it will be a burden to them to now have to consistently not only ask, but also record and report the information. The burden is not undue, it is both a preexisting and overdue burden.

Even with the data of Indian children being underreported for decades, we know Indian children are disproportionally removed from their families. Without reliable data, we cannot know the extent of the disproportionality; therefore, we cannot even begin to measure the impact of services, ICWA, permanency, or various programs on the Indian tribes and children, nor can any true conclusions be reached about the current data.

The burden to tribes, who struggle to keep their child welfare staff and resources adequate to keep their children safe, having to again stop what they are doing in their jobs to advocate for accurate, legally required, data to be collected for their children in the states' jurisdiction is an undue burden.

The administration provided all interested parties ample notice and opportunities to comment prior to the Final Rule.

The Final Rule thoroughly responded to comments on both the benefits and burdens of the proposed regulatory action. Given the multiple opportunities to comment throughout this time period, any additional collection activity is unnecessary and burdensome. In addition, tribes, tribal organizations, and advocates received notice of all these opportunities, with ample time to comment on this vital and important rule change.

States also had ample opportunity to participate. As the Final Rule explains in detail, ACF engaged in robust consultation with states and responded to their concerns, for example, by streamlining many data elements. 81 FR 90524, 90565-66. States and agencies had at least six opportunities to raise their concerns, which the ACF considered and addressed fully. 81 FR at 90566. States and agencies have also had forty years of notice that this information is of a quality that should be gathered and recorded.

These regulations are important to us, our families, and state child welfare systems.

The regulations themselves—in response to the comments from stakeholders across the country—describe the importance of these changes. As stated in the December 2016 Final Rule, 81 Fed. Reg. 90524, 90527:

> Overall, tribes, organizations, states, and private citizens supported our mission to collect additional information related to Indian children as defined in ICWA. Moreover, some states, tribes, national organizations, and federal agencies have stated that ICWA is the ''gold standard'' of child welfare practice and its implementation and associated data collection will likely help to inform efforts to improve outcomes for all children and families in state child welfare systems.
>
> Generally, tribes, organizations representing tribal interests, national child welfare advocacy organizations, and private citizens fully support the overall goal and purpose of including ICWA-related data in AFCARS, and the data elements as proposed in the 2016 SNPRM. These commenters believe that collecting ICWA-related data in AFCARS will:
>
> 1. provide data on core ICWA requirements such as ''active efforts'' and placement preferences, as well as assess how the child welfare system is working for Indian children as defined by ICWA, families and communities;
>
> 2. facilitate access to culturally-appropriate services to extended families and other tribal members who can serve as resources and high-quality placements for tribal children;
>
> 3. help address and reduce the disproportionality of AI/AN children in foster care; and
>
> 4. provide avenues for collaboration between states and tribes that are more meaningful and outcome driven, including improved policy development,

> technical assistance, training and resource allocation as a result of having reliable data available.
>
> Overall, tribal commenters and national child welfare advocacy organizations believe that collecting ICWA-related data in AFCARS is a step in the right direction to ensure that Indian families will be kept together when possible, and will help prevent AI/AN children from entering the foster care system. Many of the tribal commenters that supported the 2016 SNPRM also recommended extensive training for title IV–E agencies and court personnel in order to ensure accurate and reliable data reporting.

Other federal reports have demonstrated the need for quality national data to assess states' efforts in implementing ICWA. See Government Accountability Office, *Indian Child Welfare Act: Existing Information on Implementation Issues Could be Used to Target Guidance and Assistance to States*, GAO-05-290 (Apr. 4, 2005) http://www.gao.gov/products/GAO-05-290.

Nothing has changed since ACF made clear in its final rule that data collection is necessary to protect Indian children and families and their tribes. There remains a pressing need for comprehensive national data on ICWA implementation. Congress has not amended the Act's data collection provisions. And there have been no changes in circumstances that would alter the burdens or benefits of the final rule's data collection requirements.

Tribes have relied on the final rule.

Tribes have long sought data points regarding the implementation of ICWA. This has included advocacy on local, state, and federal levels. With the promulgation of the Final Rule in December of 2016, tribes largely ceased advocacy efforts to mandate data collection, instead refocusing tribal resources toward working collaboratively with their governmental partners to implement the data elements listed in the Final Rule. To this end, some tribes have worked to develop and update agreements to reflect the data elements in the final rule and the 2016 BIA ICWA Regulations, since a goal of both is to increase uniformity.

The ANPRM is arbitrary and capricious where it seeks only information on burdens.

This ANPRM arbitrarily focuses on collecting information about burdens without considering benefits. As required by law, the final rule conducted a careful analysis of the benefits and burdens, and appropriately amended the proposed rule to achieve a balanced final rule. The agency "determined in the final rule that the benefits outweigh the burden associated with collecting and reporting the additional data." 81 FR 90528. The agency explained how its weighing of the benefits and burdens led it to make certain changes to its proposal. For example: as stated in the Final Rule at 81 FR 90528:

> In response to state and tribal comments suggesting congruence with the BIA's final rule, we revised data elements in this final rule as appropriate to reflect the BIA's regulations including removing requirements that state title IV–E agencies report certain information only from ICWA-specific court orders. These changes should allow the state title IV–E agency more flexibility, alleviate some of the burden and other concerns identified by

> states, help target technical assistance to increase state title IV–E agency communication and coordination with courts, and improve practice and national data on all children who are in foster care.

There have been no material changes in circumstances justifying the agency's new approach. The executive order is not a sufficient basis for the agency to act, as the executive order itself is arbitrary and unlawful where it provides an insufficient basis for reasonable decision-making relying solely on an examination the burden of regulations without the required balancing of benefits. Additionally, the executive orders fail to provide justification to deviate from the statutory requirement for regulations.

Responses to the Questions for Comment provided in the ANPRM:

1. Identify the data elements, non-ICWA-related, that are overly burdensome for state and tribal title IV-E agencies and explain why. Please be specific in identifying the data elements and provide a rationale for why collecting and reporting this information is overly burdensome.

Although data elements may be burdensome, they are not unduly burdensome. The need and usefulness outweighs the burden to obtain, record and report. Specific data elements are attached.

2. Previously, we received comments regarding burden and the system changes needed to report the ICWA-related data elements of the 2016 SNPRM. We would like to receive more detailed comments on the specific limitations we should be aware of that states will encounter in reporting the ICWA-related data elements in the final rule. Please be specific in identifying the data elements and provide a rationale for why this information is overly burdensome.

The ANPRM requests IV-E states and tribes to provide the number of children in foster care who are considered Indian children as defined in ICWA. However, it is specifically due to the lack of a national data reporting requirement, that any number provided in response to this question would be significantly inaccurate. This speaks to the critical importance of the ICWA-related data points – without a data reporting requirement, many states simply do not appropriately identify or track Indian children in their child welfare system.

Some commenters, current and past, estimated significant burden associated with collecting the data necessary to report on the ICWA data elements. These arguments are the precise reason that it's essential to require the collection of all of the ICWA data elements. The ICWA data elements within the final rule correspond directly with the information that has to be collected for ICWA compliance. Any commenter estimating an increase in burden hours associated with the collection of, or training for the collection of, ICWA data is admitting a failure to apply the minimum standards established within ICWA for the safety and wellbeing of AI/AN children. Even the data elements that require an agency to report on court findings pertain to information that caseworkers and agencies have to track and monitor as the petitioners of a case; it may be the judge's responsibility to make the necessary findings, but the legality of the agency's continued custody of AI/AN children is reliant on those findings. The collection of ICWA information is already a requirement for the states pursuant to ICWA. Any burdens associated with reporting the information that agencies have an existing obligation to know and collect is dwarfed when compared to the benefits of protecting abused and neglected AI/AN children from a child welfare system known to abuse and neglect AI/AN children. One state's child welfare agency/department has not even been able to consistently report on the AI/AN children in care for which a particular

tribe has filed interventions regarding into the case—the state's data at the time of the final rule included only roughly half of the number of that state's Indian children's actually in care and for which that tribe had filed formal written interventions and provided notice of the interventions to the state.

3. Previously, we received comments that particular data elements did not lend themselves to national statistics and were best assessed with qualitative methods such as case review. Please provide specific recommendations on which data elements in the regulation to retain that are important to understanding and assessing the foster care population at the national level. Also, provide a rationale for your suggestion that may include its relevance to monitor compliance with the title IV-B and IV-E programs or another strong justification for using the data at the national level.

As discussed above, there has been ample opportunity for comment and this additional ANPRM is itself both unlawful as crafted and is a waste of finite resources. Tribes and states properly relied on the final rule in working toward implementation for nearly a year and a half. Any modification to the existing data points frustrate those efforts, would require states to begin again collaborating with their tribal partners and ultimately further delay implementation. This comes at the expense of the health, safety and welfare of not only Indian children, their families, and their tribes, but the child welfare system at large where a modification of the final rule would cost system-wide resources.

Case reviews will not capture the data needed to assess compliance, outcomes, engagement, consistency, uniformity and other ICWA related components. Such information is necessary to make a determination about the status of AI/AN children within the system. In addition, Sault Tribe has requested to be involved in the case review process of cases for which we are an intervened party and has only once been called upon, as the intervening ICWA party, to engage in case reviews. The system is set up so the caseworker/agency is the one who informs the reviewer of the parties to contact in conducting the reviews and the tribe is not one of the parties for whom contact information is generally given to reviewers.

4. Previously we received comments noting concerns with variability in some of the data elements across states and within jurisdictions. Please provide specific suggestions to simplify data elements to facilitate the consistent collection and reporting of AFCARS data. Also, provide a rationale for each suggestion and how the simplification would still yield pertinent data.

In the absence of a national data reporting requirement, it is guaranteed there will be variability with data elements frustrating a stated purpose of the 2016 BIA ICWA Regulations, to establish uniformity of application throughout the nation. The need to eliminate the data variability is precisely why it is important to have a national data collection standard. It will assist HHS/ACF efforts to support states in properly implementing ICWA by having targeted, data-driven identification areas where states need support the most. The continuation of AI/AN underreporting impacts programs, systems, tribes, and tribal children across the country. Underreporting is directly related to no meaningful requirement to obtain, record, and report information in the data elements. The data elements should not be simplified further. Some were already eliminated after the intensive comment periods previously and the remaining data elements are crucial to gaining meaningful, useable data.

5. Previously we received comments questioning the utility, reliability, and purpose of certain data elements at the national level. Provide specific recommendations on which data elements in the

regulation to remove because they would not yield reliable national information about children involved with the child welfare system or are not needed for monitoring the title IV-B and IV-E programs. Please be specific in identifying the data elements and provide a rationale for why this information would not be reliable or is not necessary.

As discussed above, ICWA is the "gold standard" of child welfare and ensuring compliance with this federal law informs how the existing child welfare system may improve. Each of the ICWA-related data points are tied to existing federal law and regulation and are necessary to monitor and support title IV-B and IV-E programs. Each of the ICWA-related data points are critical.

For the foregoing reasons, we strongly support each of the ICWA-related data points and believe, as your agency did in publishing the Final Rule in 2016, the benefits of this data collection outweighs any burden.

Any hindrance or streamlining of ICWA data point collection significantly impacts tribal children, families, and county agencies trying to comply. The Social Security Act requires the Secretary of the HHS to collect national, uniform, and reliable information on children in state care. Furthermore, the Secretary of the HHS has an obligation to promulgate final regulations concerning data systems that collect data relating to adoption and foster care in the United States.

ICWA instructs state and federal agencies as to the minimum standards of placement for AI/AN children. HHS should be using AFCARS to report to Congress whether or not states are meeting ICWA's minimum standards and holding the states accountable when they are not. In the interest of protecting our children and families, we respectfully submit these comments and ask HHS, ACF, and the Children's Bureau to implement the 2016 AFCARS final rule, as previously approved, without delay. **Comments regarding each of the specific data elements are attached.**

If there are any questions regarding these comments, please contact Sault Tribe's Indian Child Welfare Attorney, Elizabeth A. Eggert, at:

Sault Ste. Marie Tribe of Chippewa Indians
2218 Shunk Road
Sault Ste. Marie, MI 49783
906.632.5250
eeggert@saulttribe.net

Respectfully,

Aaron A. Payment

During the listening session on May 15, 2018, tribes were encouraged to detail which data elements (both ICWA and others) the tribes believe are important, if there are any data elements that can be streamlined for efficiency, and if any of the data elements are unduly burdensome. Sault Tribe supports all the ICWA data elements remaining in the AFCARS requirements, believes there are additional data elements that would be beneficial that were considered and denied for inclusion by ACF, understands the reasons certain data elements were previously removed or denied, and does not agree that any of the current (Dec. 2016) data elements are unduly burdensome. Specific comments regarding each of the data elements from Sault Tribe are below.

Comments Regarding Specific Data Elements:

Section 1355.43 Data Reporting Requirements:

(a) The Final Rule increased the time frame from 30 to 45 days and this rule is not unduly burdensome.

(b) Agree that issuing one final rule on AFCARS with all revisions is the efficient way to review AFCARS, rather than stages, especially since revision has been proposed since the 2008 NPRM. There is nominal burden considering that the technology must be updated anyway, and multiple stages would be more resource consuming/less cost effective. Limiting to most recent information in .44(a) and (b) should have lessened the associated burden here.

(c) Adoption and guardianship assistance data would be helpful to identify the efficiency of these permanency plans and limiting the reported information to the recent information on the last day of the reporting period should have lessened the associated burden here.

(d) It is particularly important to Sault Tribe that there be a distinction between "blank" and "missing" to more easily identify when perhaps certain questions just were not asked as opposed to asked, but still unknown.

(e) Allowing the reports to be submitted electronically should relieve the burden of paper copies.

(f) For children still of an age to be in or reenter care, all records should be retained. It should be made clear to agencies, departments, and Indian Tribes (even those that are non-IV-E agencies) at what point they are able to dispose of their case files and if there is a storage location for case files of children who have aged out of foster care and the hard files are still required.

Section 1355.44 Out-of-Home Care Data File Elements

(a)-(b)(2)(ii). No comment.

(b)(3). This is not unduly burdensome. The primary reason this could be viewed as unduly burdensome by states or agencies is if the information is not currently being gathered, as it should be. To propose the information be obtained from case reviews or narratives will not provide useable data to allow and assessment of ICWA compliance, the number of Indian

children coming into care, the permanency outcomes for Indian children, etc. If these questions are not asked at the beginning of the case when all other family/demographic information is being gathered, it is not likely the questions will be asked later or throughout the case.

(b)(4) and (b)(5). This is not be unduly burdensome as this is information the title IV-E agencies are supposed to know already. The final rule is asking to have the information reported that the agencies by law should already have. As discussed in the 2016 SNPRM and in the December 2016 final rule, "data elements related to whether ICWA applies are essential because application of ICWA triggers procedural and substantive protections and this data will provide a national number of children in the out-of-home care reporting population to whom ICWA applies." Each of the data elements within this section are crucial and are not unduly burdensome.

(b)(6)(i)-(iii). This particular data element would be of particular importance to ICWA compliance, because rarely do we receive notice of a removal with ten-day notice prior to a court hearing. With the policies of some states to not share Child Protection Services information with tribes, they have made it very difficult for workers to truly provide active efforts, requiring qualified tribal experts to be prepared to testify within a day or two of receiving notice of a removal or extending the emergency removal by requesting the allowed extension of time. Often, Sault Tribe is not even getting notice until after the first two hearings due to the states' policies in these cases. One state's policy gives a worker up to three days after the removal to notify the tribe, even if the Indian child's tribe is known for months in advance. The statute states no hearing shall take place until 10 days after notice is provided, not within 10 days of the hearing.

In addition--suggestion, when there are multiple tribes a child is enrolled in, the tribe the child was enrolled in first should be the deciding factor unless there are no ties with that tribe, but there are with the other tribe. A practical reason for this analysis is that most tribes recognize that a child should only be enrolled in one tribe, but it does happen where a child has been enrolled in two.

Sault Tribe is often notified of a proceeding by a grandparent or aunt/uncle of the Indian child and sometimes not until permanency, even though there were reasons for the agency/department to know the child was an Indian child. Often, we also receive information regarding an Indian child involved in something with the state, but do not receive a petition or additional information without having to make a specific request and sometimes multiple requests for information. In addition, we are often told the information is confidential unless you are a party to the case. We cannot intervene and become a party to the case unless they supply us with the information first.

(b)(7). These data elements will provide important information nationwide regarding the volume of cases that are transferred to tribal courts. This information is valuable to track permanency outcomes and other critical information regarding Indian children.

(b)(8). This is a very important data element and the burden is outweighed by the benefit of the federal government and tribes having state by state as well as overall national information regarding this, as well as the reasons for denial of transfers in order to review compliance. This should be very easy information for agencies/departments to obtain since a transfer of a case to

tribal court is an outcome that would be very apparent. The dynamics involved in transfer of timely services for the families as well as the involvement and policies of the Interstate Compact for the Placement of Children Office would be very helpful as well.

(b)(9) – (b)(10). Collecting data regarding the race of the children in care throughout the country is very important to show trends in child welfare and the differences in the data given certain demographics. Identifying a child who is eligible for or a member/citizen of a federally recognized Indian tribe has a significant legal meaning in "child custody cases" pursuant to ICWA, so those data elements are crucial for legal compliance in addition to understanding trends within certain demographics. The collection of this data is not unduly burdensome.

(b)(11) - (b)(13). Collection of this information is not unduly burdensome. In addition, with the research regarding "Adverse Childhood Experiences" and the relation to health issues, it may be very helpful to have national data for health assessments.

(b)(14) - (b)(16). This information is important to show patterns and trends that could be helpful to the legislature in creating laws to address any identified issues and is not unduly burdensome.

(b)(17) - (b)(22). This information is important to show patterns and trends that could be helpful to the legislature in creating laws to address any identified issues and is not unduly burdensome.

(b)(23) - (b)(25). Maintaining a relationship with and placement with siblings is a very important consideration in foster care/adoption cases. Ensuring the agency/department working with the family understands those relationships is important and reporting the data should not be unduly burdensome.

(c)(1) and (c)(2). No comment.

(c)(3) and (c)(4). This is important information and should be information already obtained by the agency/department, thus would not be an undue burden.

(c)(5). This information can assist to see trends across the country to track what is occurring from state to state and nationally to parental rights. The benefit to having this information outweighs the burden.

(c)(6)(i)-(iii). This information is legally significant and would be a good indicator of ICWA compliance at involuntary termination hearings at the national level. This is not unduly burdensome.

(c)(7). This information is beneficial to know nationally whether the states are complying with ICWA in voluntary terminations. It might be helpful to know if there is collection of data regarding ICWA notice occurring in voluntary termination under (b)(6), above.

(d). This is necessary information and not an undue burden. This is all information the agency/department should already be obtaining, if not reporting yet.

(d)(1). This information is necessary to track in order to track timelines for corresponding information. However, in ICWA cases is this the emergency removal or the order removing after making the required findings under ICWA. Or, does the removal date back to the date of the emergency removal once the findings have been made to validate the removal as a valid ICWA removal? Either way, the information is not unduly burdensome.

(d)(2). No comment.

(d)(3). This information is extremely important to determine ICWA compliance. It would also be a good tool to determine where training may be necessary. Collecting this information is not unduly burdensome.

(d)(4). No comment.

(d)(5). No comment.

(d)(6) - (d)(8). This information is important to understand the national dynamics of certain circumstances the country's youth are experiencing and at what rate. This is not unduly burdensome.

(e) - (e)(7). This information is important to understand the national dynamics of certain circumstances the country's youth are experiencing in foster care placements. This is not unduly burdensome.

(e)(8) and (e)(9). Foster homes are in short supply, both ICWA compliant and non-ICWA compliant homes. Compiling data regarding placement of Indian children would yield good information regarding how many Indian children are able to be placed with family or tribal homes. This information is necessary to determine what level of programming should be activated for foster home recruitment. Collection of this data is not unduly burdensome.

(e)(10) and (e)(11). This information will assist to determine ICWA compliance nationally. Collection of this data is not unduly burdensome.

(e)(12). No comment.

(e)(13). This is important information and should be recorded and reported. This is information readily available to the agencies/departments and should not be unduly burdensome

(e)(14) - (e)(25). Collecting data regarding the birth date, gender and race of the foster parents, as well as the pre-existing relationship, if any, to the child would be useful to show trends in the data given certain demographics.

(f) - (f)(9). No comment.

(f)(10). Active efforts is a foundational requirement of ICWA and capturing the data regarding the active efforts provided in a case will provide information to assist in determining ICWA

compliance. There are many jurisdictions where Sault Tribe intervenes in a case and the state's foster care caseworker believes providing referrals to the parents and sending an email to the tribal ICWA monitoring caseworker once every few months to report if the parents have been "working their plan" is sufficient to satisfy active efforts. Tracking data regarding active efforts will provide a more comprehensive understanding as to where those jurisdictions are located so appropriate training can be provided.

(g) - (g)(4). No comment.

(h) - (h)(14), except (h)(4) and (h)(10)-see below. Collecting data regarding the birth date, gender and race, of the adoptive parents, as well as the pre-existing relationship, if any, with the child could be important to show trends in the data given certain demographics.

(h)(4) and (h)(10). Due to placement preferences in ICWA, this information is important to track for ICWA compliance. It remains unclear, however, if verification of tribal citizenship is required by individuals reporting to be citizens/members of a particular federally recognized tribe. "Indian Tribe" should be as defined in 25 CFR 23.2. This is information the agencies/department would have as a legal requirement, thus would not be unduly burdensome.

(h)(15) - (h)(18). No comment.

(h)(19). Maintaining a relationship with and placement with siblings is a very important consideration in foster care/adoption cases. Gathering data regarding siblings placed or adopted together is important to understand whether siblings are ultimately being placed together. This would not be unduly burdensome.

(h)(20). This is important information to obtain, however, there should be evidence in the file that there was a diligent search by the agency/department to identify an ICWA compliant placement as indicated in 25 CFR 23.130. This data element is not unduly burdensome. Often in practice, it is stated diligent efforts were made to find an ICWA compliant placement; however, when investigated further, the diligent efforts were to ask the parents if there were any relatives they wanted to consider for placement, often only at the time of removal.

(h)(21). This information is required to measure ICWA compliance and is not unduly burdensome.

(h)(22)-(h)(23). This is not unduly burdensome. It is very important to be able to track whether or not the law is being complied with and appropriate legal findings are being made. This importance outweighs the burden.

1355.45 Adoption and Guardianship Assistance Data File Elements

No comment (a)(1)-(d).

(e). This would be helpful information because in some jurisdictions the courts are treating permanent/subsidized guardianship permanency plans as limited guardianships and are

dismissing the "permanent" guardianships as soon as the parent files a motion and is able to show that they have improved their circumstances with no requirement to engage in services to show that the statements of sobriety, employment, stability, safe associations, etc are verified. Getting national statistics on this would be helpful to provide education/training in those areas.

1355.46 Compliance

No comment.

1355.47 Penalties

There should be penalties for not complying with legal requirements and AFCARS is the only way to monitor whether or not legal requirements are complied with on a national level. The penalties should not be such that the agency/department becomes unable to perform its duties, but it should be of a degree that the agency/department is incentivized to perform in a legally competent manner with both state and federal laws. To provide penalties in the area of ICWA compliance further demonstrates to state agencies/departments, the importance of following ICWA. In many jurisdictions, ICWA does not seem important to many agencies/departments because there is no repercussion to ignoring the legal requirements of ICWA.

Aaron A. Payment, MPA

Office of the
Tribal Chairperson

523 Ashmun Street
Sault Ste. Marie
Michigan
49783

Phone

906.635.6050

Fax

906-632-6829

Email

aaronpayment@saulttribe.net

FaceBook

'Aaron Payment'

May 6, 2016

Ms. Kathleen McHugh, Director
Policy Division
Administration for Children and Families
United States Department of Health and Human Services
330 C Street, SW
Washington, DC 20024

Re: Supplemental Notice of Public Rulemaking—Proposed AFCARS data elements related to the Indian Child Welfare Act of 1978 (*Federal Register*, Volume 81, No. 67, published April 7, 2016, pages 20283–20301)

The Sault Ste. Marie Tribe of Chippewa Indians welcome the opportunity to provide comments on the Supplemental Notice of Public Rulemaking (SNPRM) regarding proposed Adoption and Foster Care Automated Reporting System (AFCARS) data elements related to the Indian Child Welfare Act of 1978 (ICWA). American Indian and Alaska Native (AI/AN) children have a unique legal status as citizens of tribal governments with federal laws, like ICWA, that provide important safeguards to help them maintain their tribal and family relationships. This unique legal status and the requirements of federal laws like ICWA are not addressed in current federal reporting requirements for state child welfare systems that serve AI/AN children and families. This has contributed to states feeling less comfortable in examining their implementation of ICWA, and difficulty in developing responses that can effectively address disproportionality and other areas for improvement. Tribes also suffer under the current data limitations, as they experience significant limitations in their ability to track the progress of their tribal members' children and families effectively across multiple states and collaborate successfully with partner states. As states and tribes together try to understand the best approaches to address these issues, access to reliable data is critical if effective solutions are going to be developed. With AI/AN children nationally facing disproportionate placement in state foster care at a rate over two times their population, the need for ongoing, reliable, and accessible data has never been greater.

The SNPRM proposes the first federal data elements that can provide detailed information on ICWA implementation. It proposes a series of data elements tied to ICWA requirements that will allow tribes, states, and federal agencies the ability to develop a more detailed understanding of the trends in out-of-home placement and barriers to permanency for AI/AN children. Improved policy development, technical assistance, training, and resource allocation can flow from having reliable data available. Establishing the data elements proposed in the SNPRM will provide AI/AN children the same opportunities to benefit from data that other children currently have, and will better inform responses that address the unique issues in both policy and practice.

Data elements proposed in the SNRPM include data that is easily obtained in the case files of Title IV-E managing agencies. This includes common case management data that details the activities of the Title IV-E agency and related activities of the court in particular cases. The full AFCARS NPRM, like the SNPRM, also proposes data from Title IV-E agencies and courts. Examples of similar AFCARS data elements include Transfer to Another Agency (1355.43(g)(4)), Living Arrangement and Provider information (1355.43(e)(1-16), Authority for Placement and Care court order (1355.43(d)(4)), Termination of Parental Rights date (1355.43(c)(3)(ii)), and Date of Judicial Finding of Abuse or Neglect date (1355.43(c)(4). The integration of ICWA-related data provides for the unique legal issues for AI/AN children,

while following a very similar framework and sources of data that have been a part of AFCARS requirements for many years and proposed in the current full AFCARS NPRM.

We would also note that Title IV-E of the Social Security Act provides authority for the Secretary of the Department of Health and Human Services (DHHS) to regulate the collection and reporting of data regarding children who are in the care of a Title IV-E agency (42 U.S.C. 679). This has more recently been interpreted by DHHS to include the collection and reporting of data related to implementation of ICWA involving AI/AN children in state child welfare systems. For many years, tribal advocates, and in some cases states, have argued for this interpretation, and we are pleased to see the current Administration adopt this common sense clarification of current authority.

We want to thank DHHS for their efforts to correct significant data gaps in federal data collection concerning AI/AN children and families, and express our support for the establishment of the proposed data elements contained in the SNPRM. It has been over 36 years since the enactment of ICWA, and while conditions and outcomes for AI/AN children have improved since that time, there are still substantial issues that need attention in order to reduce AI/AN disproportionality and improve tribal, state, and federal responses. We look forward to working with DHHS in the future to strategize on how to use the new data proposed in this SNPRM.

Sincerely,

Aaron A. Payment, Chairperson
Sault Tribe of Chippewa Indians

To: Administration for Children and Families (ACF) (2016-07920)/(0970-AC47)

Fr: Sault Ste. Marie Tribe of Chippewa Indians

Dt: May 9, 2016

Re: Comments on AFCARS Proposed Indian Child Welfare Act data elements

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Introduction

Sault Ste. Marie Tribe of Chippewa Indians (Sault Tribe) is an Indian tribe located in the Upper Peninsula of Michigan. Although the majority of our tribal population was once located in this region; today, Sault Tribe has tribal citizens located throughout the country. Thus, it is imperative to Sault Tribe that the agencies and state courts affecting our children not only adhere to the laws created to protect the future of our tribe, but to do so conscientiously and uniformly.

On April 07, 2016 the Administration for Children and Families (ACF), a division of the Department of Health and Human Services (HHS), announced it was supplementing the notice of proposed rulemaking of the Adoption and Foster Care Analysis and Reporting System (AFCARS).

The proposed regulations are an extension of an earlier proposed rule, and address the requirements for State Title IV-E agencies to collect and report data to ACF on children who are in out-of-home care and in subsidized adoption of guardianship arrangements with the State. The proposed regulations also address AFCARS penalty requirements, under the Adoption Promotion Act of 2003, which will be applied to the Title IV-E agencies for failure to comply with AFCARS collecting and reporting data requirements.

The proposed AFCARS regulations include several new modifications to address changes made by the Fostering Connections to Success and Increasing Adoptions Act of 2008, and the Preventing Sex Trafficking and Strengthening Families Act of 2014. Under these Acts, Title IV-E agencies will be required to collect and report data related to the guardianship assistance program, sibling placement, the extension of Title IV-E assistance to children 18 or older, educational stability plans, and transition plans for children in foster care. In addition, information regarding victims of sex trafficking, children in foster care who are pregnant or parenting, and children in non-foster family settings will also be required.

The new AFCARS regulations propose collecting specific data related to American Indian / Alaskan Native children. The terms American Indian and Native American will be used interchangeably throughout this comment.

Since the enactment of ICWA in 1978 the lack of statistics and meaningful data related to Indian children in "child custody proceedings" in State courts is woefully inadequate. Implementing the proposed collection of enhanced ICWA data elements is a monumental attempt to ensure compliance with and measure the effectiveness of ICWA, given that there has been no consistent and reliable data for the past 38 years.

The federal government has the ability and authority to collect this data, and to assist in ICWA compliance. The Sault Tribe is encouraged by the acknowledgement by HHS and ACF of the extreme need for this information. We welcome the opportunity to participate in information sharing regarding our people, experiences, and vision for the future. We believe the enhanced data collection requirements will lead to improved outcomes for Sault Tribe children and families.

Congress identified ICWA's purpose as:

> ... *it is the policy of this Nation to protect the best interests of Indian children* and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

25 U.S.C. § 1902 (2006).

In practice, this policy has not filtered down to the everyday experiences of Indian Tribes and families in state courts. Until the Proposed Rules can enforce ICWA there are no incentives or consequences for non-compliance by the state courts and agencies tasked with implementing ICWA.

The Authority of AFCARS to Require ICWA Data Reporting

The Sault Tribe agrees that HHS has the authority to require that state title IV-E agencies maintain a data collection system to capture the proposed ICWA data elements and to impose penalties to for failure to comply with AFCARS reporting.

Proposed AFCARS Regulations:

Section 1355.43: Out-of-home care data file elements.

Sections 3 (i), (iii), (v), (vi) in all of these subsections, the language "inquired" is vague. It is not clear what the state agency is inquiring about in these sections.

Sault Tribe feels that the language needs to be precise so that regardless of the specialized training and education of the interviewer, the information received can be accurate and consistent. The questions are part of the state agency's research into whether there is a reason to know that the child is an Indian child under ICWA. The language in these subsections should clearly state what is being asked. For example, "Indicate whether the state agency inquired with the child's biological or adoptive mother if the child is an Indian child".

Section 4 (ii) under this subsection, the agency is required to indicate the name of all federally recognized Indian tribe(s) that may potentially be the Indian child's tribe(s). Sault Tribe would recommend that the title IV-E agency also be required to document the verification of tribal membership by the child's Indian tribe and if a child is identified as either enrolled or eligible in a federally recognized tribe that the specific tribe and date of verification are included as a data element. Sault Tribe would also recommend that there be a data element that captures when the child is eligible for more than one tribe.

Section 5 if there is "no court finding" the state title IV-E agency must indicate no name listed. Sault Tribe feels that the agency should identify the Tribe's position/involvement in the case even if the court order does not clearly make a finding. The state title IV-E agency should be required to continue to report data that accurately reflects tribal involvement even when a court order does not include the information. It has been Sault Tribe's experience that the courts are not diligent about engaging the Tribe or including required ICWA findings in the court orders. By requiring this data element to remain blank if no finding is made it seems like this will be another way to misrepresent the true number of ICWA cases involved in State court and will further skew data related to specific tribal affiliation. Sault Tribe has a number of cases where the Tribe has legally intervened in a case but there are no ICWA findings contained in the court orders.

Section 7 Sault Tribe agrees with this section however, feels that "good cause" findings should be made as outlined in the Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 FR 10156. Sault Tribe would recommend an additional data element that captures the specific "good cause" finding used to decline each transfer.

Section 10 Sault Tribe would recommend adding the date of the tribal request for additional information and the date the agency responded to the tribe's request for additional information. It has been Sault Tribe's experience that the agencies are not always timely in responding to requests for additional information.

Section 11-13 Sault Tribe is concerned that, historically, the definition of active efforts has been a very subjective concept; however, they are clearly defined in the Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80

FR 10150. Sault Tribe supports that the state title IV-E agency is required to report active efforts very specifically to coincide with the definitions as found in the Guidelines (or proposed rules, once adopted).

Section 13 (i-xiii) Sault Tribe would recommend data elements be included that capture how the state title IV-E agency actively engages the tribe in case planning and with any key case decisions to include ongoing active efforts, placement and permanency goal changes.

13(xi) Sault Tribe would recommend that multiple data elements be added this section to capture "Conduct or cause to be conducted a diligent search for the Indian child's extended family members for assistance and possible placement; if no extended family members are identified, a diligent search should be conducted for other ICWA compliant placement options; and if the Tribe supported the placement and adoption of the child.

Section 15 Sault Tribe is concerned with the language "which foster care or pre-adoptive placements that meet the placement preferences of ICWA in 25 U.S.C. 1915(b) were available to accept placement." The language seems to leave the answer open to a very subjective interpretation of "were available to accept placement" and answering yes or no does not document diligent or active efforts to ensure the child is placed in an ICWA compliant placement. Suggested language would be "were pursued to accept placement pursuant to subsection 13 (xi)," as amended above.

Section 18 (v) Sault Tribe is not clear what "Other" good cause might be. Sault Tribe recommends that if there is a good cause finding denoted as "Other" that further narrative data is captured that explains the court's good cause findings. Sault Tribe feels that capturing this specific data will assist to identify any education, training, or compliance issues.

Section 19 Sault Tribe is concerned that there are no definitions of "voluntary" or "involuntary". Sault Tribe would recommend having a definition of what constitutes a "voluntary" placement. ICWA does not seem to define what a voluntary proceeding for termination of parental rights requires. See Comment for Section 22-24.

Section 22-24 Sault Tribe would recommend that data is captured regarding whether active efforts or culturally appropriate services were provided prior to a voluntary consent to termination of parental rights.

Section 26 Sault Tribe is concerned with the language "which adoptive placements that meet the placement preferences of ICWA in 25 U.S.C. 1915(b) were available to accept placement." The language seems to leave the answer open to a very

subjective interpretation of "were available to accept placement" and answering yes or no does not document diligent or active efforts to ensure the child is adopted by an ICWA compliant placement. Suggested language would be "were pursued to accept a placement for adoption pursuant to subsection 13 (xi), as amended above.

Section 27 Sault Tribe would recommend that a data element be added to capture if the Tribe supported the placement and adoption of the child.

Section 28 (v) Sault Tribe is not clear what "Other" good cause might be. Sault Tribe recommends that if there is a good cause finding denoted as "Other" that further narrative data is captured that explains the court's good cause findings. Sault Tribe feels that capturing this specific data will assist to identify any education, training, or compliance issues.

Conclusion

The lack of consistent data about American Indian / Alaska Native children is one of biggest concerns from tribal officials. The Federal government through the AFCARS process has the opportunity to collect and create a much needed consistent body of data.

Sault Tribe actively responds to all ICWA notices and is diligent with intervening in all cases involving Sault Tribe children across the United States. It is the experience of Sault Tribe that there are vast inconsistencies across states and jurisdictions with the interpretation and application of ICWA. The collection of accurate and consistent data is a first step to start a meaningful discussion about what is currently happening with Native American children in state IV-E agency custody.

When tribal children are taken into state custody and not properly identified they and their families lose the enhanced protections that are afforded to them under ICWA. Poor plans are made and lead to chaos and unnecessary trauma for tribal children. Tribes lose their children and their futures. Children lose their families and their connection to their tribe. These losses are irreplaceable parts of their identity and have lifelong consequences. Consistent and accurate data is the first step to open a meaningful discussion for creating a better future for Indian children and tribes across the country.

When tribal children are identified when being taken into state custody, they are provided the support and connection with their tribes. Children are reunited with their relatives, extended families and tribal communities. Tribes are able to advocate for tribal children and families. Support can be provided to develop plans that include culturally appropriate services and decrease the barriers Indian

families face to safely parent their children. When children are connected with their families and their Tribes, outcomes for Indian children improve.

The fear that tribes continue to face is the fear of the unknown. With no reliable and accurate data, it is unclear what is happening with tribal children. It is not known how many children and families are being lost in the system, thus lost to their tribes and the tribe's long and rich history lost to the children of future generations. Until accurate and consistent data is collected, the tribes are very concerned about their children in state custody. If state IV-E agencies were able to reliably report what is happening with Indian children in state custody the conversations and collaboration between states and tribes would be more meaningful and outcome driven. Goals, action steps and outcomes could be measured and data would create a clear vision of the future and how to further improve outcomes for Indian children and families.

Sault Tribe's experience with state title IV-E agency data is that there can be as much as a 50% discrepancy between the numbers reported by the state agency and the number of children known to be in state custody by the tribe, thus the tribe is aware of twice as many children in state custody as what is reported by the state. This is an alarming number and further highlights the need for improved data collection and reporting.

We hope these recommendations are helpful to the Department of Health and Human Services and the Administration for Children and Families in its commitment to assessing the incidence, characteristics, and status of adoption and foster care in the United States, and develop the appropriate national policies and data measures with respect to adoption and foster care by including requirements that conform with the Indian Child Welfare Act.

As of: September 14, 2020
Received: June 12, 2018
Status: Posted
Posted: June 12, 2018
Tracking No. 1k2-93od-vv1f
Comments Due: June 13, 2018
Submission Type: E-mail

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0071
Puerto Rico

Submitter Information

Name: Sandra Rosario
Organization: Puerto Rico

General Comment

See Attached

Attachments

Puerto Rico

Puerto Rico amended

Puerto Rico reviewed and analyzed the new rules of the AFCARS elements and understood that at this time it does not collect the data corresponding to the new elements of the ICWA. In our territory only the element that we currently have in relation to ICWA is collected.
In addition we have doubts that refers to the element 145 (Victim of sex trafficking while in foster care) that is under the area D (Removal Information). Does this mean if the child has a second removal? Can you clarify a little more how to work with this element?

In relation to the other elements we understand that they can be worked with the documentation that is collected from the minors in custody.

Puerto Rico review and analyzed the new rules of the AFCARS elements and understand:

At these moment we are evaluating a new application system and working the necessary improvements that don't allows be handled in a quick and agile way by staff in the island. These tasks require contract for outside companies with a high economic cost, which generates a great deal of concern by reductions in the agency's budget. We are concerned with the amount of new elements in this Regulation, as the work with the same and add them to the new system require a great economic impact on the budget allocated. In addition the agency working with the regulations established by the Puerto Rico Oversight, Management and Economic Stability Act of 2016 related to the economic area.

As of: September 14, 2020
Received: June 12, 2018
Status: Posted
Posted: June 12, 2018
Tracking No. 1k2-93oc-463u
Comments Due: June 13, 2018
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0072
Comment on FR Doc # 2018-05042

Submitter Information

Name: Mary Corbin

General Comment

AFCARS 2.0 is a complete rewrite of AFCARS 1.0. Even the remaining foster care elements will require recoding.

The level of detail required for each placement/living arrangement/foster parent within each removal is a major undertaking both from a coding as well as a data validation standpoint. Some elements listed in AFCARS 2.0 do not exist in our system and are not currently being collected. Given the workforce issues that we are currently experiencing below are our suggestions for what would help eliminate some of the burden.

Move the ICWA elements completely out of AFCARS 2.0 for this round.
Allow states that have no recognized tribal association such as ours to auto populate the ICWA related elements with a negative or null response.
Suspend the level of detail required for each placement/living arrangement/foster parent(s)/guardian within each removal for this round.
Leave the disability conditions categories as they appear in AFCARS 1.0. Add diagnosis codes such as Autism to already existing disability categories for this round rather than re-categorize.

As of: September 14, 2020
Received: June 12, 2018
Status: Posted
Posted: June 12, 2018
Tracking No. 1k2-93od-px4s
Comments Due: June 13, 2018
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0073
Comment on FR Doc # 2018-05042

Submitter Information

Name: D Dina Friedman

General Comment

As an MSW and a parent of an LGBTQ-identified child, I know how important it is to protect our LGBTQ youth. My child was raised in a safe and supportive environment, but their friends, many of whom I know personally, were not as fortunate. We need to keep the question about family conflict in the HHS document so we can fully support and understand the context by which a child left home and be able to arrange for appropriate accommodations. Do to anything less would risk children's overall health, well-being, and susceptibility to trauma.

As of: September 14, 2020
Received: June 12, 2018
Status: Posted
Posted: June 12, 2018
Tracking No. 1k2-93od-blv3
Comments Due: June 13, 2018
Submission Type: API

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0074
Oklahoma Department of Human Services

Submitter Information

Name: Elizabeth Roberts
Address: 73125
Email: e.roberts@okdhs.org
Organization: Oklahoma Department of Human Services

General Comment

See attached file(s)

Attachments

Oklahoma Department of Human Services

Oklahoma Department of Human Services
Child Welfare Services
PO Box 25352
Oklahoma City, OK 73125-0352

Commentary to ANPRM

45 CFR Part 1355
83 FR 11449

Oklahoma is submitting the following estimates related to (1) Design/Update to the Child Welfare Information System; (2) Training; (3) Case Documentation; (4) Recurring Administrative Costs. In addition, the state has identified specific elements from AFCARS Final Rule that are burdensome and/or overly difficult to validate the accuracy.

(1) Cost Estimate - Design/Update CW Information System					
Federal Fiscal Year	Design/Business Requirements	Programming	Testing	Administrative Meetings w/Program Staff	**Totals - FFY**
FFY 2019	2 Program Field Representatives @ $165,000	$0	$0	Meetings with program staff, including Administrators and Directors @ $51,000	**$ 216,000.00**
FFY 2020	2 Program Field Representatives @ $165,000	2 Programmers @ $360,000	2 Program Field Representatives @ $165,000	Meetings with program staff, including Administrators and Directors @ $51,000	**$ 741,000.00**
FFY 2021	$0	2 Programmers @ $360,000	3 Program Field Representatives @ $247,000	Meetings with program staff, including Administrators and Directors @ $51,000	**$ 658,000.00**
FFY 2022	$0	$0	3 Program Field Representatives @ $247,000	$0	**$ 247,000.00**
TOTAL	**$ 330,000.00**	**$ 720,000.00**	**$ 659,000.00**	**$ 153,000.00**	**$ 1,862,000.00**

(2) Cost Estimate - Training					
Federal Fiscal Year	In-Service Training Hours for Existing Field Staff	Pre-Service Training Hours for New Field Staff	Number of Staff	Hours x Staff	Estimated Costs [Hours x $54] - {2 Trainers}
FFY 2021	12	0	3,200	38,400	$ 2,073,600.00
FFY 2022	0	4	600	2,400	$ 129,600.00
FFY 2023	0	4	600	2,400	$ 129,600.00
FFY 2024	0	4	600	2,400	$ 129,600.00
Total					**$2,462,400.00**

(3) Cost Estimate - Case Documentation						
Federal Fiscal Year	Average number of children in Out of Home Care - to be updated	Average number of children entering Out of Home Care - data to be collected and documented	Average number of Foster/ Adoptive Parents - will need to be updated	Average number of new Foster/Adoptive Parents - data to be collected and documented	Number of Hours [Clients x 3 hours]	Estimated Costs [hours x $23.00]
FFY 2021	8600	4800	11,260	9,140	101,400	$ 2,332,200.00
FFY 2022	0	4800	0	9,140	41,820	$ 961,860.00
FFY 2023	0	4800	0	9,140	41,820	$ 961,860.00
FFY 2024	0	4800	0	9,140	41,820	$ 961,860.00
Total						**$ 5,217,780.00**

Case Documentation Option B:

Oklahoma values the quality practice of child, parent, and foster parent visitation and engagement. The addition of these AFCARS elements, especially those which are overly burdensome (listed below), without the addition of adequate supports for those staff, will result in a diminished capacity for engagement, a principle that is recognized by the Children's Bureau as critical for a high quality Child Welfare System. To create the work hours needed for all the additional case documentation and maintain the high expectation of our front line staff to focus on family engagement, additional support staff will be needed. Positions for support staff or "Child Welfare Assistants" would be created to assist with other case duties so Child Welfare Specialists can maintain their focus on family engagement as well as collecting and documenting the new elements. The estimate for the Child Welfare Assistants added into the case documentation already presented would be considerable, $41,469,020.

(3b) AFCARS Changes - Case Documentation Option B								
Federal Fiscal Year	Average number of children in Out of Home Care - will need to be updated	Average number of children entering Out of Home Care - data needs to be collected and documented	Average number of Foster/Adoptive Parents - will need to be updated	Average number of new Foster/Adoptive Parent - data needs to be collected and	Number of Hours [Clients x 3 hours]	Estimated Costs [hours x $23.00] Data Collection	Estimated Cost Data Entry (232 Addt'l Child Welfare Assistants)	Total Cost
FFY 2021	8600	4800	11,260	9,140	52,080	$ 1,197,840.00	$ 9,512,000.00	$ 10,709,840.00
FFY 2022	0	4800	0	9,140	32,220	$ 741,060.00	$ 9,512,000.00	$ 10,253,060.00
FFY 2023	0	4800	0	9,140	32,220	$ 741,060.00	$ 9,512,000.00	$ 10,253,060.00
FFY 2024	0	4800	0	9,140	32,220	$ 741,060.00	$ 9,512,000.00	$ 10,253,060.00
Total						**$ 3,421,020.00**	**$ 38,048,000.00**	**$ 41,469,020.00**

(4) Estimate - Recurring Administrative Costs				
Federal Fiscal Year	Additional Help Desk Staff	Additional Support for missing AFCARS elements and monitoring	Additional Live Training	**Totals**
FFY 2020	2 Program Field Representatives @ $165,000	4 Program Field Representatives @ $330,000	2 Program Field Representatives @ $165,000	**$ 660,000.00**
FFY 2021	2 Program Field Representatives @ $165,000	4 Program Field Representatives @ $330,000	2 Program Field Representatives @ $165,000	**$ 660,000.00**
FFY 2022	2 Program Field Representatives @ $165,000	4 Program Field Representatives @ $330,000	2 Program Field Representatives @ $165,000	**$ 660,000.00**
FFY 2023	2 Program Field Representatives @ $165,000	4 Program Field Representatives @ $330,000	2 Program Field Representatives @ $165,000	**$ 660,000.00**
Total	**$ 660,000.00**	**$ 1,320,000.00**	**$ 660,000.00**	**$ 2,640,000.00**

Data File and Extraction – Without element specific clarification and specificity of the file type for extraction, it is difficult to determine a resources' estimate for developing the data file/extraction.

Validation/Compliance/Data Quality – The final rule addressed additional types of errors for which the state will be held accountable; however, utilities for monitoring were not specifically discussed, nor were error thresholds or data quality thresholds. The burden related to developing tools for field staff related to compliance/data quality errors cannot be determined at this time.

Preliminary Estimate – The state estimates a cost of **$12,182,180**; however, if the state pursues additional child welfare assistant positions to assist with data entry, the overall costs will increase significantly, **$45,793,420.00**.

Out of Home Care File – Non-ICWA Data Elements:

Sexual Orientation – the state questions how reporting this to the federal government for youth 14 and older, foster parents, and adoptive parents assists with analyzing and evaluating whether the state is meeting the needs of its child population. This may not be a sensitive subject for all, but it will be for some, and while a value of "decline" has been included, the social worker should not be in the position of having a **mandatory** discussion with a youth, foster parent, or adoptive parent in order to record someone's individual sexual orientation. For the state, it may be of value to know if a prospective foster or adoptive home parent feels that they are able to parent and meet the needs of LBGTQ youth. If these elements are to remain in the final rule, it is curious and an explanation would be appreciated as to why sexual orientation was not included as an element in 1355.44(c) parent/legal guardian information.

Health Assessment – the state would like to confirm that computing the element of timely health assessment is allowable. If computing "yes" or "no" is not allowable, this element will be burdensome. In the side by side comparison of elements, Health Assessment was equated to Child Diagnosed with Disability. The state does not view these elements as equivalent.

Educational Stability – the educational stability element and values will be difficult to obtain and validate. The state is concerned with giving the CW specialist discretion without adequate knowledge of education prompts and limited input from education subject matter experts.

Pregnant as of the end of the report period – there were no age parameters attached to this element for reporting pregnancy or parenting or placement with children at the end of the report period. There was no guidance as to how this element should be developed. It is a burden to the worker to answer this series of questions for every child on a workload regardless of the age of the child.

Prior Adoption Date/Prior Guardianship – Prior adoption/guardianship information is difficult to obtain in detail. The state asks that if detailed date information is not available that an estimate of the age of the child at the time of the adoption or guardianship may be reported. The state also asks for clarification as to whether step-parent adoptions are to be included in this reporting.

Total Number of Siblings: This information is not easily validated and while family composition is necessary to fully assess family relationships and dynamics and should be included in narrative content, it does not appear to serve a purpose to report this to the federal government. This will be a summary number with no context. The Bureau will have no way of knowing if the number reported is inclusive of minor siblings or adult siblings, or in some instances, deceased siblings.

Siblings in living arrangement – the state can report this, but does not understand the value of this element.

Child and Family Circumstances at Removal – the significant increase in the number of values does not lend itself to better information being received for analysis or evaluation. Referencing the side-by-side comparison document, the state suggests that 1355.44 (d)(6)(iii) through 1355.44(d)(6)(vii), (d)(6)(ix) and (d)(6)(x) are basic overall reasons to remove a child. The remaining values should be labeled as conditions (or circumstances) that existed at the time of removal rather than being grouped with actual reasons for removal. Family circumstances are part of an

assessment and should not always have a *direct* connotation as a reason for removal which is how this data will be perceived.

Sex Trafficking – the primary challenge with this series of elements is in design – primarily for the victim of sex trafficking while in foster care element as it would seem that the child welfare worker would need to revisit this question each time a youth returns from having been AWOL, as well as any out of home care investigations related to sexual abuse.

Living Arrangement and Provider Information

Sexual Orientation – as previously stated, this does not seem necessary to report.

Permanency Planning

Juvenile Justice - this will be difficult to report and will require a design change. The state has the ability to capture a delinquent adjudication; however, the way this element is written suggests that the social worker must answer this question at the end of each 6 month reporting period.

Caseworker Visit Dates – Mandatory reporting for child welfare visitation already exists. The state questions having to report visits in AFCARS and in the required child welfare visitation report.

Exit to Adoption and Guardianship

Sexual Orientation – as previously stated, this does not seem necessary to report.

Siblings in adoptive or guardianship home – this element needs clarification

Out of Home Care File – ICWA Data Elements

The number of ICWA elements is excessive and will require significant changes to the child welfare information system. Date specific fields will be a challenge, such as providing the date that the state title IV-E agency first discovered information indicating the child is or may be an Indian child as defined in ICWA. Additionally, gathering information for the Notification questions will be difficult and potentially, not possible. Oklahoma Indian Child Welfare Act per Section 40.4 of Title 10 of the Oklahoma Statutes requires the state court to ensure the initiating party, usually district attorney, sends notice by certified mail, return receipt requested, to the Indian child's parents; Indian custodians; child's tribe; and the appropriate Bureau of Indian Affairs office. It places an undue burden on the child welfare worker to gather information that essentially has to do with whether or not the court complied with its responsibility.

Throughout the child information section and Parent/Legal Guardian section, the tribal element questions are gender and two-party specific. This presents a problem for accurately recording information for a child who was adopted by a single parent and has entered out of home care; or who was adopted by a same sex couple and has entered out of home care. This is an issue all the way through TPR if AFCARS utilities are (1) looking for TPR on 2 parents and (2) looking for gender specific parents. These types of inconsistencies need to be resolved.

Thank you for the opportunity to comment on the ANPRM.

Sincerely,

Millie Carpenter

Millie Carpenter, Interim Child Welfare Director
Oklahoma Department of Human Services

As of: September 14, 2020
Received: June 12, 2018
Status: Posted
Posted: June 12, 2018
Tracking No. 1k2-93oe-kyxt
Comments Due: June 13, 2018
Submission Type: Unknown

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0075
Wisconsin Dept. of Children and Families

Submitter Information

Name: Eloise Anderson
Address: 53708
Organization: Wisconsin Dept. of Children and Families

General Comment

See Attached

Attachments

Wisconsin Dept. of Children and Families

WISCONSIN DEPARTMENT OF CHILDREN AND FAMILIES

201 East Washington Avenue
P.O. Box 8916
Madison, WI 53708-8916

Governor Scott Walker
Secretary Eloise Anderson

June 12, 2018

Ms. Kathleen McHugh, Director
Division of Policy, Children's Bureau
Administration on Children, Youth and Families
Administration for Children and Families
1250 Maryland Ave SW, Suite 800
Washington, DC 20024
CBComments@acf.hhs.gov

RE: Comments on 45 CFR Part 1355 RIN 0970-AC72

Dear Ms. McHugh,

Wisconsin appreciates the opportunity to provide commentary on the Proposed Rule Changes to Adoption and Foster Care Analysis and Reporting System (AFCARS). This letter is in response to 45 CFR Part 1355 RIN 0970-AC72, Advance Notice of Proposed Rulemaking (ANPRM) regarding delaying implementation of the AFCARS final rule of December 14, 2016 (81 FR 90524) until October 1, 2021.

Wisconsin reiterates and resubmits our original commentary regarding 80 FR 7132 on February 9, 2015, which is provided as Attachment 1. We believe this commentary remains relevant to the current ANPRM.

The following are Wisconsin's comments on the most recent Questions for Comment in the current ANPRM.

The costs related to implementing non-ICWA AFCARS items
The proposed AFCARS rules will require information technology (IT) development, policy development/implementation and caseworker time and training to enter the new elements. Wisconsin estimates the costs for these areas are:

- IT Development for the state's eWiSACWIS child welfare data information system
  - 5,740 hours for design, development and testing
  - $527,700 of IT contract costs which is equivalent to 11% of our IT case management budget
- Policy Development and Implementation
  - 800 hours of program staff time for the development and implementation on the following fifteen new policies and practice guidance on twenty areas requiring changes in caseworker practice

AFCAR Data Element	Practice Implications	Policy Implications
Health assessment	X	
Date of Health Assessment	X	
Whether the child has an Individualized Education Program (IEP) plan or Individualized Family Service Program (IFSP) plan,	X	
Educational Enrollment status	X	
Grade Level	X	
Whether the child is enrolled or is in the process of enrolling in a new school prompted by an initial placement into foster care or a placement change	X	
Total number of siblings	X	X
Number of siblings in foster care	X	X
Child's sexual orientation (for 14 year olds and older).	X	X
Environment at removal – household or a facility.	X	
Whether a child is a victim of sex trafficking prior to entering foster care	X	X
Whether a child is a victim of sex trafficking while in foster care	X	
Whether a child is a victim of sex trafficking if yes, whether the agency reported it to law enforcement and date.	X	
Foster parents relationship to the child	X	X
Whether the child was found to be adjudicated delinquent or a status offender during the report period.	X	X
Guardian relationship to child	X	X
Guardian sexual orientation	X	X
Adoptive parent relationship to child	X	X
Adoptive parent sexual orientation	X	X
The number of siblings in the same adoptive or guardianship home as the child.	X	X
Whether a termination/modification of parental rights is voluntary or involuntary.		X
Termination/modification of parental rights petition date.		X
Environment at removal – household or a facility.		X
Information on foster parent's sexual orientation.		X

- Caseworker time and training
    - As noted above, we expect that fifteen AFCARS elements would require a state policy change and twenty items would require practice changes for caseworkers. This would require additional training time for workers. In addition, these changes would most likely increase the amount of caseworker time needed to input information in our case management system. Caseworkers in our state are currently experiencing high and increasing caseloads. The workload associated with the additional AFCARS items would affect their time on current and new cases. At this time, we are not able to estimate the number of additional caseworker hours required for the training and data documentation involved with the new non-ICWA AFCARS requirements

The costs related to implementing ICWA AFCARS items

The proposed AFCARS rules will require IT development, policy development/implementation and caseworker time and training to enter the new elements. Wisconsin estimates the costs for these areas are:

- IT Development for the state's eWiSACWIS child welfare data information system
    - 1,200 hours for design, development and testing
    - $103,680 of IT contract costs which is equivalent to 2 % of our IT case management budget
- Policy Development and Implementation
    - 200 hours of program staff time for the development and implementation on the following five new policies and practice guidance on five areas requiring changes in caseworker practice

ICWA AFCAR Data Element	Practice Implications	Policy Implications
For states only, ICWA-related data elements: reason to know a child is an Indian child as defined in ICWA	X	X
For states only, ICWA-related data elements: court determine ICWA applies	X	X
For states only, ICWA-related data elements: notification of child custody proceedings	X	X
For states only, ICWA-related data elements: transfers to tribal court	X	X
For states only, data elements on involuntary and voluntary termination/modifications under ICWA (e.g., whether the state court found beyond a reasonable doubt that continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child in accordance with 25 U.S.C. 1912(f)).	X	X

- Caseworker time and training
    - As noted above, we expect that five AFCARS elements would require a state policy change and five items would require practice changes for caseworkers. This would require training time for workers. In addition, these changes would most likely increase the amount of caseworker time needed to input information in our case management system. Caseworkers in our state are currently

experiencing high and increasing caseloads. The workload associated with the additional AFCARS items would affect their time on current and new cases. At this time, we are not able to estimate the number of additional caseworker hours required for the training and data documentation involved with the new ICWA AFCARS requirements.

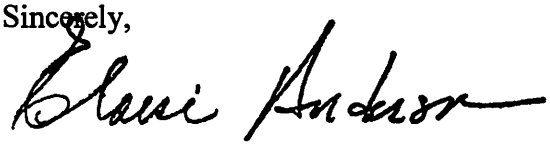
Other Data Collection Concerns

The Final Rule contains variables that may not be ideal to collect in the AFCARS format. Wisconsin is concerned about requiring data collection of child sexual orientation. As noted in previous comments (April 2015) we recommend continuing to collect these data elements through the National Youth in Transition Database (NYTD) survey where any information collected is aimed towards older youth and is voluntary. Similarly, we are concerned about collecting sexual orientation information for foster parents, guardians, and adoptive resources.

Summary

Wisconsin wishes to express our appreciation for the opportunity to provide feedback on this proposed rule and for the ongoing efforts to improve the quality of AFCARS data. We also appreciate the efforts of Administration for Children and Families to address the need for longitudinal placement data for children in out-of-home care. While we have significant reservations about many of the changes, including the costs of the changes, we look forward to continuing an ongoing conversation and partnership with the ACF, representatives from other states, and key resource center and advocacy group staff to prioritize and address improvements in AFCARS data quality and content. Please feel free to contact Fredi-Ellen Bove, the state child welfare director, at (608) 422-6891 or via e-mail at Frediellen.Bove@wisconsin.gov with any questions regarding our state's comments.

Sincerely,



Eloise Anderson
Secretary
Department of Children and Families

Attachment 1: Wisconsin Comments on AFCARS NPRM of February 9, 2015

201 East Washington Avenue, Room E200
P.O. Box 8916
Madison, WI 53708-8916
Telephone: 608-266-8787
Fax: 608-266-5547

Governor Scott Walker
Secretary Eloise Anderson

Division of Safety and Permanence

Attachment 1

Wisconsin Comments on AFCARS NPRM of February 9, 2015

Wisconsin has thoroughly reviewed the Adoption and Foster Care Analysis Report System (AFCARS) Notice of Proposed Rule-making (NPRM) published on February 9, 2015 and appreciates the opportunity to provide detailed comments regarding the AFCARS changes proposed in the NPRM. Wisconsin shares the Administration for Children and Families (ACF) commitment to improve the quality and utility of foster care and adoption data submitted by states. We, too, are committed to providing accurate and timely data regarding foster care and adoption services and share ACF's desire to obtain and use longitudinal placement data to strengthen our understanding of the status and needs of children in out-of-home care.

Wisconsin recognizes the importance of AFCARS data which serves as the primary mechanism for the Children's Bureau (CB) to improve the nation's understanding of the foster care and adoption populations, to assess national and state performance on the federal permanency measures, and to manage effectively federal funds. However, the AFCARS data collection requirements have a profound impact on child welfare case practice and workload and on the development and maintenance of information systems used to collect AFCARS information. As such, the desire to know more about children in out-of-home care and adoption must be balanced with the current demands on child welfare caseworker time and the increasingly limited state resources to develop, maintain and enhance information systems and to fund child welfare programming and services. In addition, it is inefficient and leads to flawed data to require child welfare caseworkers to be the source for information maintained by other systems, such as education and healthcare data.

Scope of the Adoption and Foster Care Analysis and Reporting System: Section 1355.40(b)
In reference to the adjustment of using longitudinal datasets, while Wisconsin supports the research aspect of the proposed data elements, the state requests more information regarding the file structure and system that is being planned to support such a change. It is difficult to provide comments on overall cost, staff hours, and suggested one-year preparation time for file creation when no information regarding the new structure is provided.

Report Periods and Deadlines: Section 1355.42(a)
Wisconsin proposes that the submission deadline remain, at a minimum, at the 45 day submission timeframe currently established in the AFCARS rules and regulations. Based on the significant amount of data that is being required within the proposed rule, few, if any, states can

meet the proposed 30 day submission timeline. Data entry at the local caseworker level must remain a consideration when determining deadlines that will produce accurate, reliable data.

Data Elements: Child Information: Section 1355.43
Health, behavioral or mental health conditions: 1355.43(b)(7)(i-xii)
While Wisconsin believes that every child should receive proper healthcare and medical attention, the state questions whether tracking this information as part of the state's AFCARS file would lead to accurate or timely data regarding a child's health and wellbeing. Constant monitoring of this data will be time consuming for child welfare caseworkers. Caseworkers do not have training or expertise on detailed, technical healthcare information. Given that medical information and procedures are constantly changing, relying on caseworkers to gather, enter and update this information in a timely manner will lead to the submission of incomplete and inaccurate data. Wisconsin strongly recommends ACF consider data sharing agreements with the Centers for Medicare and Medicaid Services within the US Department of Health and Human Services, as that agency is already responsible for such data, collects such data, and is trained and knowledgeable in the meaning of this data.

School and Educational elements: 1355.43(b)(8-12)
Wisconsin actively seeks to keep all children in their own school districts while in out-of-home care, and, in collaboration with the state education agency, endeavors to strengthen these children's academic achievement. However, the state questions whether tracking this information as part of the state's AFCARS file would lead to accurate or timely data regarding a child's educational outcomes. Caseworkers have no formal training with the institutional aspects of education. Requiring child welfare workers to gather additional information from the education system will increase workload on child welfare workers, diverting them from other critical tasks, and result in inaccurate data collection and a lag in data entry. Wisconsin strongly recommends ACF consider data sharing agreements with sources like the US Department of Education, an agency that is already responsible for such data, collects such data, and is trained and knowledgeable in the meaning of this data.

Child Financial and Medical Assistance: 1355.43(b)(16)
The proposal to track other financial assistance the child receives is an additional workload burden for child welfare caseworker, diverting them from other critical tasks. The child and family are under no obligation to share this information, nor is the caseworker formally trained to collect such information.

Proposal to collect LGBTQ data elements:
Wisconsin recommends continuing to collect these data elements through the National Youth in Transition Database (NYTD) survey, where any information collected is aimed towards older youth and is voluntary.

Parent(s) or legal guardian(s) born in the United States: 1355.43(c)(1)(ii) and (c)(2)(ii)
This information is not mandatory for parents to provide; while it may be informally or more formally disclosed by the parent or in the course of serving the family, the ACF should not mandate penalties on information that will likely be unreliably attained.

Removal information: 1355.43(d)(1-5)
Wisconsin currently does not require many of the suggested Removal data elements in its SACWIS system, for example neither the Environment at Removal (d) (3) or Child and Family Circumstances at Removal (d)(5) are currently collected. Like many of the added elements in these proposed changes, requiring these new data elements will take significant time in both caseworker training and system development to implement. If this proposal is adopted, Wisconsin and many other states will need longer than the suggested one year to construct the system changes and develop and implement new standards and worker training.

Living Arrangement and Provider Information: Section 1355.43(e)
If the ACF is suggesting expanding the allowed placement setting types, Wisconsin suggests lifting any restriction on placement setting and having the federal data analysts categorize the data at the federal level. Rather than require all states to reconfigure mapping of their files, the ACF should allow for broader scrapes of data to be sent and have any necessary adjustments or exclusions made at the federal level. Creating the distinction between three different types of group homes (e)(4) does not allow more flexibility for states, rather it creates layers of complexity for both data entry and coding at the local level; all for a goal with little benefit.

If ACF plans to pursue this proposal, it is critical that ACF provide more detailed information regarding the proposed file structure and recommendations for mapping. The datasets of placement information are massive, and without a clear structure and guidelines for how the file should be created, it will be longer than a year before Wisconsin and other states can submit the file and far longer than that before the ACF will be able to undertake any national analyses of the datasets.

Siblings in Out of Home Care: Section 1355.43(e)(8-13)
It is very difficult to create family trees for cases in child welfare because the lines between biological family members, immediate family members, and other types of case participants, such as significant others, half-siblings, cousins in one household, etc., are blended and difficult to distinguish. Wisconsin asks that the ACF provide a clearer definition of how to determine siblings in a child welfare case.

Juvenile Justice: Section 1355.43(f)(7)
Wisconsin is a county-administered state and as such, many counties address their child welfare and juvenile justice populations differently and separately. The strongest difference is in Milwaukee County, the state's largest county, where child welfare is administered by the state and juvenile justice is administered by the county. The new requirement regarding reporting juvenile delinquency data involves a significant change of practice at the state and local levels, and as such will necessitate policy, training, and information system changes. It is not simply a matter of adding a new data element.

Exit to Adoption and Guardianship Information: Section 1355.43(h)
Wisconsin does not currently collect information through its SACWIS system on private or international adoptions. The addition of these elements will impose additional workload on caseworkers and other staff, diverting them from other critical tasks. In addition, it will require policy, training, and information system changes.

Title IV–E Adoption and Guardianship Assistance Arrangement and Agreement Information: Number of Siblings: Section 1355.44(c)
The additional proposed elements regarding an adoptive child's case are problematic, as in Wisconsin a child becomes the only participant in his/her case once the termination of parental rights (TPR) is completed. Wisconsin statute effectively disconnects the child from all former participants in any previous case, including parents and siblings. Changing the existing data elements and structure to determine a child's family situation, biological or otherwise, once the adoption has been finalized will involve a significant change in the information system and impose additional work on caseworkers.

Data Quality Standards: Section 1355.45(d)
With these proposed changes, the AFCARS file would grow from its current 65 data elements to over 200 data elements, many of which are completely new requirements to states and the caseworker. As noted above, many of the new elements, such as the medical and educational data elements, are out of the control of the child welfare system. ACF's proposed ten percent margin for data errors in conjunction with these substantial and complex changes is unrealistic.

Administrative Impact and Cost Estimates
The fiscal and workload estimates provided in the proposed rule are insufficient and reflect an inadequate understanding of the practical and technical ramifications of the AFCARS changes proposed within this rule. These estimates do not reflect the extent to which the proposed changes and additions to the AFCARS reporting requirements will affect state and local child welfare workload and costs associated with changing the state's SACWIS system.

The workload impact analysis for child welfare staff is inadequate and does not reflect a full understanding of the practical impact the changes proposed in this rule impose on a child welfare caseworker's time. For example, the rule appears to estimate only those tasks related to data entry for the new data elements proposed by this rule. This approach to assessing workload impact does not take into consideration the actual practice or changes in practice needed to collect, verify and update the new information required under this proposed rule.

Implementation Process
Based on the magnitude and scope of changes proposed in the rule, we do not believe that it is feasible, nor would it be advisable, to have full implementation of all of the proposed changes at one time. This approach, as suggested in the proposed rule, would create significant pressure to carry out all of the following responsibilities simultaneously:

1) Re-create the new AFCARS file and re-tool the AFCARS submission process,
2) Design, develop and put into production the sweeping changes and additions to the SACWIS application to meet these new reporting requirements, and:
3) Develop and implement training, technical assistance and monitoring plans to address the extensive supports needed to ensure child welfare staff understand and are able to carry out the new reporting requirements.

This pressure will result in severe hardships for the state and local child welfare agencies, where many of the same staff (particularly state program and technical staff) will be responsible for most, if not all, of the tasks described above. We recommend that implementation of any changes and additions to the AFCARS reporting requirements be implemented in stages. This approach would allow for more thoughtful and planned actions needed to support new AFCARS reporting requirements and would enable the state to plan for the fiscal and personnel resources needed to support these requirements.

We also recommend that any proposed changes to the AFCARS reporting requirements, particularly those of the scope introduced in this NPRM, be piloted with a small number of states prior to full implementation of these changes. This process would enable ACF and states to understand more fully the technical, fiscal and practical impact associated with implementing any proposed changes to the AFCARS reporting requirements and to identify key strategies and issues affecting successful implementation of these changes.

Finally, we strongly urge ACF to consider collaborating with the Centers for Medicare and Medicaid Services within the Department of Health and Human Services and the Department of Education to obtain health and education data, respectively, on foster children directly from these agencies. The ability to share data has increased dramatically within the past five years, and there is no reason to impose greater workloads and stress on child welfare caseworkers to gather information that is outside their control, when accurate and detailed data is available within the source agency.

As of: September 14, 2020
Received: June 12, 2018
Status: Posted
Posted: June 12, 2018
Tracking No. 1k2-93oa-nt23
Comments Due: June 13, 2018
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0076
Comment on FR Doc # 2018-05042

Submitter Information

Name: Ann Stith

General Comment

I think it's extremely important for records to be kept on the sexual orientation and gender identity of both foster parents and foster children. Children in this category need to have their rights respected. Parents need to have potential fosters know who they are.

As of: September 14, 2020
Received: June 12, 2018
Status: Posted
Posted: June 12, 2018
Tracking No. 1k2-93og-844e
Comments Due: June 13, 2018
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0077
Missouri

Submitter Information

Name: Joni Ralph
Address: 64501
Email: Joni.L.Ralph@dss.mo.gov
Organization: Missouri

General Comment

Missouri's response to Docket # 2018-05042 RIN # 0970-AC72

Attachments

Missouri

Identify the data elements, non-ICWA-related, that are overly burdensome for state and tribal title IV-E agencies and explain why. Please be specific in identifying the data elements and provide a rationale for why collecting and reporting this information is overly burdensome. If possible, provide specific cost and burden estimates related to the following areas:

Of the new non-ICWA related data points, Missouri would need to add the following data points to our information system:

- **Child Information:** 7. (b.2.ii) Child's sexual orientation; 38. (b.11.i) Health assessment; 39. (b.11.ii) Date of health assessment; 40. (b.12) Timely Health Assessment; 41. (b.13) Health, behavioral or mental health conditions; 42. (b.13.i) Intellectual disability; 43. (b.13.ii) Autism spectrum disorder; 47. (b.13.vi) Mental/emotional disorders; 48. (b.13.vii) Attention deficit hyperactivity disorder; 49. (b.13.viii) serious mental disorders; 50. (b.13.ix) Developmental delay; 51. (b.13.x) Developmental disability; 55. (b.16) Educational stability; 56. (b.16.i) Proximity; 57. (b.16.ii) District/zoning rules; 58. (b.16.iii) Residential facility; 59. (b.16.iv) Services/programs; 60. (b.16.v) Child request; 61. (b.16.vi) Parent/Legal Guardian request; 62. (b.16.vii) other; 63. (b.17.i) Pregnant as of the end of the report period; 64. (b.17.ii) Ever fathered or bore children; 68. (b.19.i) Prior adoption date; 69. (b.19.ii) Prior adoption type – intercountry; 70. Prior Guardianship (b.20i); 71. (b20.ii) Prior guardianship date; 75. (b.21.iii) Title XXI SCHIP; 82. (b.21.x)Title IV-B; 83. (b.21.xi) SSBG; 85. (b.21.xiii) other; 87. (b.23) Total Number of siblings.
- **Removal Information:** 106. (d.4) Environment at removal; 108. (d.6.i) Runaway; 109. (d.6.ii) Whereabouts unknown; 112. (d.6.v) Psychological or emotional abuse; 114. (d.6.vii) Medical neglect; 115. (d.6.viii) Domestic violence; 117. (d.6.x) Failure to return; 125. (d.6.xviii) inadequate access to mental health services; 126. (d.6.xix) inadequate access to medical services; 134. (d.6.xxvii) Child requested placement; 135. (d.6.xxviii) Sex trafficking; 136. (d.6.xxix) Parental immigration detainment or deportation; 137. (d.6.xxx) Family conflict related to child's sexual orientation, gender identity, or gender expression; 138. (d.6.xxxi) Educational Neglect; 139. (d.6.xxxii) Public agency title IV-E agreement; 142. (d.7) Victim of sex trafficking prior to entering foster care; 143. (d.7.i) Report to Law Enforcement; 144. (d.7.ii) Dates of each report; 145. (d.8) Victim of sex trafficking while in foster care; 146. (d.7.i) Report to Law Enforcement; 147. (d.7.ii) Dates of each report;
- **Living arrangement and Provider information:** 173. (e.13) Child's relationships to the foster parent(s); 184. (e.18) Gender of first foster parent; 185. (e.19) First foster parent sexual orientation; 196. (e.18) Gender of second foster parent; 197. (e.19) second foster parent sexual orientation.
- **Permanency planning** 202 (f.5) Juvenile justice; 205 Transition plan; 206 Date of transition plan; 207 - 219 (f.10) Active Efforts;
- **General exit information:** 223. (g.4) Transfer to another agency.
- **Exit to adoption and guardianship information:** 258. (h.16) Interjurisdictional adoption or guardianship jurisdiction; 261. (h.19) Siblings in adoptive or guardianship home.

In Missouri, the total annual average of new entries into foster care for FFY2015, FFY2016, and FFY2017 was 7,102. On May 31, 2018, there were 13,794 total children in foster care in Missouri.

The addition of the 74 above-mentioned non-ICWA related data points to Missouri's information system would create a total cost burden of approximately **$499,166.93.**

This includes

- **$106,528.63** for data gathering and entry;
- **$67,494.75** for training staff on the new data points;
- **$17,058.55** to develop training materials;
- **$294,975.00** to develop data points and modify our information system; and
- **$13,110.00** for extracting data and submitting to ACF.

These are the cost estimates based on the average number of foster care entries per federal fiscal year. The amount for gathering and entering data for all children in foster care would be nearly twice the average cost of foster care entries alone.

Previously, we received comments regarding burden and the system changes needed to report the ICWA-related data elements of the 2016 SNPRM. We would like to receive more detailed comments on the specific limitations we should be aware of that states will encounter in reporting the ICWA-related data elements in the final rule. Please be specific in identifying the data elements and provide a rationale for why this information is overly burdensome. If possible, provide specific cost and burden estimates related to the following areas:

a. The number of children in foster care who are considered Indian children as defined in ICWA.

b. Recordkeeping hours spent annually:

i. Searching data sources, gathering information, and entering the information into the electronic case management system,

ii. Developing or modifying procedures and systems to collect, validate, and verify the information and adjusting existing ways to comply with AFCARS requirements, and

iii. Training and administrative tasks associated with training personnel on the AFCARS requirements (*e.g.,* reviewing instructions, developing the training and manuals).

c. Reporting hours spent annually extracting the information for AFCARS reporting and transmitting the information to ACF.

Of the new ICWA related data points, Missouri needs to add the following data points to our information system:

- **Child Information:** 8– 14. (b.3) Reason to know a child is an "Indian Child" as defined in the Indian Child Welfare Act; 18 – 20. (b.5) Court determination that ICWA applies; 24. (b.7) Request to transfer to tribal court – ICWA; 25 - 28. (b.8) Denial of transfer – ICWA; 76. (b.21.iv) State/Tribal adoption assistance; 77. (b.21.v) State/Tribal foster care.
- **Parent or legal guardian information:** 92. (c.3) Tribal membership mother; 93. (c.4) Tribal membership father; 97 - 99 involuntary termination/modification of parental rights under ICWA; 100. Voluntary termination/modification of parental rights under ICWA;
- **Removal Information:** 103 -105 Removals under ICWA.
- **Child and family circumstances at removal:** 140. (d.6.xxxiii) Tribal title IV-E agreement.

- **Living arrangement and Provider information:** 158. (e.6) Location of living arrangement; 42. Is Current Placement Setting Outside of State or Tribal Service Area; 160 -164 (e.8) Available ICWA foster care and pre-adoptive placement preferences: a member of the Indian child's extended family; 165. (e.9) Foster care and pre-adoptive placement preferences under ICWA; 166. (e.10) Good cause under ICWA; 167 - 171. (e.11) Basis for good cause; 175. (e.15) First foster parent tribal membership; 187. (e21) Second, foster parent tribal membership.
- **Exit to adoption and guardianship information:** 234. (h.4) First adoptive parent or guardian tribal membership; 246. (h.10) Second adoptive parent, guardian, or other member of the couple tribal membership; 262 – 265. (h.20) Available ICWA Adoptive placements; 266. (h.21) Adoption placement preferences under ICWA; 267. (h.22) Good cause under ICWA; 268 – 272. (h.23) Basis for good cause.

In Missouri, the total annual average of American Indian children entering foster care for FFY2015, FFY2016, and FFY2017 was 98. Seven American Indian children have returned to their tribes during these reporting periods.

On May 31, 2018, there were 58 American Indian children in foster care in Missouri. The addition of the 55 above-mentioned ICWA related data points to Missouri's information system would create an estimated cost burden of approximately **$298,044.58**. This includes:

- **$1,843.76** for data gathering and entry;
- **$50,917.09** for training staff on the new data points;
- **$12,868.73** to develop training materials;
- **$222,525.00** to develop data points and modify our information system; and
- **$9,890.00** for extracting data and submitting to ACF.

These are the cost estimates based on the average number of American Indian foster care entries per federal fiscal year. The amount for gathering and entering data for all American Indian children in foster care would be nearly half the average cost of foster care entries alone.

There are no federally recognized American Indian tribes in Missouri. On May 31, 2018, American Indian children in foster care represented .04% of the population for all children in foster care in Missouri. The average entry rate of American Indian children for FFY 2015, FFY2016 and FFY2107 was 1% of all foster care entries in Missouri. This cost burden does not include costs related to the requirements of interstate compacts in order to return American Indian children to the state where their tribes are located.

As of: September 14, 2020
Received: June 12, 2018
Status: Posted
Posted: June 12, 2018
Tracking No. 1k2-93oh-bpza
Comments Due: June 13, 2018
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0078
Salt River Pima-Maricopa Indian Community

Submitter Information

Name: Julia Hintze
Address: 85256
Email: julia.hintze@SRPMIC-nsn.gov
Organization: Salt River Pima-Maricopa Indian Community

General Comment

Salt River Pima-Maricopa Indian Community (SRPMIC) is a new title IV-E agency. Currently they are developing a data
collection system to be able to report on AFCARS. There is considerable work required in development, training, implementation and data collection on the new elements. The cost associated with all the previously listed tasks is significant
and not currently accounted for in the tribal budget for matching funds for title IV-E. With the significant increase in time
allowed for training, development and collection there should be a one time implementation fund available for being able
to meet the new federal regulations. Currently the data at SRPMIC has to be extracted manually since none of the data
elements are able to be pulled from the current electronic case management system (CMS) used. Although SRPMIC is in
development of a new CMS, these data elements require more time in development.

Currently for data elements 7, 185, 197, 244, and 256 are not gathered or asked regularly. These data elements will
require specialized training for direct line staff to be able to gather this data in the most supportive and sensitive manner.
Also being a tribal community and having many adoption occurring with relatives, being able to maintain trust and honesty
while gathering sexual orientation information can create and uncomfortable dynamic if direct line staff are not trained
appropriately. Online and didactic training would not be substantial training for a topic such as how to ask about

sexual
orientation in a supportive and non-judgmental manner. The trainings would need to be hands on and allow direct line
staff to be able to practice using those skills, prior to going out and asking to create a healthy dynamic between the children
in foster care, foster parents and adoptive parents. A training of this magnitude and level with 25 staff can be cumbersome
and time consuming to the direct line staff that are already managing heavy case loads.

In conclusion providing funding to assist with the financial burden on implementation, training, development and reporting
during the first required reporting period would assist those agencies with less resources be successful and be able to adhere
to the federal timelines on reporting.

As of: September 14, 2020
Received: June 12, 2018
Status: Posted
Posted: June 12, 2018
Tracking No. 1k2-93oi-2s5n
Comments Due: June 13, 2018
Submission Type: Unknown

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0001
Adoption and Foster Care Analysis and Reporting System: Advance notice of proposed rulemaking.

Document: ACF-2018-0003-0079
Pokagon Band of Potawatomi Indians

Submitter Information

Name: John Warren
Address: 49047
Organization: Pokagon Band of Potawatomi Indians

General Comment

See attached

Attachments

Pokagon Band of Potawatomi Indians

Pokégnek Bodéwadmik · Pokagon Band of Potawatomi
Tribal Council

P.O. Box 180 • 58620 Sink Road • Dowagiac, MI 49047 • www.PokagonBand-nsn.gov
(269) 782-6323 • (888) 376-9988 toll free • (269) 782-9625 fax

June 11, 2018

Attn: Kathleen McHugh
United States Department of Health and Human Services
Administration for Children and Families
Policy Division
330 C Street SW
Washington, DC 20024

Via electronic correspondence at: *CBComments@acf.hhs.gov*

Re: RIN: 0970-AC72 Adoption and Foster Care Analysis and Reporting System; Notice of Proposed Rulemaking (3/15/2018)

Dear Ms. McHugh:

The Pokagon Band of Potawatomi Indians ("Pokagon Band") is a federally recognized sovereign government located in Indiana and Michigan. However, our citizen-children live throughout the United States and this is why the Pokagon Band is again submitting comments in support of the need for accurate and thorough reporting of information concerning Indian children by Title IV-E and IV-B state agencies. It cannot be said enough that our children are the future of the Pokagon Band and that future is threatened when the Indian Child Welfare Act ("ICWA") is not followed. Accurate data reporting enhances the application of the ICWA because the December 14, 2016 Final Rule, 81 Fed. Reg 90524 ("Final Rule") mandated such reporting and included ICWA data elements and sanctions for failing to report those ICWA data elements. Until the Final Rule takes effect, ICWA compliance by Title IV-E and IV-B agencies will remain inconsistent and in some instances, nonexistent.

Enhancing data collection consistent with the ICWA isn't a burden. It is a responsibility. We are far removed from the days of data collection by pen and paper. With the advances of technology many of the data elements required in the Final Rule are collected in the context of any ICWA case and maintained on various state digital platforms. Yet, despite modern means of data collection, current collection of data by Title IV-E and IV-B agencies regarding Pokagon Band children is often inaccurate. Implementation of the Final Rule, as is, will enhance the type of data collected and the consistency of the data collected.

The Pokagon Band supports the inclusion of the data elements included in the Final Rule and provides these additional comments in response to those questions posed in the original solicitation of RIN 0970-AC72.

General Comments:

These regulations are important to us, our families, and state child welfare systems.

The regulations themselves—in response to the comments from stakeholders across the country—describe the importance of the changes included in the Final Rule. As stated in the Final Rule, at 90527:

> Overall, tribes, organizations, states, and private citizens supported our mission to collect additional information related to Indian children as defined in ICWA. Moreover, some states, tribes, national organizations, and federal agencies have stated that ICWA is the ''gold standard'' of child welfare practice and its implementation and associated data collection will likely help to inform efforts to improve outcomes for all children and families in state child welfare systems.

Nothing has changed since ACF made clear in the Final Rule that data collection is necessary to protect Indian children and families and their tribes. There remains a pressing need for comprehensive national data on ICWA implementation. Congress has not amended the Act's data collection provisions. And there have been no changes in circumstances that would alter the burdens or benefits of the Final Rule's data collection requirements.

The data collection requirements of the Final Rule are consistent with ACF's statutory mission.

Section 479 of the Social Security Act mandates the Department of Health and Human Services (HHS) collect national, uniform, and reliable information on children in state care. Section 474(f) of the Act requires HHS to impose penalties for non-compliant AFCARS data. Section 1102 of the Act instructs the Secretary to promulgate regulations necessary for the effective administration of the functions for which HHS is responsible under the Act.

The Final Rule, which ACF promulgated pursuant to these statutory requirements, will ensure the collection of necessary and comprehensive national data on the status of American Indian/Alaska Native (AI/AN) children for whom ICWA applies and historical data on children in foster care. The Final Rule's data collection elements are necessary to ACF's statutory mission under Section 479 of the Act.

The administration provided all interested parties with ample notice and opportunities to comment on the final rule.

Tribes, tribal organizations, and tribal advocates have long sought the inclusion of ICWA-related data points in the AFCARS. The initial rules were changed due to comments by these entities and others after reviewing the Administration of Children and Families' February 9, 2015 proposed rule. On April 2, 2015 the Agency issued a Supplemental Notice of Proposed Rulemaking (SNPRM) changing certain data elements. Yet another SNPRM was issued on April 7, 2016. Specifically, the Agency sought comments on the inclusion of the ICWA data points in both the April 2015 Intent to Publish a SNPRM, as well as the April 2016 SNPRM. Ultimately,

the Final Rule was published on December 14, 2016 (Final Rule), and included the ICWA data elements.

The Final Rule thoroughly responded to comments on both the benefits and burdens of the proposed regulatory action. Given the multiple opportunities to comment throughout this time period, any additional collection activity is unnecessary. In addition, tribes, tribal organizations, and advocates received notice of each opportunity with ample time to comment on this vital and important rule change.

States also had ample opportunity to participate. As the Final Rule explains in detail, ACF engaged in robust consultation with states and responded to their concerns, for example, by streamlining many data elements. 81 Fed. Reg. 90524, 90565-66. States had at least six different opportunities to raise their concerns, which the ACF considered and addressed fully. 81 Fed. Reg. at 90566.

States are in the process of implementing these changes.

Since these regulations have been effective for approximately fifteen months as of the date of the March 15, 2018 notice, all states are or should be in the process of implementing them. At this stage, any modification of the data collection requirements would be a waste of finite state child welfare resources, which itself is an additional burden.

The ANPRM is arbitrary and capricious where it seeks only information on burdens.

The agency "determined in the final rule that the benefits outweigh the burden associated with collecting and reporting the additional data." Final Rule, at 90528. The agency explained how its weighing of the benefits and burdens led it to make certain changes to its proposal. For example: as stated in the Final rule at 81 Fed Reg. 90528:

> In response to state and tribal comments suggesting congruence with the BIA's final rule, we revised data elements in this final rule as appropriate to reflect the BIA's regulations including removing requirements that state title IV–E agencies report certain information only from ICWA-specific court orders. These changes should allow the state title IV–E agency more flexibility, alleviate some of the burden and other concerns identified by states, help target technical assistance to increase state title IV–E agency communication and coordination with courts, and improve practice and national data on all children who are in foster care.

There have been no material changes in circumstances justifying the agency's new approach. The Executive Order requiring this review is not a sufficient basis for the agency to act where it provides an insufficient basis for reasonable decision-making relying solely on an examination of the burden of regulations without the required balancing of benefits. Additionally, the executive orders fail to provide justification to deviate from the statutory requirement for regulations.

Pokagon Band comments to the questions provided in the ANPRM (at page 11450):

1. Identify the data elements, non-ICWA-related, that are overly burdensome for state and tribal title IV-E agencies and explain why. Please be specific in identifying the data elements and provide a rationale for why collecting and reporting this information is overly burdensome.

No response.

2. Previously, we received comments regarding burden and the system changes needed to report the ICWA-related data elements of the 2016 SNPRM. We would like to receive more detailed comments on the specific limitations we should be aware of that states will encounter in reporting the ICWA-related data elements in the final rule. Please be specific in identifying the data elements and provide a rationale for why this information is overly burdensome.

The ANPRM requests IV-E states and tribes to provides the number of children in foster care who are considered Indian children as defined in ICWA. However, it is specifically due to the lack of a national data reporting requirement, that any data provided in response to this question would be significantly inaccurate. This speaks to the critical importance of the ICWA-related data points – without a data reporting requirement, many states simply do not appropriately track Indian children in their child welfare system, let alone the individual ICWA-related data points.

3. Previously, we received comments that particular data elements did not lend themselves to national statistics and were best assessed with qualitative methods such as case review. Please provide specific recommendations on which data elements in the regulation to retain that are important to understanding and assessing the foster care population at the national level. Also, provide a rationale for your suggestion that may include its relevance to monitor compliance with the title IV-B and IV-E programs or another strong justification for using the data at the national level.

Tribes and states properly relied on the Final Rule in working toward implementation for nearly a year and a half. Any modification to the existing data points frustrate those efforts, would require states to begin again collaborating with their tribal partners and ultimately further delay implementation. This comes at the expense of the health, safety and welfare of not only Indian children, their families, and their tribes, but the child welfare system at large where a modification of the final rule would cost resources that are system-wide.

All the data elements are important to understanding and assessing the foster care population in general and, specifically, for Indian children. Case review does not promote consistency or objectivity in reporting. Case review is also limited by state confidentiality laws and limits those who can participate in case review. It is better for children to focus on implementation of the Final Rule than to again question the need for it.

4. Previously we received comments noting concerns with variability in some of the data elements across states and within jurisdictions. Please provide specific suggestions to simplify data elements to facilitate the consistent collection and reporting of AFCARS data. Also, provide a rationale for each suggestion and how the simplification would still yield pertinent data.

The need to eliminate the data variability is precisely why it is important to have a national data collection standard. It will assist HHS/ACF efforts to support states in properly implementing ICWA by having targeted, data-driven identification areas where states need support the most. In the absence of a national data reporting requirement, it is guaranteed there will be variability with data elements frustrating a stated purpose of the 2016 BIA ICWA Regulations.

5. Previously we received comments questioning the utility, reliability, and purpose of certain data elements at the national level. Provide specific recommendations on which data elements in the regulation to remove because they would not yield reliable national information about children involved with the child welfare system or are not needed for monitoring the title IV-B and IV-E programs. Please be specific in identifying the data elements and provide a rationale for why this information would not be reliable or is not necessary.

Each of the ICWA-related data points are tied to existing federal law and regulation and are necessary to monitor and support title IV-B and IV-E programs. The ICWA is the "gold standard" of child welfare and ensuring compliance with this federal law informs how the existing child welfare system may improve in whole.

The Pokagon Band appreciates the opportunity to again comment on the Final Rule. Any hindrance or stoppage of ICWA data point collection significantly impacts our children and our ability to adequately respond as a government and limits our ability to collaborate with our state partners for best practices. In the interest of protecting our children and families, the Pokagon Band submits these comments.

Respectfully,

John P. Warren

John P. Warren, Chairman
Pokagon Band of Potawatomi Indians