As of: September 14, 2020
Received: June 18, 2019
Status: Posted
Posted: June 18, 2019
Tracking No. 1k3-9ajp-gph9
Comments Due: June 18, 2019
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0224
Adoption and Foster Care Analysis and Reporting System

Document: ACF-2018-0003-0299
Child Trends

Submitter Information

Name: Carol Emig
Address:
Bethesda, MD,
Email: kharper@childtrends.org
Organization: Child Trends

General Comment

See attached file(s)

Attachments

Child Trends

June 18, 2019

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

RE: RIN 0970-AC72
Adoption and Foster Care Analysis and Reporting System (AFCARS)

Dear Ms. McHugh,

Child Trends is a highly respected, nonpartisan research organization focused exclusively on improving the lives and prospects of children, youth, and their families. For nearly 40 years, decision makers have relied on our rigorous research, unbiased analyses, and clear communication to improve public policies and interventions that serve children and families. Pursuant to the notice published in the Federal Register on April 19, 2019 (84 FR 16572), Child Trends submits these comments to request that the agency withdraw the proposed rule and fully implement the AFCARS Final Rule issued in 2016.

The data collected in AFCARS are critical in ensuring that title IV-E agencies comply with federal laws, including title IV-B and title IV-E of the Social Security Act ("the Act"), the Fostering Connections to Success and Increasing Adoption Act of 2008 ("Fostering Connections"), and the Every Student Succeeds Act (ESSA). These laws promote the safety and well-being of children in foster care; without proper oversight and compliance monitoring, we put this already vulnerable population at-risk of experiencing further negative outcomes. In addition to improved program monitoring, these data will help stakeholders evaluate the effectiveness and impact of the main provisions of these laws.

These data allow for proper oversight and monitoring of the Act, Fostering Connections, and ESSA by providing HHS the information necessary to determine whether the agency is meeting the requirements of each policy or statute. For example, by knowing which youth have a transition plan and when that plan was created, HHS will know whether the agency is developing transition plans for all applicable youth. Without these data elements, there is not one uniform data repository that holds the information necessary for proper oversight and monitoring of these policies.

7315 Wisconsin Avenue, Suite 1200W
Bethesda, MD 20814
www.childtrends.org

Beyond their utility in monitoring compliance with federal law, these data are also critical for research and evaluation purposes. Over the years, Child Trends has conducted numerous studies involving the analysis of AFCARS data. We have seen these data—and the research employing these data—inform policymakers, practitioners, and other stakeholders about the lives and prospects of children in foster care. The publicly available nature of these data also increases research transparency, which is currently a government priority. The ability to monitor trends and analyze longitudinal data is critically important to developing services and supports that keep children safe and set them on a healthy trajectory.

Given this experience, we recommend that the Administration of Children and **Families' AFCARS Final Rule ("2016** Final Rule**"**), as published on December 14, 2016 (81 FR 90524), is necessary not only to provide adequate oversight of title IV-E agencies and their compliance with federal law, but also to enhance stakeholder understanding of how to best provide for and serve children involved in foster care.

Below, we offer more detailed recommendations regarding AFCARS. We recognize and understand HHS' concerns about the burden to states of collecting additional information. However, many states are already collecting this information (for example, under Fostering Connections). Additionally, these data elements reflect federal statutes with which title IV-E agencies are required to comply. Therefore, the information should be available to agency staff and not require much additional effort to report.

Recommendation #1: Retain an educational stability element within AFCARS and, if necessary, utilize a simplified version of the element outlined in the 2016 Final Rule.

An educational stability data element is necessary to ensure that title IV-E agencies comply with Section 475(1)(G) of the Act, Fostering Connections, and ESSA. These laws all require states to prioritize educational stability for children in foster care and collaborate with education agencies. In removing the only measure of educational stability from AFCARS, stakeholders will have no sense of whether agencies are promoting such stability. However, we understand HHS' concerns over the level of burden associated with collecting this information as outlined in the 2016 Final Rule and propose a simplified version, removing the specification for the reason(s) for the change.

> *Educational stability.* Indicate if the child is enrolled or is in the process of enrolling in a new elementary or secondary school prompted by an initial placement after entry into foster care or a placement change during the report period with "yes" or "no" as appropriate.

Frequent school moves negatively impact the educational growth of children in foster care.[1] However, few data—and none in any federal data collection system—are available on school stability among children in foster care. Fostering Connections already requires child welfare agencies to collect educational stability information in their case plans, thus posing little additional burden on states. Including this element in AFCARS will result in more accurate data by encouraging uniformity across states. Additionally, having educational stability data in a publicly available data set will allow stakeholders to continue further study of the influence of educational stability and identify ways to improve educational outcomes within and across states.

Recommendation #2: Retain the private agency arrangement element from the 2016 Final Rule.

The private agency arrangement data element outlined in the 2016 Final Rule is necessary to ensure that Title IV-E agencies comply with Section 479(c)(3)(A) of the Act requiring agencies to collect foster and adoptive parent demographics. As more title IV-E agencies contract out child welfare services to private providers—including the recruitment, training, licensure, ongoing support of, and placement of children with foster/adoptive families—this element is critical in providing adequate oversight to ensure that private providers accurately and consistently provide this required information to the title IV-E agency. Therefore, we propose retaining the private agency arrangement element as written in the 2016 Final Rule.

> *Private agency living arrangement.* Indicate the type of contractual relationship with a private agency for each of the child's living arrangements reported in the living arrangement and provider information item. Indicate "private agency involvement" if the child is placed in a living arrangement that is either licensed, managed, or run by a private agency that is under contract with the title IV–E agency. Indicate "no private agency involvement" if the child's living arrangement is not licensed, managed or run by a private agency.

As the proportion of services contracted out to private agencies increases, so should the level of oversight of private agencies, both by HHS and other stakeholders. We do not currently have a count of the number or proportion of children who are placed in private agency homes or facilities, nor do we know how child outcomes differ between private and public agency placements. These data should be collected to hold private agencies—who receive federal funding via title IV-E foster care maintenance payments—to the same accountability as public agencies for providing adequate care and oversight of children in foster care.

Recommendation #3: Retain the transition plan and date of transition plan elements from the 2016 Final Rule.

[1] https://www.unco.edu/cebs/foster-care-research/pdf/Academic-Growth-Trajectories.pdf

The transition plan data elements outlined in the 2016 Final Rule are necessary to ensure that title IV-E agencies comply with Section 475(5)(H) of the Act, requiring agencies to develop a personalized plan to aid youth in their transition to adulthood. Therefore, we propose retaining the two transition plan data elements as written in the 2016 Final Rule.

> *Transition plan.* Indicate whether a child has a transition plan that meets the requirements of Section 475(5)(H) of the Act, including plans developed before the 90-day period. Indicate "yes," "no," or "not applicable."
>
> *Date of transition plan.* Indicate the month, day and year of the child's transition plan, if the title IV–E agency indicated that the child has a transition plan that meets the requirements of Section 475(5)(H) of the Act; otherwise leave this item blank.

Proper and advanced transition planning for older youth in foster care is an important way to help ensure they have a successful and positive transition into adulthood. It is well-documented that youth who exit foster care without finding a permanent home ("age out") are at risk of experiencing a wide range of negative outcomes, from homelessness to unemployment and lower rates of high school and college graduation. These outcomes have financial impacts, both for the young people who age out and for our larger society (e.g., Medicaid costs, public assistance, lost wages, etc.).[2] Every annual cohort of youth leaving foster care costs nearly $8 billion. This figure stresses the importance not only of investing in services for transition-age foster youth but also of providing HHS with the information it needs to make sure this planning happens.

Recommendation #4: Replace the proposed health assessment element with the date of health assessment element from the 2016 Final Rule.

Collecting data on health assessments is necessary to ensure that title IV-E agencies comply with Section 422(b)(15)(A) of the Act, which requires agencies to plan for the medical needs of children in foster care, including a timely schedule for health screenings in accordance with medical standards (Health Oversight and Coordination Plan). The health assessment element proposed in the NPRM asks whether the child had a health assessment during the *current out-of-home care episode*. This element does not accurately capture whether the agency is complying with the Act's standard of *timely* health screenings. Based on Child Trends' analysis of FY 2017 AFCARS data, the average length of a child's current out-of-home care episode is 20.1 months, and many children spend years in one out-of-home care episode. The American Academy of Pediatrics recommends well-child visits at least once a year through adolescence.[3] Therefore, one screening or health assessment in a multi-year episode is not timely.

[2] https://www.aecf.org/resources/cost-avoidance-the-business-case-for-investing-in-youth-aging-out-of-foster/

[3] https://www.healthychildren.org/English/family-life/health-management/Pages/Well-Child-Care-A-Check-Up-for-Success.aspx

Instead of reporting whether the assessment took place during the current out-of-home care episode, we recommend reporting the date of the most recent health assessment.

> *Date of health assessment.* Indicate the month, day, and year of the child's most recent health assessment.

Reporting the date of the assessment will likely present the same level of burden as reporting whether the assessment occurred during the current out-of-home care episode, and would result in more accurate information about the timeliness of the assessments. Prompt and regular medical care is critical to promoting children's physical health. The inclusion of the health assessment date provides stakeholders with a baseline understanding of how agencies are responding to the health care needs of children in foster care. By improving health services for children, stakeholders can better meet the Children's Bureau's mission of promoting the safety, well-being, and permanency of children in foster care.

Recommendation #5: Retain the juvenile justice element from the 2016 Final Rule.

Collecting data on juvenile justice involvement is necessary to provide adequate services for children and youth in foster care. Because information on juvenile justice involvement is not collected consistently across states, the precise proportion of youth in the custody of title IV-E agencies who are also juvenile justice-involved ("cross-over" or "dual-involved" youth) is unknown, but estimates range up to 50 percent.[4] Understanding the prevalence and needs of dual-involved youth has been and remains a bipartisan Congressional priority, as evidenced by the introduction of the Child Outcomes Needs New Efficient Community Teams (CONNECT) Act in 2016 and 2019, which would provide grants to improve data collection on dual-involved youth. Retaining the juvenile justice element as written in the 2016 Final Rule would begin to address this priority by—at the minimum—providing an accurate count of dual-involved youth.

> *Juvenile justice.* Indicate whether the child was found to be a status offender or adjudicated delinquent by a juvenile judge or court at any time during the report period. A status offense is specific to juveniles, such as running away, truancy or underage alcohol violations. Indicate "yes" or "no."

Knowing more about the characteristics and outcomes of dual-involved youth can help agencies determine how to better serve these youth, and ultimately figure out ways to prevent or reduce dual system involvement.

Recommendation #6: Retain the child sexual orientation elements from the 2016 Final Rule.

[4] http://www.ncjj.org/pdf/Juvenile%20Justice%20Geography,%20Policy,%20Practice%20and%20Statistics%202015/WhenSystemsCollaborateJJGPSCaseStudyFinal042015.pdf

Collecting data on sexual orientation is necessary to provide adequate services for children and youth in foster care. No national-level data exists on the number of LGBTQ children in foster care. However, local-level studies and evaluations tell us that LGBTQ youth are overrepresented in the foster care population[5] and experience greater placement instability and increased rates of homelessness and criminal justice involvement compared to their non-LGBTQ peers.[6] To help youth overcome these issues and make thoughtful and constructive decisions about their care, it is imperative that title IV-E agencies collect information on sexual orientation and gender identity. Therefore, we recommend retaining the child sexual orientation element.

> *Child's sexual orientation.* For children age 14 and older, indicate whether the child self identifies as "straight or heterosexual," "gay or lesbian," "bisexual," "don't know," "something else," or "decline," if the child declined to provide the information. Indicate "not applicable" for children age 13 and under.

In the discussion of comments on the 2018 NPRM, HHS concluded that including this element in AFCARS would not yield reliable information due to the self-reporting nature of the element. However, information on sexual orientation has been reliably collected in a variety of other child- and youth-serving settings, such as schools, juvenile justice, and health care systems. Additionally, in instances where youth do not want to disclose their sexual orientation or are unsure of how to respond, the 2016 Final Rule provides a "decline" option.

Recommendation #7: Retain the foster and adoptive parent sexual orientation elements from the 2016 Final Rule.

Collecting data on the sexual orientation of foster/adoptive parents is necessary to provide adequate out-of-home care placements for children and youth in foster care. In the discussion of comments on the 2018 NPRM, HHS concluded that stakeholders who would like to know the sexual orientation of foster/adoptive parents can use other data elements (e.g., sex and marital status of foster/adoptive parents) to determine which couples identify as "non-heterosexual." However, this approach is not an accurate or respectful way of identifying such couples because it encourages stakeholders to make assumptions and judgements about foster/adoptive parents and takes away the self-identification aspect of reporting sexual orientation. Additionally, it would not reflect single foster/adoptive parents who are not part of a couple. Therefore, we propose retaining the foster and adoptive parent sexual orientation elements from the 2016 Final Rule.

> *First foster parent sexual orientation.* Indicate whether the first foster parent self identifies as "straight or heterosexual," "gay or lesbian," "bisexual," "don't

[5] https://www.acf.hhs.gov/sites/default/files/cb/im1103.pdf
[6] https://williamsinstitute.law.ucla.edu/wp-content/uploads/LAFYS_report_final-aug-2014.pdf

know,'' ''something else,'' or ''declined'' if the first foster parent declined to identify his/her status.

Second foster parent sexual orientation. Indicate whether the second foster parent self identifies as ''straight or heterosexual,'' ''gay or lesbian,'' ''bisexual,'' ''don't know,'' ''something else,'' or ''declined'' if the second foster parent declined to identify his/her status.

First adoptive parent or legal guardian sexual orientation. Indicate whether the first adoptive parent or legal guardian self identifies as ''straight or heterosexual,'' ''gay or lesbian,'' ''bisexual,'' ''don't know,'' ''something else,'' or ''declined'' if the first adoptive parent or legal guardian declined to identify his/her status.

Second adoptive parent or legal guardian sexual orientation. Indicate whether the second adoptive parent or legal guardian self identifies as ''straight or heterosexual,'' ''gay or lesbian,'' ''bisexual,'' ''don't know,'' ''something else,'' or ''declined'' if the adoptive parent or legal guardian declined to identify his/her status.

Recruiting and retaining high-quality foster/adoptive homes is one of the core responsibilities of title IV-E agencies, but agencies across the country are struggling to do so. While widespread data on foster/adoptive parent sexual orientation are not available, small-scale studies have shown that same-sex couples are seven times more likely to be raising foster and adoptive children than different-sex couples.[7] Stakeholders can use data on the sexual orientation of foster/adoptive parents to tailor recruitment and retention strategies to reach this valuable and untapped resource.

Recommendation #8: Retain all Indian Child Welfare Act (ICWA) elements from the 2016 Final Rule.

Collecting data related to Native American children is necessary to understand how to effectively support Native American children and families. Currently, Native American children are overrepresented in the foster care population and face some of the worst outcomes. ICWA-related elements required by the 2016 Final Rule would allow the field to understand the circumstances under which Native American children enter the foster care system, the rate of utilization of relatives or kin as a placement, and the ways in which these cases flow through state and tribal courts. These elements will also hold agencies accountable for due diligence in determining a child's eligibility for ICWA and for notification of tribes of the child's involvement with child welfare. The way that race/ethnicity is currently collected in AFCARS does not likely yield an accurate account of the number of Native American children in foster care, as it relies on the discretion of

[7] https://williamsinstitute.law.ucla.edu/wp-content/uploads/Parenting-Among-Same-Sex-Couples.pdf.

child welfare workers. Therefore, we recommend retaining all 60 of the 2016 Final Rule elements related to ICWA.

Conclusion

Thank you for your time and commitment to the safety and well-being of children, youth, and families. We appreciate this opportunity to provide recommendations and to reiterate that improvements to the AFCARS will improve on the important work done on their behalf by title IV-E agencies across the country.

For any questions regarding these comments, please contact Sarah Catherine Williams at Child Trends (swilliams@childtrends.org; 404.680.0287).

Sincerely,

/s/

Carol Emig
President

As of: September 14, 2020
Received: June 18, 2019
Status: Posted
Posted: June 18, 2019
Tracking No. 1k3-9ajp-kg3t
Comments Due: June 18, 2019
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0224
Adoption and Foster Care Analysis and Reporting System

Document: ACF-2018-0003-0300
National Association of Counsel for Children

Submitter Information

Name: Allison Green
Address:
Denver, CO, 80218
Email: allison.green@naccchildlaw.org
Organization: National Association of Counsel for Children

General Comment

Attached to this message please find a response to the request for public comment on elements of the AFCARS 2016 Final Rule from the National Association of Counsel for Children.

Attachments

National Association of Counsel for Children

NACC National Association of Counsel for Children

Promoting Excellence | Building Community | Advancing Justice

June 18, 2019

Kathleen McHugh
U.S. Department of Health and Human Services
Administration for Children and Families
Director, Policy Division
330 C Street SW
Washington, DC 20024
CBComments@acf.hhs.gov

Re: Response to Request for Public Comments on Elements of the Adoption and Foster Care Analysis and Reporting System (AFCARS) 2016 Final Rule

Dear Ms. McHugh,

Thank you for the opportunity to share comments regarding the Adoption and Foster Care Analysis Reporting System (AFCARS). Pursuant to the notice published in the Federal Register on April 19, 2019 (84 Fed. Reg 16572), the National Association of Counsel for Children submits these comments to discourage changes to the AFCARS Final Rule issued in 2016.

The National Association of Counsel for Children (NACC) is a non-profit association of over 1500 professionals dedicated to advancing the rights, well-being, and opportunities of children impacted by the child welfare system through high-quality legal representation. Our members include attorneys who represent children, parents, and agencies in these cases as well as judges, academic experts, CASAs, social workers, and pediatricians.

We have reviewed the Comment Analysis within in the Notice of Proposed Rulemaking (NPRM) and appreciate the close consideration of these data elements in light of potential, projected demands on child protection agency staff. However, we observe that the analysis is overly narrow in scope, as it does not consider the full range of members of the child welfare workforce which, according to Children's Bureau Associate Commissioner Dr. Jerry Milner, includes "the courts" and "attorneys for parents, children." Indeed, "the child welfare workforce is far more expansive than the social workers that populate the child welfare agency."[1]

Child welfare attorneys and judges rely on AFCARS data to contribute to key multidisciplinary planning processes. These include:

- **Children's Justice Act (CJA) multidisciplinary task forces** ("To be eligible for CJA funds, States…are required to establish and maintain a multidisciplinary Task Force on children's justice"[2]).

[1] Milner, Jerry. "The Need for an Expanded View of the Child Welfare Workforce." Children's Bureau Express. Vol. 19, No. 7. September 2018.
[2] Children's Justice Act Fact Sheet. Available at: https://www.acf.hhs.gov/cb/resource/childrens-justice-act

- **Court Improvement Program, Child and Family Services Reviews (CFSRs), Program Improvement Plans (PIPs), and Child and Family Service Plan (CFSP) advisory and implementation teams** ("Federal law requires meaningful, ongoing collaboration between the courts and the State agency as a part of CIPs and CFSPs. Additionally, the State Court CIP is now directed [pursuant to sections 427 and 428 of the Social Security Act] to help implement the state's PIP"[3]).
- **Prevention Planning and Implementation** ("[J]udges, court administrators, and attorneys play critical roles in prevention activities outside the courtroom as part of systems improvement work at the state and local level"[4]).
- **Training and Oversight Functions and Required by Federal Law** (e.g. the 2018 Family First Prevention Services Act requires court participation in the development of Child Fatality Prevention Plans[5]).

Legal professionals cannot and should not fulfill these important functions without critical data points, which may sometimes include data at a high level of detail.[6] Specific information directs teams to generate innovative and targeted solutions, rather than rehash defunct approaches to problems that have plagued child welfare for decades. Without this information, attorney's and judicial officers' critical, federally-mandated role in multidisciplinary system reforms is significantly diminished. Proposals seeded from incomplete data, or data without a nuance are detail, risk being duplicative, ineffective or even regressive.

Although including these additional 89 data elements may require a greater investment of agency time upfront[7], it yields a significant return on investment in the form of data-rich planning processes that target scarce resources towards the appropriate cohorts of children and families. Any burdens experienced by one portion of the workforce are offset by the need of other members of the workforce to have this information available for effective planning and implementation decisions.

---

[3] Child Welfare Capacity Building Center for Courts. 2015. Child and Family Services Reviews: How Judges, Court Administrators and Attorneys Should Be Involved. Washington, D.C.: Children's Bureau, Administration for Children and Families, U.S. Department of Health and Human Services.

[4] Administration for Children and Families Information Memorandum ACYF-CB-IM-18-05. November 16, 2018. Available at: https://www.acf.hhs.gov/sites/default/files/cb/im1805.pdf

[5] 42 U.S.C. 622(b)(19).

[6] Concerns about housing information of a "sensitive and private nature" in a government record are unfounded, as AFCARS currently tracks many such protected data elements, such as medical, mental health, and substance use/ abuse history. Children's attorneys – and the caseworkers with whom they partner - are accustomed to routinely making these inquiries of children and families – and vigilantly ensuring confidentiality - in order to inform their recommendations regarding safety, permanency, and well-being.

[7] NACC observed the significant discrepancies between states in burden estimates (between 1,000 and 95,000 hours) and cost estimates (ranging from $1 million to $45 million). While we agree that some variability is expected due to differences in IT systems, staffing, and foster care population sizes, this range is so vast as to belie flaws in agency estimation processes. NACC encourages ACF to increasingly scrutinize the methods used to arrive at such estimates.

To act as effective partners during these processes, court partners need detailed information about statewide trends that can be disaggregated to create local comparisons. Data points regarding health assessments, educational stability, LGBTQ+ status, ICWA status are particularly relevant. Consider the following examples:

- **Health Assessments:** attorneys and judges are the accountability agents to monitor the timeliness of health assessments for young people experiencing foster care. Although many legal professionals routinely report seeing these delays for children on their caseload, without a statewide data point (See, e.g., 45 CFR 1355.44(b)(11)(ii)), they do not have the tools to understand the problem and advocate for practical solutions.
- **Educational Stability**: courts are the oversight entity responsible for ensuring that landmark federal school stability legislation is honored by child protection agencies. Absent this data element (See, e.g., 45 CFR 1355.44(b)(16)), they are blind from understanding whether barriers that appear for individual clients are anomalous to their clients or are indeed part of a systemic trend.
- **LGBTQ+ Youth:** Information about gender identity, placements, kin, and more is critical to developing policies that break though longstanding barriers to permanency for LGBTQ+ youth. Judges and attorneys participating in multidisciplinary leadership meetings need access to information such as the child's gender (45 CFR 1355.44(b)(2)(i)), and sexual orientation (45 CFR 1355.44(b)(2)(ii)) to understand how and when LGBQT+ status plays a role in placement decisions and disruptions, and to develop responsive service arrays and court procotols. It is also helpful for the federal government to collect this data in order to broadly assess whether states are meeting reasonable efforts requirements pursuant to the federal Adoption Assistance and Child Welfare Act of 1980 (AACWA) and the Adoption and Safe Families Act of 1997 (ASFA).[8]
- **American Indian and American Native (AI/AN) Youth:** Monitoring and ensuring compliance with the Indian Child Welfare Act (ICWA) is one of the cardinal responsibilities for attorneys and judges in dependency courts in every jurisdiction. Since its passage in 1978, courts have made strides in routinizing ICWA inquiry practice, yet disproportionality and disparate outcomes persist for AI/AN youth experiencing foster care[9]. To sufficiently understand the root causes of this reality, legal professionals need detailed information about the nature and frequency of the agency's inquiries. General data about whether the child protection agency made inquiries with family is generally not useful, whereas detailed information about inquiries to maternal relatives, paternal relatives, the child, etc. (45 CFR 1355.44(b)(3)), will reveal patterns that court partners can help rectify. For example, if data reveals that agencies are adequately interviewing mothers but not similarly interviewing fathers, judicial officers can be sure to inquire about this at court hearings. Additionally, simply having these data elements in AFCARS serves as an important reminder for caseworkers and supervisors to engage in thorough, multi-step investigation with each member of the family network.

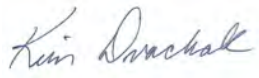
[8] 42 USCA 671(a)(15).

[9] See, e.g., 2017 Report on Disproportionality of Placements of Indian Children. National Indian Child Welfare Association. ("Nationwide AI/AN children are overrepresented in foster care at a rate 2.7 times greater than their proportion in the general population."). Available at: https://www.nicwa.org/wp-content/uploads/2017/09/Disproportionality-Table.pdf

A data-driven approach has rightly been emphasized by the federal government and technical assistance entities as a starting point for system changes work. As recently as April, the Children's Bureau Express emphasized the importance of "data collection, evaluation and continuous quality improvement" - a principle reiterated in many of its published materials and technical assistance work.[10] Although surveys, qualitative reviews, and academic research are important, they are not a sufficient substitute statewide AFCARS data which is broader in scale and more accurate than opt-in surveys. Importantly, AFCARS is widely accepted as a source of unbiased information that teams with competing interests can productively work from.

Lastly, should the Administration for Children and Families choose to revise AFCARS data elements notwithstanding these concerns, NACC strongly urges against revisiting the October 1, 2020 implementation date. By that time, agencies will have benefitted from nearly four years of notice about these proposals, including multiple opportunities to provide comment. Any data elements that are retained must be swiftly implemented in AFCARS to begin tracking these important issues and informing systemic changes. Children cannot and should not wait for an accurate, robust, data-driven approach to designing the programs and policies that shape their experiences in the foster care system.

Sincerely,



Kim Dvorchak, JD, Executive Director
National Association of Counsel for Children
www.NACCchildlaw.org
(202) 810-9914
Kim.Dvorchak@NACCchildlaw.org

[10] Children's Bureau's Capacity Building Center for States. *"Implementation Planning: Myth v. Reality." Vol. 20, No. 3. April 2019.*

As of: September 14, 2020
Received: June 18, 2019
Status: Posted
Posted: June 18, 2019
Tracking No. 1k3-9ajq-pf0q
Comments Due: June 18, 2019
Submission Type: API

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0224
Adoption and Foster Care Analysis and Reporting System

Document: ACF-2018-0003-0301
American Bar Association

Submitter Information

Name: Denise Cardman
Address:
Chicago, IL, 20036
Email: Denise.cardman@americanbar.org
Organization: American Bar Association

General Comment

See attached file(s)

Attachments

American Bar Association

AMERICANBARASSOCIATION

Robert M. Carlson
President
321 N. Clark Street, Chicago, IL 60654-7598
T 312.988.5109 • F 312.988.5100
abapresident@americanbar.org
americanbar.org

June 18, 2019

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

Re: **FR Document No. 2019-07827, RIN 0970-AC72**
Comments on the Education Elements of the Adoption and Foster Care Analysis and Reporting System 2016 Final Rule

Dear Ms. McHugh:

Thank you for the opportunity to share comments regarding the Adoption and Foster Care Analysis Reporting System (AFCARS). Pursuant to the Notice of Proposed Rulemaking (NPRM) published in the Federal Register on April 19, 2019 (84 Fed. Reg 16572), the American Bar Association (ABA) submits these comments to commend the Department of Health and Human Services' (HHS) decision to retain three of the four education data elements from the Final Rule and to encourage reconsideration of the proposal to eliminate the education stability data element. These comments also serve to affirm our strong support for the AFCARS Final Rule issued in 2016.

The ABA is a voluntary professional membership organization with more than 400,000 members. The ABA has submitted prior comments in support of the 2016 Final Rule with a particular emphasis on the importance of retaining data elements for education, consistent with ABA Resolution 117C, which supports education access and stability for children in foster care.

The NPRM maintains three key data elements concerning education for children and youth in foster care: school enrollment, educational level, and special education. We concur with HHS's assessment that each of these elements provides critical information to "assess nationally the well-being of children placed in out-of-home care as part of monitoring the title IV-B and IV-E programs." (84 Fed. Reg 16572, 16580).

However, we respectfully urge reconsideration of the proposal to eliminate the data element on educational stability for the reasons detailed in the remainder of this letter.

Education Stability Data Supports Congress's Goals as Expressed in Federal Legislation

Like the three other education elements, data about education stability is critical to assessing children's well-being while in out-of-home care. The significance of education stability for children is evident in Congress's attention to the issue in two different pieces of federal legislation.

- The *Fostering Connections to Success and Increasing Adoptions Act* of 2008 (Fostering Connections) mandates school stability for children in foster care. Under this law, child welfare agencies must take steps to place children close to the schools they have been attending. Child welfare agencies must also collaborate with education agencies to ensure children who experience a change in living placement remain in the same school unless a change in school is in a child's best interest.

- The *Every Student Succeeds Act* (ESSA) further reinforces Fostering Connections by recognizing the role of education agencies in promoting school stability and interagency data sharing related to students in foster care. Pursuant to ESSA, state departments of education are now required to report on the educational performance of students in foster care in the State Education Agency (SEA) Report Card.

By including the education stability element in AFCARS, state and federal agencies, and Congress will be able to more effectively measure progress on the education stability goals in these two important pieces of legislation.

Education Stability Data Supports Children's Goals

Education stability is not only important to Congress and state and federal agencies, it is also important to children and youth in foster care. Indeed, one of the main reasons Congress has focused on education stability in federal legislation is because youth who have experienced foster care often cite frequent school placements and education disruption as a cause of poor education outcomes. (Fostering Success in Education: National Factsheet on the Educational Outcomes of Children in Foster Care, April 2018). This topic arises regularly in the context of legal representation as well, where children and youth seek to ensure their views about education access and stability are understood and represented in court. For example, in a New Jersey state-wide assessment of youth engagement in court conducted by the ABA Center on Children and the Law in 2017, education was the second most important issue (behind living placement) children and youth raised in their court hearings.

Education Stability Data Provides Key Benefits in Relationship to Other Education Elements in AFCARS

Education stability data is both distinct from and complementary to the three other education data elements in AFCARS. It is distinct because it addresses longitudinal information rather than a point-in-time reflection of children's education status. In other words, while school enrollment, education level, and special education focus on what is happening in a child's life at the time of the report, the education stability element provides key information about the child's path while

in care and reflects changes that may have an impact on the other education elements. Because this information will already be collected in child welfare agency case plans, as required under Title IV E, capturing it in AFCARS is critical to help agencies compare their longitudinal stability information and trends with national data.

Education stability data is also complementary to the point-in-time education elements because it can be cross-referenced with data on school enrollment, education level, and special education, to make each of those elements more informative. For example, although it is valuable to track education level achieved, it is especially valuable to compare that data with education stability numbers to identify correlations between stability and point-in-time outcomes. By tracking these complementary data elements together in AFCARS, the overall information produced will be much more valuable to agencies and will enhance their work with children and families. This complementary information will also better inform assessments of national trends and the effective implementation of federal provisions of Fostering Connections and ESSA.

Concerns About Education Stability Data Can Be Addressed Without Eliminating the Data Element in the Final Rule

The NPRM indicated that information in the education stability data element may be "too detailed or qualitative for a national data set" which could lead to inaccurate reporting. (84 Fed. Reg 16572, 16576). In support of this view, commenters on the Advanced Notice of Proposed Rulemaking raised concerns about the specificity of the drop-down menu of options to define education stability. For example, Oklahoma noted "[t]he state is concerned with giving the CW specialist discretion without adequate knowledge of education prompts and limited input from education subject matter experts." (Oklahoma ANPRM Commentary, June 12, 2018). Similarly, Louisiana commented that "education stability will be extremely subjective" and the reasons for education stability will be specific to each child and should not be limited to the five drop-down criteria listed (i.e., proximity, district rules, residential facility services, child and parent request). (Louisiana ANPRM Commentary, June 13, 2018).

To address concerns related to the subjectivity of the "reasons for school changes," one alternative would be to revise the Final Rule to include a "yes" or "no" only and eliminate the additional explanatory information in this data element. In this structure, the caseworker would successfully track whether a child had moved schools during the reporting period without needing to provide potentially subjective explanations for the move. Although this would not provide detail about the reasons for school changes, it would allow for accurate and straightforward reporting that would support analysis of education stability progress and trends across the country, especially when viewed in relationship with the other AFCARS education data elements.

Massachusetts raised a concern that the element will be insufficient to fully understand education stability because it will capture only one school move during a reporting period where there may be multiple moves and because it does not address other disruptions such as poor attendance or suspensions. Although a limited "yes" or "no" response would not address all the variables that could impact education stability, it would still go a long way to improving the basic tracking of this issue in a way that significantly advances the status quo (i.e., no national education stability

information). Tracking the basic information about whether the child is in the same school as he or she was at the last reporting time, rather than eliminating this element altogether, would also be more consistent with the goals of federal law and with efforts to understand how to better support children's paths to education success while in foster care.

Education Stability Information Is Already Available or Collected

Other ANPRM comments focused on the increased workload and the burden of tracking education data generally. This is consistent with general comments during the ANPRM process. As the NPRM requests, however, we have set out below key information about why education stability information constitutes "information already available or collected as part of the title IV-E agency's casework." (84 Fed. Reg 16572, 16578).

Specifically, because education stability is already a requirement under federal law that both child welfare agencies and school districts must work toward collaboratively, stability data should already be accessible to caseworkers. Indeed, the ANPRM commentary from Tennessee confirms the point by explaining the Department "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." (Tennessee ANPRM Commentary, June 11, 2018). In other words, because child welfare agencies are already required to keep school stability information as part of their case plans pursuant to Fostering Connections, capturing it as a data element via AFCARS should not create unnecessary burdens.

By comparison, the additional benefits are substantial because tracking this data through AFCARS will encourage uniformity in reporting across states and allow for better analysis of the school stability challenges students in foster care face and seek to address in their case plans.

AFCARS Is the Most Effective Vehicle for Collection of Education Stability Data

Very little national data about the education of children in foster care currently exists, particularly about school stability. AFCARS is the most effective way to collect educational stability data because it allows for straightforward quantitative reporting of whether children have changed schools each reporting period. No other vehicle is better suited to tracking this type of data on a national scale.

Although qualitative review or case study regarding school stability is important, it does not preclude the need for quantitative data in this critical area. Research on the educational performance of students in foster care overwhelmingly shows increased attention to educational issues is critical – and that students with high mobility face many educational challenges. (Fostering Success in Education: National Factsheet on the Educational Outcomes of Children in Foster Care, April 2018). Moreover, the longitudinal nature of this data will provide key information to agencies themselves as they seek to track the correlation between education levels achieved, school enrollment, special education, and school stability over time in care.

Recent Information Does Not Contradict Prior Factual Findings

The education stability data element in the Final Rule was thoughtfully considered and found to be of great value in the prior review processes. Recent concerns about the subjectivity of the drop-down menu and the general burden of new data elements as expressed in the ANPRM process do not reach the level of contradicting those prior factual findings. *F.C.C. v. Fox Television Stations, Inc.,* 556 U.S. 502, 515-16 (2009) (an agency's revised factual findings cannot contradict prior factual findings without a clear justification for doing so). Accordingly, under APA precedent there is no basis for eliminating this data element from the AFCARS Final Rule.

Conclusion

The ABA continues to support the inclusion of the educational stability data element in AFCARS as set out in the Final Rule. Education stability information is readily available through title IV-E agencies' existing casework; it provides critical longitudinal information on children's education path; helps states, federal agencies and Congress assess progress on important goals in federal legislation; and serves children's interests by prioritizing one of the topics they continually identify as among the most important in their case plans and court hearings. The ABA respectfully requests HHS retain the education stability data element in the AFCARS Final Rule.

Sincerely,

Robert M. Carlson

As of: September 14, 2020
Received: June 18, 2019
Status: Posted
Posted: June 18, 2019
Tracking No. 1k3-9ajr-cpp3
Comments Due: June 18, 2019
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0224
Adoption and Foster Care Analysis and Reporting System

Document: ACF-2018-0003-0302
Stephanie Lindley

Submitter Information

Name: Stephanie Lindley

General Comment

As States work toward modernizing their existing systems for regulatory compliance with important foster care and adoption initiatives such as AFCARS 2.0 and the Family First Preventive Services Act, there will need to be comprehensive validation and testing to ensure we continue to provide quality services for these vulnerable populations. Confirmation of a delay of the 2016 final rule for an additional year to October 1, 2021 would provide the opportunity to test and implement these changes while reducing risk to all involved.

As of: September 14, 2020
Received: June 18, 2019
Status: Posted
Posted: June 18, 2019
Tracking No. 1k3-9ajq-6qh6
Comments Due: June 18, 2019
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0224
Adoption and Foster Care Analysis and Reporting System

Document: ACF-2018-0003-0303
National Center for Transgender Equality

Submitter Information

Name: Ma'ayan Anafi
Address:
Washington, DC,
Organization: National Center for Transgender Equality

General Comment

Please find attached a comment submitted on behalf of the National Center for Transgender Equality.

Attachments

National Center for Transgender Equality

National Center for TRANSGENDER EQUALITY

July 18, 2019

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: NPRM amending AFCARS regulations (RIN 0970-AC72)

Dear Kathleen McHugh:

We appreciate the opportunity to provide comments regarding the Notice of Proposed Rulemaking at 84 Fed. Reg. 16572 regarding changes to the Adoption and Foster Care Analysis and Reporting System (AFCARS).

Founded in 2003, the National Center for Transgender Equality is one of the nation's leading social justice organizations working for life-saving change for the nearly two million transgender Americans and their families. Through our work, we are deeply aware of the stigma and discrimination faced by transgender youth, who are frequent targets of harassment, mistreatment and abuse in their schools, at home, and in child welfare and juvenile justice systems. We have also seen the positive steps taken in recent years by a range of federal agencies to collect data on sexual orientation and gender identity, which is essential to understanding and addressing the diverse needs of the lesbian, gay, bisexual, transgender, and queer (LGBTQ) population, including LGBTQ youth.

The collection of data related to sexual orientation and gender identity from foster youth and adoptive families is critical for identifying trends in the placements and experiences of LGBTQ youth. Without adequate data on the particular risks that LGBT youth face in foster care, government agencies, states, and tribes cannot adequately develop policies, services, and funding allocation decisions to best address the needs of these vulnerable populations. Eliminating this national dataset will undermine the ability to track demographic trends and identify gaps in services and will place LGBTQ youth at continued risk of harassment and discrimination. We urge you to retain the questions on sexual orientation for foster youth, parents, and guardians, and 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." We also urge you to add gender identity questions for foster youth.

1133, 19th Street NW
Suite 302
Washington, DC 20036

202 642 4542
www.TransEquality.org

Federal data collection on sexual orientation, gender identity and gender expression is essential to address widespread mistreatment faced by LGBTQ youth.

Transgender youth—young people who know themselves to be a gender that is different from the one they were thought to be at birth—live in every part of the United States. An estimated 0.7% of the U.S. population between the ages of 13 and 17 is transgender, representing 150,000 adolescents, in addition to nearly 1.5 million adults.[1] Additionally, population-based surveys have shown that 4.5% of people in the United States identify as lesbian, gay, bisexual, or transgender and that younger people are more likely to identify as LGBTQ than older people at every age group.[2]

Transgender young people are highly vulnerable to mistreatment and abuse.

Population-based studies indicate that transgender youth face high rates of mistreatment and violence. For example, an optional module in the 2017 Youth Risk Behavior Survey (YRBS) provided questions regarding gender identity and expression, and its results indicated that transgender youth, who represented approximately 2% of youth where the question was used, faced far higher rates of harassment and violence than their peers[3]:

- Transgender youth were more likely to face bullying and violence in school overall compared to cisgender (non-transgender) youth. For example, **24% had been threatened or injured with a weapon at school** (compared to 6% of cisgender boys and 4% of cisgender girls), **35% had been bullied in school** (compared to 15% of cisgender boys and 21% of cisgender girls), and **27% felt unsafe traveling to or from school** (compared to 5% of cisgender boys and 7% of cisgender girls).[4]
- Transgender youth were more likely to have faced sexual violence. **Nearly one-quarter (24%) of transgender youth had been forced to have sexual intercourse**, compared to 4% of cisgender boys and 11% of cisgender girls.[5]
- The health impacts of this disproportionate violence can be severe for many transgender youth. In the 2017 YRBS, **35% of transgender youth had attempted suicide**, compared to 5.5% of cisgender boys and 9% of cisgender girls. Transgender youth were also more likely to have used drugs in their lifetime, including **36% who reported misusing prescription opioids** (compared to 11.5% of cisgender boys and 12% of cisgender girls), and **26% who reported using heroin** (compared to 2% of cisgender boys and less than 1% of cisgender girls).

---

[1] Jody L. Herman et al. *Age of Individuals who Identify as Transgender in the United States* (2017), https://williamsinstitute.law.ucla.edu/wp-content/uploads/TransAgeReport.pdf. *See also* Andrew R. Flores et al., *How Many Adults Identify as Transgender in the United States?* (2016), http://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf.

[2] Williams Institute, *LGBT Demographic Data Interactive* (Jan. 2019), https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT#density.

[3] Michelle M. Johns et al., *Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students—19 States and Large Urban School Districts, 2017*, 63 MORBIDITY AND MORTALITY WEEKLY REPORT 67, 69 (Jan. 25, 2019), https://www.cdc.gov/mmwr/volumes/68/wr/pdfs/mm6803a3-H.pdf.

[4] *Id.*

[5] *Id.*

Similarly, the 2015 YRBS found higher rates of violence among lesbian, gay, and bisexual (LGB) students compared to heterosexual students. For example, 10% of LGB students, compared with 5% of heterosexual students, reported being threatened or injured with a weapon at school. More than a third (34%) reported being bullied on school property, compared to 19% of heterosexual students.

The high rates of abuse faced by transgender youth were also mirrored in the 2015 U.S. Transgender Survey (USTS), a study of nearly 28,000 transgender adults in the United States. The USTS also revealed that while many transgender people reported having supportive family members, a large proportion of the sample had experienced rejection by their immediate family. For example, 10% of respondents who were out to their immediate family reported that a family member had physically abused them because they were transgender.[6] One in twelve (8%) were kicked out of the house for being transgender,[7] and one in ten (10%) ran away from home.[8]

Being kicked out of the home had lifelong effects for many transgender people in the USTS. For example, nearly one in three (30%) of all USTS respondents experienced homelessness during their lifetime. But among respondents who had been kicked out of the house, nearly three quarters (74%) had experienced homelessness.[9] Respondents who had been kicked out of the house for being transgender were also more likely to be living in poverty, more likely to be living with HIV, and more likely to report poor mental health outcomes compared to other respondents.[10]

LGBTQ youth are overrepresented and disproportionately mistreated in the foster care system.

Family rejection and homelessness contribute to the overrepresentation of LGBTQ youth in foster care.[11] A 2013 study conducted in connection with the ACYF-funded R.I.S.E. Project illustrates the disproportionately high representation of LGBTQ youth in the foster care system.[12] The study found that almost one in five (19%) of youth ages 12–21 in out-of-home care in Los Angeles County identify as LGBTQ, including 5.6% who identify as transgender, with youth of color constituting the majority of LGBTQ youth.[13] Other studies have estimated even higher numbers of LGBT youth in foster care.[14]

In addition to being disproportionately represented in the foster care system, LGBTQ youth experience worse conditions and outcomes in foster care. The same Los Angeles County study found that on in eight (12%) LGBTQ youth aged 17–21 and 3.4% of those aged 12–16 had been kicked out or ran away

---

[6] Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey* 71 (2016), www.ustranssurvey.org/report.
[7] *Id.* at 72.
[8] *Id.* at 74.
[9] *Id.* at 73.
[10] *Id.*
[11] 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 https://assets2.hrc.org/files/assets/resources/HRC-YouthFosterCare-IssueBrief-FINAL.pdf?_ga=2.203792144.123444589.1528475781-119191609.1523902394
[12] Bianca D.M. Wilson et al., *Sexual and Gender Minority Youth in Foster Care: Assessing Disproportionality and Disparities in Los Angeles* 27 (2014), https://www.acf.hhs.gov/sites/default/files/cb/pii_rise_lafys_report.pdf
[13] *Id.*
[14] *See, e.g.,* 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.

from a home or placement because of mistreatment related to their sexual orientation or gender identity or expression.[15] LGBTQ youth's placements were less stable than those of non-LGBTQ youth: the estimated average of foster placements was higher for LGBTQ youth than for non-LGBTQ youth.[16] LGBTQ youth were more than twice as likely to report being treated poorly in foster care compared to non-LGBTQ youth, and they were three times as likely to be hospitalized for emotional reasons.[17] Similarly, a survey of LGBTQ youth in out-of-home care in New York City found that 78% were removed or ran away from their foster placements as a result of hostility toward their sexual orientation or gender identity, and 70% reported physical violence in group homes.[18]

The experiences of LGBTQ youth in foster care underscores the need for data collection.

In order to identify and address the risks that LGBTQ youth face in foster care, it is essential that AFCARS maintains questions related to the child's sexual orientation and family conflict related to gender identity, in addition to adding a question related to the child's gender identity. Failure to understand these data and take them into account can lead to decisions that undermine a child's wellbeing, safety, and permanency. When agencies know the characteristics and experiences of youth in out-of-home care, they are able to analyze whether there are gaps in care and whether there are certain groups experiencing disparities. The lack of national data on LGBTQ youth would obscure the experiences of this vulnerable population and will make it difficult to track whether the system is making improvements to address this significant population of youth in out-of-home care.

Data on LGBTQ foster youth is necessary to inform law, policy and funding determinations, identify best practices for replication and, importantly, to enhance the Administration on Children and Families' efforts to prevent removal and allow to children to remain safely at home with their families. Collecting data on LGBTQ foster youth 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 experienced by LGBTQ foster children.

Data related to sexual orientation and gender identity can be administered effectively.

The NPRM justifies the erasure of sexual orientation and gender identity (SOGI) data collection with the unsubstantiated claim that the resulting data would likely be inaccurate and collecting it could lead to breaches of confidentiality.[19] The child welfare profession, however, has long had guidelines in place on managing SOGI information in child welfare systems.[20] Child welfare agencies are experienced and competent in collecting, holding and managing sensitive information. Case workers routinely collect highly personal, private and confidential data, such as information about sexual abuse, mental health

[15] Wilson et al., *supra* note 12 at 34.
[16] *Id.* at 38.
[17] *Id.*
[18] New York City Association of Homeless and Street-Involved Youth Organizations, *State of the City's Homeless Youth Report 2011* (2012).
[19] 45 C.F.R. § 1355 (2019) 16576
[20] *See, e.g., 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.

diagnoses, and medications. Sexual orientation and gender identity questions should not be handled any differently from the sort of sensitive information case workers have been collecting and managing for decades. Information in state and tribal systems, like all personal information, is protected by confidentiality requirements.

Additionally, the speculative fears raised in the NPRM are belied by the experience of many public agencies, which have been successfully collecting sexual orientation and gender identity data on LGBTQ youth to better assess risk and track disparities and outcomes in different areas of federal policy.[21] For example, sexual orientation questions have also been included on school-based surveys of adolescents since the mid-1980s through versions of the Center for Disease Control's Youth Risk Behavior Survey[22] and data about transgender status were collected by ten states and nine large urban school districts in the 2017 YRBS.[23] The National Survey of Youth in Custody includes a measure of sexual orientation for youth over the age of 14,[24] and has provided a wealth of important information about disproportionate incarceration and sexual victimization of LGB youth in custody.[25] The National Survey of Family Growth, which includes respondents as young as 15, similarly includes a sexual orientation measure.[26] Sexual orientation and gender identity data are also routinely collected by many health care institutions.[27] The rules promulgated under the Prison Rape Elimination Act require youth and adult correctional officers to collect sexual orientation and gender identity information as part of the initial screening process to identify residents and inmates who may be vulnerable to sexual assault while incarcerated.[28] More and more state and local child welfare and juvenile justice agencies, as well has providers serving youth experiencing homelessness, have developed policies requiring the collection of SOGI data.

---

[21] Sexual Minority Assessment Research Team (SMART), Williams Institute, *Best Practices for Asking Questions about Sexual Orientation on Surveys* 24 (2009), https://williamsinstitute.law.ucla.edu/wp-content/uploads/SMART-FINAL-Nov-2009.pdf (citing various surveys).

[22] Laura Kann et al., Sexual Identity, Sex of Sexual Contacts, and Health-Related Behaviors Among Students in Grades 9-12—United States and Selected Sites, 2015, 65 *Morbidity & Mortality Weekly Report* 1, 11, 15, https://www.cdc.gov/mmwr/volumes/65/ss/pdfs/ss6509.pdf, at 2.

[23] Johns et al., *supra* note 3.

[24] Bureau of Justice Statistics, *Data Collection: National Survey of Youth in Custody (NSYC)*, https://www.bjs.gov/index.cfm?ty=dcdetail&iid=321.

[25] *See, e.g.*, Bianca D.M. Wilson et al., *Disproportionality and Disparities among Sexual Minority Youth in Custody*, 46 J. YOUTH & ADOLESCENCE 1547 (2017); Alan J. Beck et al., Bureau of Justice Statistics, *Facility-Level and Individual-Level Correlates of Sexual Victimization in Juvenile Facilities, 2012*, NCJ Publication No. 249877 (2016), http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5663.

[26] *See* Anjani Chandra et al., *Sexual Behavior, Sexual Attraction, and Sexual Identity in the United States: Data From the 2006–2008 National Survey of Family Growth*, 36 NATIONAL HEALTH STATISTICS REPORTS 1, https://www.cdc.gov/nchs/data/nhsr/nhsr036.pdf.

[27] Sean Cahill et al., *Do Ask, Do Tell: High Levels of Acceptability by Patients of Routine Collection of Sexual Orientation and Gender Identity Data in Four Diverse American Community Health Centers*, PLOS ONE 9 (9) (2014): e107104, http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0107104.

[28] National Standards to Prevent, Detect and Respond to Rape, 28 CFR § 115 (2012).

Conclusion

For the reasons outlined above, we urge ACF and HHS to retain all data elements related to sexual orientation and gender identity and expression, and urge the agencies to add gender identity data points for foster youth, parents, and guardians.

Thank you for your consideration.

As of: September 14, 2020
Received: June 18, 2019
Status: Posted
Posted: June 18, 2019
Tracking No. 1k3-9ajr-33nt
Comments Due: June 18, 2019
Submission Type: E-mail

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0224
Adoption and Foster Care Analysis and Reporting System

Document: ACF-2018-0003-0304
Nottawaseppi Huron Band of the Potawatomi

Submitter Information

Name: Jamie Stuck
Address:
Fulton, MI,
Organization: Nottawaseppi Huron Band of the Potawatomi's
Government Agency Type: Tribal
Government Agency: Nottawaseppi Huron Band of the Potawatomi's

General Comment

See Attached

Attachments

Nottawaseppi Huron Band of the Potawatomi

NOTTAWASEPPI HURON
BAND OF THE POTAWATOMI
A FEDERALLY RECOGNIZED TRIBAL GOVERNMENT

June 18, 2019

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

Agency: Children's Bureau; Administration on Children, Youth and Families; Administration for Children and Families; Department of Health and Human Services

Action: Adoption and Foster Care Analysis and Reporting System; Notice of Proposed Rulemaking (4/19/19)

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 Nottawaseppi Huron Band of the Potawatomi reiterates that 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 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. **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 2016 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 foregoing are responses to statements presented in the NPRM:

The NPRM states: "the vast majority of commenters that opposed streamlining are not required to report AFCARS data and did not offer any specific estimates regarding the burden or cost placed on reporting title IV-E agencies."

Tribes have endured the burden and the cost of the unwarranted removal of their children for decades. AFCARS is the best vehicle for collecting the 2016 Final Rule's ICWA data elements because it is HHS's statutory mission to ensure that States collect data about ICWA compliance. Holding it against Tribes that they are not in the position to estimate burden or cost placed on reporting title IV-E agencies is a perpetuation of the cycle that necessitated ICWA's creation.

The NPRM states: "Given current budgetary constraints on title IV-E and federal agencies, the objective was to be clear on how each data element meets a mandate and how ACF will use the data, thus justifying it being a requirement for reporting."

The data elements in the 2016 Final Rule meet HHS's mandate to ensure that States collect data about ICWA compliance. ACF should be using that data to impose penalties for non-compliance with that requirement.

The NPRM states: "ACF is also concerned that a significant expansion of AFCARS at this time would negatively impact states' ability to take advantage of the new title IV-E prevention services program (see section 471(e) of the Act)."

The Goals of the Families First Prevention Services Act and ICWA are Parallel and Support One Another. As the current NPRM reminds us, there is a new Title IV-E prevention services program, the Families First Prevention Services Act. The 2019 Title IV-B Program Instructions state, "[c]reating a system that sees the prevention of child abuse and neglect as the goal of child welfare changes the current system toward working with families sooner through upfront prevention efforts." (ACYF-CB-PI-19-4 (2019).) Those same Program Instructions "recognize that tribes have long embraced a vision for child welfare that focuses on strengthening families and native communities and that seeks to avoid the unnecessary removal of children from home." (ACYF-CB-PI-19-4 (2019).) Placement under Families First aligns with the placement preferences of ICWA. The placement goal of Families First is to place children in family foster care,

only utilizing congregate care as a last resort. ICWA's placement preferences have long taken this approach.

The ICWA data points in AFCARS were to be a significant step in the direction of improving child welfare practices for not only AI/AN children, but for all children. As noted in the NPRM, "states with higher numbers of tribal children in their care reported that they supported including limited information related to ICWA in AFCARS because they believe child welfare programs will be enhanced by having this information to inform policy decisions and program management." (84 Fed Reg. 16574.) In its comments to the April 2018 Advanced Notice of Proposed Rulemaking, the California Department of Social Services (the state with the largest Native American population) "unequivocally supported 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."

Having data on ICWA would provide States with a valuable tool that would help to shift the system in the direction Families First intends, toward prevention, toward placement in a family setting and toward collaboration between all parties in the system.

Importantly, the 2016 Final Rule was intended to identify more effective ways for tribes, States and the federal government to work together to advance the well-being of Indian children and families. This again is directly in line with Families First, where it includes as a goal, "a strong, healthy child welfare workforce to achieve better outcomes."

To that end, all of ICWA data points included in the 2016 Final Rule should be retained. Moreover, we strongly encourage a review of the data points being revised, in order to ensure they do not inadvertently encourage non-compliance with ICWA, whereby the well-being of Indian children would be harmed.

The NPRM states: "Commenters should consider how this proposed iteration of AFCARS will impact their work and budgets and be specific when commenting on this NPRM. Commenters should identify the specific data elements to which their comments apply and provide specific supporting information for the comment."

The Nottawaseppi Huron Band of the Potawatomi is choosing not to provide specific comments about the data elements that are proposed for streamlining because of how HHS has chosen to selectively interpret such analysis in the past. The Nottawaseppi Huron Band of the Potawatomi fears that HHS will interpret and represent a targeted discussion of specific data elements as unintended favoritism of

those elements. Each of the ICWA-related data elements contained in the 2016 Final Rule 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. The proposal to remove any of the 2016 data elements is a failure of HHS to uphold its statutory duties and a failure if the U.S. Government to uphold its trust responsibility to the Nottawaseppi Huron Band of the Potawatomi.

For the foregoing reasons, we strongly oppose the proposed streamlining of the ICWA data elements in this NPRM.

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 states 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.

Migwéch,

Jamie Stuck
Tribal Chairperson
Nottawaseppi Huron Band of the Potawatomi

As of: September 14, 2020
Received: June 18, 2019
Status: Posted
Posted: June 18, 2019
Tracking No. 1k3-9ajr-s0cj
Comments Due: June 18, 2019
Submission Type: API

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0224
Adoption and Foster Care Analysis and Reporting System

Document: ACF-2018-0003-0305
Kansas Department for Children and Families

Submitter Information

Name: Jill Loebel
Address:
KS,
Organization: Kansas Department for Children and Families
Government Agency Type: State
Government Agency: Kansas Department for Children and Families

General Comment

Please see attached.

Attachments

Kansas Department for Children and Families

Kansas respectively submits comments related to the cost and burden estimates for implementation of the AFCARS final rule.

Kansas does recognize areas of opportunity with the proposed changes to AFCARS including new data elements added in the AFCARS rule. While these opportunities for additional data will assist in some areas, the large number of new data elements and requirements will add still add significant burden. For example, the new requirements will increase the workload of the field staff charged with case management duties, working families toward reunification, safety and risk assessments and planning, adoption and other permanency activities, and documentation of case files to satisfy compliance and oversight. While the number of elements has been reduced and is greatly appreciated, a significant amount of the new elements are not readily available or collected. A concern is the amount of required information will very likely have a negative impact on the quality of these work activities due to overburdening an already overly taxed staff. Kansas, like many other states, is experiencing a reduced workforce, so an additional concern is if implemented, it will potentially reduce the reliability of some data due to "checkbox" like data collection. This increase in data elements also comes at a time when there is an increase in other federal initiatives such as Families First (FFPSA), CFRS PIP, Kansas Strong for Children and Families which contain new requirements and guidelines in data collection, monitoring and case management duties.

These proposed changes will also be overly burdensome on staffing resources for design, implementation, training, data entry, compliance, quality assurance, and monitoring. For example, business automation and quality assurance resources are currently involved in multiple state and Federal initiatives such as CCWIS planning, Families First, CFSR PIP, Structured Decision Making (SDM), Team Decision Making, Signs of Safety, CareMatch (placement matching system) and foster care contract changes/transition. These significant increases in data requirements would directly impact those already limited resources. Below are approximate staffing costs (excluding IT department costs) to implement the AFCARS changes for the first year and then ongoing.

Out of Home Care- Data File and Adoption and Guardianship subsidy file

	Hourly Wage	ICWA Cases Hours	All other Cases Hours	Total Annual Hours	Total Annual Cost
DCF & Provider Staff	$23.88	534	33,010	33,544	$801,030.72
FACTS Data Entry Staff	$20.17	534	33,010	33,544	$676,582.48
Training	$33.38	[redacted]	[redacted]	15,685	$523,565.30
System Automation Manager	$44.12	[redacted]	[redacted]	11,658	$514,350.96
Management Systems Analyst	$44.12	[redacted]	[redacted]	8,986	$396,462.32
Reporting	$41.43	[redacted]	[redacted]	7,560	$313,210.80
Estimated Kansas Cost FFY2020					$3,225,202.58

	Hourly Wage	ICWA Cases Hours	All other Cases Hours	Total Annual Hours	Total Annual Cost
DCF & Provider Staff	$23.88	534	33,060	33,594	$802,224.72
FACTS Data Entry Staff	$20.17	534	33,060	33,594	$677,590.98
Training	$33.38	[redacted]		11,764	$392,673.98
System Automation Manager	$44.12			8,744	$385,763.22
Management Systems Analyst	$44.12			6,740	$297,346.74
Reporting	$41.43			5,670	$234,908.10
Estimated Kansas Cost Ongoing Years					$2,790,507.74

Additionally, the increase in data elements will require Kansas to make massive and costly changes to our Child Welfare Information System (FACTS). Due to IT working other Federally Mandated work efforts, the IT cost for implementing the changes required to meet the new AFCARS data collection has not been fully researched. The estimate for updating the Kansas Child Welfare applications is 10,000 hours. This includes documenting requirements, system design, construction, testing and implementation. The estimated hourly contractor rate is $150 per hour, so the cost estimate to update the in house supported Child Welfare applications is $1,500,000.

Kansas also has seven 3rd party vendors that support other applications which would require changes to add and extract data to supply AFCARS information. One vendor is in process of making major infrastructure changes to the KS Eligibility and Medicaid system within in the next year. We estimate the vendor would be able to complete AFCARS in December 2022. Another vendor estimates they would be able to complete these AFCARS changes by December 2021. We do not have a time estimate for the remaining 3rd party vendors. Due to not being able to provide time estimates for all our 3rd party vendors, we are not able to provide a cost estimate for our 3rd party vendors.

Currently, KS Dept for Children and Families has interfaces with KS Juvenile Justice Authority (JJA) system. KS JJA is in process of implementing a new system, so we are unable to estimate time and cost for KS JJA to make the required changes.

With all the changes KS would be required to make to our in-house systems, seven 3rd party vendor systems, Court systems and other state agency systems, the time estimate to complete and implement AFCAR requirements is over two years. Kansas is also in the planning phase of moving/obtaining a CCWIS system within three to four years. Kansas is currently issuing an RFP for a CCWIS planning vendor that will be released by the end of June 2019.

In conclusion, while Kansas does see benefit in some of the changes to AFCARS and data elements, it comes with a high cost (a minimum of 7.5 million dollars), a large number of resources, and additional duties being added to our already overburden staff. We are

concerned of the possibility of harmful unintended consequences if resources are diverted away from providing services to vulnerable children and families in Kansas.

As of: September 14, 2020
Received: June 18, 2019
Status: Posted
Posted: June 18, 2019
Tracking No. 1k3-9ajs-6xi9
Comments Due: June 18, 2019
Submission Type: API

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0224
Adoption and Foster Care Analysis and Reporting System

Document: ACF-2018-0003-0306
Minnesota Department of Human Services

Submitter Information

Name: Jamie Sorenson
Address: 55155
Email: Jamie.sorenson.state.mn.us
Organization: Minnesota Department of Human Services
Government Agency Type: State
Government Agency: Minnesota Department of Human Services

General Comment

June 18, 2018

Ms. 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: Notice of proposed rulemaking
45 CFR Part 1355
RIN 0970-AC72
Minnesota Response

Dear Ms. McHugh:

The Minnesota Department of Human Services (Department) respectfully submit these comments in response to the notice regarding the Adoption and Foster Care Analysis and Reporting System (AFCARS) by the Childrens Bureau within the Administration for Children and Families (ACF) on April 19, 2019. Thank you for the opportunity to comment.

The Department strongly opposes the removal of the previously proposed requirements that state title IV-E agencies collect and report additional data elements related to the Indian Child Welfare Act of 1978 (ICWA) in AFCARS. The Department maintains our agreement with the previous ACF position that the proposed ICWA data will help address the unique needs of Indian children in foster care or adoption and their families by clarifying how the ICWA requirements and how title IV-E/IV-B requirements affect placement of Indian children.

The inclusion of ICWA data is very much needed and long overdue as indicated by the 2005 GAO Report . Compliance with the mandates of ICWA is an issue across the nation as it is a law that is difficult to enforce. Also, it is a law that was enacted without a federal monetary mandate. Thus, this inclusion of ICWA data into AFCARS is a very good beginning to start to alleviate the disproportionate numbers and disparate treatment of Native children and families in out of home placement. Although the additional requirements will require increased effort and the Department supports the general goal of reducing unnecessary data collection, the Department feels that ICWA is a priority. As such, the Department will continue to collect most of the previously proposed ICWA data elements contained in the 2016 final rule regardless of the decision made by ACF.

Additionally, the Department strongly opposes the proposed rule change eliminating the data elements related to sexual orientation, gender identity and expression. Collecting this data is critical to improving outcomes and addressing the disparities that exist between lesbian, gay, bisexual, transgender, and questioning (LGBTQ) foster children and non-LGBTQ children in placement. 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 persons sexual orientation, gender identity or gender expression.

Research funded by the United States Department of Human Services showed that nearly 1 in 5 foster youth are LGBTQ and are twice as likely to report poor treatment while in foster care as non-LGBTQ youth . LGBTQ foster youth are also more likely to experience multiple placements, longer stays in residential care, homelessness and criminal justice involvement among other negative outcomes. Although data collection alone is not a solution to these challenges, requiring these data elements for foster care youth is an important first step that will support states and tribes in improving outcomes, identifying and funding needed resources, and reducing disparities experienced by LGBTQ foster children. Furthermore, the requirement by ACF is a statement that sexual orientation, gender identity, and expression are important topics to discuss with foster youth in order to ensure their needs are met.

Sincerely,

Jamie P. Sorenson, Director
Child Safety and Permanency Division

Attachments

MN Response to AFCARS ICWA

DEPARTMENT OF HUMAN SERVICES

June 18, 2018

Ms. 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: Notice of proposed rulemaking
45 CFR Part 1355
RIN 0970-AC72
Minnesota Response

Dear Ms. McHugh:

The Minnesota Department of Human Services (Department) respectfully submit these comments in response to the notice regarding the Adoption and Foster Care Analysis and Reporting System (AFCARS) by the Children's Bureau within the Administration for Children and Families (ACF) on April 19, 2019. Thank you for the opportunity to comment.

The Department strongly opposes the removal of the previously proposed requirements that state title IV-E agencies collect and report additional data elements related to the Indian Child Welfare Act of 1978 (ICWA) in AFCARS. The Department maintains our agreement with the previous ACF position that "the proposed ICWA data will help address the unique needs of Indian children in foster care or adoption and their families by clarifying how the ICWA requirements and how title IV-E/IV-B requirements affect placement of Indian children."

The inclusion of ICWA data is very much needed and long overdue as indicated by the 2005 GAO Report[1]. Compliance with the mandates of ICWA is an issue across the nation as it is a law that is difficult to enforce. Also, it is a law that was enacted without a federal monetary mandate. Thus, this inclusion of ICWA data into AFCARS is a very good beginning to start to alleviate the disproportionate numbers and disparate treatment of Native children and families in out of home placement. Although the additional requirements will require increased effort and the Department supports the general goal of reducing unnecessary data collection, the Department feels that ICWA is a priority. As such, the Department will continue to collect most of the previously proposed ICWA data elements contained in the 2016 final rule regardless of the decision made by ACF.

Additionally, the Department strongly opposes the proposed rule change eliminating the data elements related to sexual orientation, gender identity and expression. Collecting this data is critical to improving outcomes and addressing the disparities that exist between lesbian, gay, bisexual, transgender, and questioning ("LGBTQ") foster children and non-LGBTQ children in placement. In April 2011, ACF confirmed and reiterated "the fundamental belief that every child and youth who is unable to live

[1] https://www.gao.gov/assets/250/245936.pdf

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]

Research funded by the United States Department of Human Services showed that nearly 1 in 5 foster youth are LGBTQ and are twice as likely to report poor treatment while in foster care as non-LGBTQ youth[3]. LGBTQ foster youth are also more likely to experience multiple placements, longer stays in residential care, homelessness and criminal justice involvement among other negative outcomes. Although data collection alone is not a solution to these challenges, requiring these data elements for foster care youth is an important first step that will support states and tribes in improving outcomes, identifying and funding needed resources, and reducing disparities experienced by LGBTQ foster children. Furthermore, the requirement by ACF is a statement that sexual orientation, gender identity, and expression are important topics to discuss with foster youth in order to ensure their needs are met.

Sincerely,

Jamie P. Sorenson, Director
Child Safety and Permanency Division

[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] 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

As of: September 14, 2020
Received: June 18, 2019
Status: Posted
Posted: June 18, 2019
Tracking No. 1k3-9ajs-hmi9
Comments Due: June 18, 2019
Submission Type: API

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0224
Adoption and Foster Care Analysis and Reporting System

Document: ACF-2018-0003-0307
American Atheists

Submitter Information

Name: Alison Gill
Address:
Cranford, NJ, 20001
Email: agill@atheists.org
Organization: American Atheists

General Comment

Please see attached comment submitted on behalf of American Atheists.

Attachments

American Atheists

AMERICAN ATHEISTS

June 18, 2019

Kathleen McHugh
U.S. Department of Health and Human Services
Administration for Children and Families
Director, Policy Division
330 C Street S.W.
Washington, D.C. 20024
cbcomments@acf.hhs.gov

Re: Proposed Rulemaking amending the Adoption and Foster Care Analysis and Reporting System (AFCARS) to remove questions relating to sexual orientation (Apr. 19, 2019) [RIN 0970-AC72]

Dear Ms. McHugh:

American Atheists, on behalf of its many thousands of constituents who have engaged with our nation's child welfare systems, writes to comment on the Notice of Proposed Rulemaking (NPRM) amending the Adoption and Foster Care Analysis and Reporting System (AFCARS). We are writing in response to the request for public comments (RIN 0970-AC72) that proposes to eliminate data collection on sexual orientation for youth and prospective parents in AFCARS. Having appropriate data collection is essential to an effective child welfare system. American Atheists believes that the proposed rulemaking is unnecessary, that it is harmful to the effective administration of our nation's child welfare systems, and that it is motivated by religious bigotry, and therefore we strongly oppose this proposed rule.

American Atheists is a national civil rights organization that works to achieve religious equality for all Americans by protecting what Thomas Jefferson called the "wall of separation" between government and religion created by the First Amendment. We strive to create an environment where atheism and atheists are accepted as members of our nation's communities and where casual bigotry against our community is seen as abhorrent and unacceptable. We promote understanding of atheists through education, outreach, and community-building and work to end the stigma associated with being an atheist in America.

As advocates for the health, safety, and well-being of all Americans, American Atheists opposes the exclusion of sexual orientation from the AFCARS data collection. Eliminating sexual orientation data from the AFCARS data collection will harm American children and potential parents who identify as LGBTQ, undermining the ability of child welfare systems to effectively meet their needs. This proposed rule is especially concerning due to the overrepresentation of vulnerable LGBTQ youth in the child welfare system.

Various states have made some progress in their efforts to address the needs of LGBTQ young people, and the Every Child Deserves a Family (ECDF) Act was recently introduced in the House and the Senate[1] to provide nondiscrimination protections at the federal level. However, tremendous work yet remains to

[1] Every Child Deserves a Family Act, S.1791, H.R. 3114, 116th Cong. (2019).

American Atheists
225 Cristiani St.
Cranford, NJ 07016

phone 908.276.7300
fax 908.276.7402
www.atheists.org

be done to understand the needs of and better care for LGBTQ young people. Regardless of whether ECDF passes, there is a demonstrable need to collect data and study trends on LGBTQ youth to provide these young people with the best care to suit their specific needs.

Moreover, there are currently 10 states that allow adoption and foster care agencies to discriminate against potential parents (and in some cases young people themselves) for non-merit related reasons, including being LGBTQ. These laws deprive children of loving homes and result in LGBTQ children and youth being placed into hostile environments where they will not be accepted because of their identity or possibly subject to dangerous practices like conversion therapy. The Administration's approach on this issue has been wrongheaded and destructive.[2] Broadening these religious exemptions will only allow for more discrimination, putting religious dogma above the health and safety of vulnerable children. By erasing the sexual orientation components of AFCARS, the Administration clearly hopes to hide the harm being done to LGBTQ young people and potential parents.

Collecting data on LGBTQ youth in foster care and adoptive programs is critical to identify trends in types of placements, rate of disruptions, and the number of foster placements within LGBTQ families that will translate into permanent adoptive placements. It has been 25 years since AFCARS was last updated, and the AFCARS 2016 Final Rule made significant progress for LGBTQ youth to be seen, heard, and to have their needs met. Since 1993 (the last time AFCARS was updated) we have also made substantial advances in the technology that can make the data collection a less time consuming, onerous process and provide greater security for those providing this data.

The data collected through this system will also inform federal law, policy, and funding determinations. Eliminating this data collection mechanism would not only harm individual youth and adults involved in the child welfare system, it would cause a greater systemic harm for the entire LGBTQ community. Given the current lack of explicit nondiscrimination protections for LGBTQ young people and adults in this country, it is imperative that we learn as much as we can about the health and safety disparities affecting the LGBTQ community. Preventing the collection of this national dataset will undermine the ability to track demographic trends and identify gaps in services, which will place LGBTQ young people and prospective parents at continued risk of harassment and discrimination across our nation.

This comment highlights the need for data collection to protect young people and to help place them with loving, accepting parents/guardians, and it demonstrates that the collection of sexual orientation data can be administered effectively, safely, and without excessive burden. The proposed withdrawal of the sexual orientation data collection will significantly harm many young people under the guise of protecting them. To truly protect the safety, permanency, and well-being of LGBTQ young people, we urge you to rescind the NPRM and proceed with the AFCARS 2016 Final Rule as issued.

The exclusion of data elements related to foster youth sexual orientation would negatively impact the safety, permanency, and well-being of LGBTQ youth in child welfare systems.

The lack of federal data related to the health disparities and unique needs of LGBTQ youth in foster care is deeply troubling in light of the fact that LGBTQ youth are disproportionately represented in out-of-

[2] Ariana Eunjung Cha, *Administration seeks to fund religious foster-care groups that reject LGBTQ parents*, Wash. Post (Feb. 8, 2019), https://www.washingtonpost.com/health/2019/02/08/trump-administration-seeks-authority-fund-religious-foster-care-groups-that-reject-lgbtq-parents/?noredirect=on&utm_term=.f6f186ddd7cf.

home care. This data is critical to understanding how LGBTQ youth experience the child welfare system and how these systems can best serve them.

A report that the Department issued in 2011 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."[3] The Department further stated that LGBTQ youth in foster care are overrepresented and in the population of youth experiencing homelessness. A 2013 federally-funded study of Los Angeles County's foster care system similarly found that nearly 20% of youth identified as LGBTQ -- almost twice the percentage of LGBTQ youth estimated to be in the general population.[4]

In addition to showing that LGBTQ youth are disproportionately represented in the system, the Department's report also showed that LGBTQ youth are over twice as likely as other youth to report being treated poorly by the foster care system.[5] LGBTQ foster youth suffer worse outcomes in foster care than non-LGBTQ youth, such as multiple placements, longer stays in residential care, homelessness, criminal justice involvement, and greater rates of hospitalization for emotional reasons. These findings are consistent with the growing body of research demonstrating that LGBTQ youth suffer from a range of health and mental health disparities associated with family rejection, school bullying, and societal stigma and discrimination.[6] In fact, family rejection is one of the most commonly cited reasons for LGBTQ youth entering out-of-home care.[7] The mental anguish that accompanies this kind of familial rejection may be amplified by experiencing repeated rejection when these young people are placed with a family that either does not recognize their identify or outright rejects them. By refusing to collect the necessary data on sexual orientation, the Department is putting LGBTQ children and youth at risk of being rejected again if their identity becomes known. This is relevant even if the youth chooses to hide their identity due to fear of rejection, resulting in increased stressors, negative attitudes, anxiety, and other mental health risks.[8]

---

[3] 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 [hereinafter "*ACYF-CB-IM-11-03*"].

[4] Bianca D.M. Wilson et al., *New Report: Sexual and Gender Minority Youth in Foster Care*, WILLIAMS INST., at 6 (Aug. 2014), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LAFYS_report_final-aug-2014.pdf [hereinafter "*Sexual and Gender Minority Youth*"].

[5] *ACYF-CB-IM-11-03,* supra note 3 (12.9% of LGBTQ youth report being treated poorly compared to 5.8% of non-LGBTQ youth).

[6] *Sexual and Gender Minority Youth*, at 11 ("LGB young adults who reported higher levels of family rejection during adolescence were 8.4 times more likely to report having attempted suicide, 5.9 times more likely to report high levels of depression, 3.4 times more likely to use illegal drugs, and 3.4 times more likely to report having engaged in unprotected sexual intercourse, compared to their peers who reported no to low levels of family rejection.") (citing Caitlyn Ryan, David Huebner, Rafael M. Diaz, & Jorge Sanchez, *Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay, and Bisexual Young Adults*, 123 PEDIATRICS 346 (2009)).

[7] Shannan Wilber et al., *CWLA Best Practice Guidelines for Serving Youth in Out-of-Home Care*, CHILD WELFARE LEAGUE OF AMERICA, 4 (2006), http://www.nclrights.org/wp-content/uploads/2013/07/bestpracticeslgbtyouth.pdf.

[8] Hilary Daniel, Renee Butkus, *Lesbian, Gay, Bisexual, and Transgender Health Disparities: Executive Summary of a Policy Position Paper From the American College of Physicians*, Annals of Internal Med. (July 21, 2015) https://annals.org/aim/fullarticle/2292051/lesbian-gay-bisexual-transgender-health-disparities-executive-summary-policy-position.

In order to identify and address these risks, the child welfare system must affirmatively collect information about the sexual orientation of the young people in its custody. Failure to understand these aspects of a child's identity can lead to poor decisions that seriously undermine the child's permanency, safety, and well-being. When agencies know the characteristics and experiences of youth in out-of-home care, they are able to analyze whether there are gaps in care and whether there are certain groups experiencing disparities. Eliminating questions related to sexual orientation in AFCARS keeps invisible the experiences of the LGBTQ community and leaves the government blind to the unique needs of the LGBTQ community. The absence of accurate data on the national level will obscure the experiences of this vulnerable population and will make it impossible to track whether the system is making improvements to address this significant population of youth in out-of-home care. More data about the experiences and needs of LGBTQ youth is needed, not less.

Collecting sexual orientation data for foster youth can be administered effectively, and the Department should provide training and resources to states and tribes to do so.

The NPRM justifies the erasure of sexual orientation data collection of LGBTQ youth upon an unsubstantiated conclusion (unsupported by empirical evidence) that the collected data would be inaccurate and that the data could lead to breaches of confidentiality because a case worker would be gathering the information.[9]

The child welfare profession has acknowledged the importance of collecting sexual orientation and gender identity (SOGI) information about young people, along with other demographic and critical information about the young person'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.[10] 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 without experiencing the speculative harms cited in the NPRM. Sexual orientation questions have been included on school-based surveys of adolescents for decades through versions of the current Youth Risk Behavior Surveillance Survey distributed by the Center for Disease Control, 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.[11] The regulations promulgated under the Prison Rape Elimination Act (PREA) require youth and

---

[9] Adoption and Foster Care Reporting System. 84 Fed. Reg. 16572, (Apr. 19, 2019) (to be codified at 45 CFR 1355) ("It is impossible to ensure that a child's response to a question on sexual orientation would be kept private, anonymous, or confidential considering a caseworker would be gathering this information to enter into a child's case electronic record.")

[10] 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.

[11] 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).

adult correctional officers to collect SOGI information as part of their initial screening process to identify inmates who may be vulnerable to sexual assault.[12] More and more state and local child welfare and juvenile justice agencies, as well as providers serving youth experiencing homelessness, have developed and successfully implemented policies requiring the collection of SOGI data.

In addition, child welfare agencies are comfortable and competent in collecting, holding, and managing sensitive information. Case workers collect data that is highly personal, private, and confidential, such as sexual abuse backgrounds, mental health diagnoses, and medications. Sexual orientation questions should not be handled any differently from the sort of sensitive information case workers have been collecting and managing for decades. Information in state and tribal systems, like all personal information, is protected by confidentiality requirements.

Child welfare professionals have acknowledged the importance of collecting SOGI information about young people in order to tailor an individualized case plan. While the NPRM confirms that it would be helpful for states to have this data to assist the children and families they work with, the Department takes the position that since there is no statutory requirement, it isn't necessary to collect this critical data.[13] However, the law clearly allows for the collection of this data and, in fact, Congress enacted statutes requiring the Children's Bureau to add data elements to AFCARS (including information on children who have been placed in alternative child care institutions) to further improve care and promote stability. [14] Further, agencies have an obligation to collect a comprehensive national data set to best effectuate federal programs.

Agencies should retain the sexual orientation question for adoptive and foster parents and guardians.

There is a chronic shortage of foster homes in the United States. Efforts to recruit and retain all qualified families (including LGBTQ families) should be a core part of an agency's recruitment strategy. LGBTQ communities continue to serve as an untapped resource for finding permanent families for children and youth in foster care, and obtaining key data on this population is an essential part of increasing the number of prospective families available for the many young people who are seeking stable families.

Increasing numbers of LGBTQ adults are interested in and actively creating their families through foster care and adoption. A 2007 study found that almost two million LGB adults expressed interest in adopting children.[15] According to the same study, LGB foster parents are raising 6 percent of foster children in the United States. Finally, a 2018 study from the Williams Institute found that same-sex couples are 7 times more likely to be raising foster and adoptive children than different-sex couples.[16] Yet fear of discrimination causes many prospective LGBTQ parents to turn away from foster and

[12] National Standards to Prevent, Detect and Respond to Rape, 28 CFR § 115 (2012).
[13] Adoption and Foster Care Reporting System. 84 Fed. Reg. 16572, (Apr. 19, 2019) (to be codified at 45 CFR 1355).
[14] *See* Fostering Connections to Success and Increasing Adoptions Act (public Law 110-351, 2008) and the Preventing Sex Trafficking and Strengthening Families Act (Public Law 113-183, 2014); See 42 U.S.C.A. § 679(d) of the Social Security Act.
[15] M. V. Lee Badgett et al., *Adoption and Foster Care by Gay and Lesbian Parents in the United States*, 3 URBAN INST https://www.urban.org/sites/default/files/publication/46401/411437-Adoption-and-Foster-Care-by-Lesbian-and-Gay-Parents-in-the-United-States.PDF.
[16] Shoshana K. Goldberg & Kerith J. Conron, *How Many Same-Sex couples are Raising Children?*, WILLIAMS INST. (July 2018), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Parenting-Among-Same-Sex-Couples.pdf.

adoption agencies. LGBTQ parents often express uncertainty about their ability to find an agency that would welcome them as parents. And all too often they are proven correct – in a 2011 national survey of 158 gay and lesbian adoptive parents, nearly half of respondents reported experiencing bias or discrimination from a child welfare worker or birth family member during the adoption process.[17] Further, qualified, loving, LGBTQ couples who have been barred from adopting at one agency are significantly less likely to apply again out of fear of similar discrimination.

Requiring sexual orientation data collection of foster and adoptive parents would encourage training that would lead LGBTQ parents to have more confidence that they would not be discriminated against. Additionally, this would lead to broader efforts to recruit and utilize LGBTQ families, ensuring a more thorough matching and placement process that would provide the greatest chance for success and permanency.

Almost 40 years of research has demonstrated that young people raised by same-sex couples are as healthy and psychologically sound as young people raised by heterosexual parents.[18] Tracking the data of these prospective parents will promote routine discussions between prospective foster parents and Title IV-E agencies, normalize conversations about sexual orientation, and signal increased acceptance of LGBTQ caregivers. A national data set capturing information about prospective LGBTQ parents would assist agencies in recruiting, training, and retaining a larger pool of foster care providers who can meet the needs of children in foster care. In contrast, eliminating the collection of this data will undermine these benefits for same-sex couples seeking to foster or adopt, for children who are seeking permanent homes, and for placement agencies.

The data elements in the final rule are not overly burdensome and have already been streamlined through numerous comment periods.

When HHS released the proposed rule in 2016, the rule went through an extensive notice and comment period, during which the burden of all data elements were discussed and addressed by scores of researchers, advocates, and child welfare and social service experts. The Department already considered and dismissed the purported reasons given in the 2019 NRPM for eliminating this data.

---

[17] David M. Brodzinsky & Evan B. Donaldson, *Expanding Resources for Children III: Research-Based Best Practice in Adoption by Gays and Lesbians*, EVAN B. DONALDSON ADOPTION INSTITUTE (2011), https://www.adoptioninstitute.org/wp-content/uploads/2013/12/2011_10_Expanding_Resources_BestPractices.pdf.

[18] *See* Alicia Crowl et al, *A Meta-Analysis of Developmental Outcomes for Children of Same-Sex and Heterosexual Parents*, JOURNAL OF GLBT FAMILY STUDIES (Jan. 9, 2007), https://www.tandfonline.com/doi/abs/10.1080/15504280802177615 ("extensive data available from more than 30 years of research reveal that children raised by gay and lesbian parents have demonstrated resilience with regard to social, psychological, and sexual health despite economic and legal disparities and social stigma."); Ellen C. Perrin, Benjamin S. Siegel, *Promoting the Well-Being of Children Whose Parents are Gay or Lesbian*, AMERICAN ACADEMY OF PEDIATRICS (Apr. 2013), https://pediatrics.aappublications.org/content/131/4/e1374. ("Analyses revealed statistically significant effect size differences between groups for one of the six outcomes: parent-child relationship. Results confirm previous studies in this current body of literature, suggesting that children raised by same-sex parents fare equally well to children raised by heterosexual parents.")

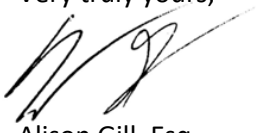
The 2016 Final Rule already represents a "streamlining" of the original proposed rule (2015 NPRM and 2016 SNPRM) and the burdens identified by commenters were addressed in the Final Rule. In fact, states, tribal entities, and other stakeholders have had numerous opportunities to provide public comments on AFCARS data elements including in 2003, 2008, 2010, 2015, and 2016. The Final Rule's sexual orientation data elements reflect those numerous public comments, they are not overly burdensome, and they 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 a more informed state and federal child welfare system resulting in improved outcomes for some of the most marginalized children in these systems.

Reducing instability and achieving permanency for LGBTQ children through placement with affirming, supportive families and providing needed supportive services will also provide cost savings. A recent Center for American Progress estimate indicates that a child adopted from foster care costs the state only 25% per year as much as a child who remains in foster care, amounting to a $29,000 cost savings per year, per child.[19]

Conclusion

For these reasons, American Atheists strongly opposes the elimination of the sexual orientation data elements for youth and adults through the AFCARS system. Without the data collection established by the 2016 AFCARS Final Rule there is no national data on LGBTQ foster youth or on prospective parents. Given the discrimination faced by both, it is imperative that we learn as much as possible about these too often marginalized populations. If you should have any questions regarding American Atheists' comments on the NPRM, please contact me at 908.276.7300 x309 or by email at agill@atheists.org.

Very truly yours,



Alison Gill, Esq.
Vice President, Legal and Policy
American Atheists

[19] Frank J. Bewkes et al, *Welcoming All Families: Discrimination Against LGBTQ Foster and Adoptive Parents Hurts Children*, CENTER FOR AMERICAN PROGRESS (Nov. 20, 2018), https://www.americanprogress.org/issues/lgbt/reports/2018/11/20/461199/welcoming-all-families/.

As of: September 14, 2020
Received: June 18, 2019
Status: Posted
Posted: June 18, 2019
Tracking No. 1k3-9ajs-p2tv
Comments Due: June 18, 2019
Submission Type: API

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0224
Adoption and Foster Care Analysis and Reporting System

Document: ACF-2018-0003-0308
Center for the Study of Social Policy

Submitter Information

Name: Alexandra Citrin
Address:
Washington, DC, 20005
Email: alexandra.citrin@cssp.org
Organization: Center for the Study of Social Policy

General Comment

See attached file(s)

Attachments

Center for the Study of Social Policy

Center for the Study of Social Policy
Ideas into Action

1575 Eye Street, NW #500
Washington, DC 20005
202.371.1565

39 Broadway, #2220
New York, NY 10006
212.979.2369

1000 North Alameda Street, #102
Los Angeles, CA 90012
213.617.0585

June 18, 2019

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: Notice of Public Rulemaking – Proposed revisions to streamline the Adoption and Foster Care Analysis and Reporting System (AFCARS) data elements that were finalized in the AFCARS final rule published on December 14, 2016 (*Federal Register*, Volume 84, No. 76, published April 19, 2019, pages 16572–16600)

Submitted Electronically

Dear Ms. McHugh:

The Center for the Study of Social Policy (CSSP) is a national nonprofit organization recognized for its child welfare expertise and leadership in reforming public systems. Our work in public systems includes our role as the federal court appointed monitor in several state and county child welfare systems and our work providing technical assistance across the nation on improving policy and practice strategies impacting families with young children, adolescents and transition age youth, expectant and parenting youth, youth facing homelessness, and youth who identify as lesbian, gay, bisexual, transgender or questioning (LGBTQ). All of our work is devoted to ensuring children have equitable opportunities to maximize their potential.

CSSP welcomes the opportunity to provide comments on the Notice of Public Rulemaking (NPRM) regarding revisions to streamline data elements that were finalized in the Adoption and Foster Care Analysis and Reporting System (AFCARS) 2016 Final Rule. CSSP previously provided comment on the NPRM for the 2016 Final Rule (81 FR 90524), the Supplemental Notice of Proposed Rulemaking (SNPRM) for AFCARS data elements related to the Indian Child Welfare Act of 1978 (ICWA) (81 FR 20283), the NPRM regarding the proposed delay for compliance and effective date for the AFCARS 2016 Final Rule (83 FR 11450), and the ANPRM regarding proposed streamlining of AFCARS data elements (83 FR 11449).

AFCARS is an essential tool for collecting national and state data to inform policy development, identify gaps in services, and highlight populations that are experiencing disparate outcomes. The collection of these data within states and across states has the capacity to inform and drive critical decision-making about investments within a state's child welfare system. These

investments have real life impacts on the health, well-being, safety, and permanency of children served by child welfare. As is outlined in the Social Security Act, AFCARS data should and must "promote improved knowledge on how best to ensure strong, permanent families for children."[1] In order to achieve the intent outlined in law, AFCARS data need to identify the distinct reasons for entry into foster care and child demographic information – including sexual orientation, gender identity, race, tribal affiliation, and whether youth are pregnant or parenting. Being able to disaggregate overall population data will permit us to better understand barriers to achieving positive well-being and permanency outcomes for youth in foster care.

While we commend the Administration for Children and Families (ACF) for the inclusion of a number of new data elements in AFCARS in the NPRM, there are still a number of data elements that should be collected through AFCARS and are necessary to support the safety, permanency, and well-being of children who come into contact with the child welfare system. The discussion below addresses these data elements and ACF's request for comment related to:

- how AFCARS data, which is aggregated at the national level, can support the work of title IV-E agencies, children, and families;
- why AFCARS is the most effective vehicle for collection of the data proposed and why no other current method is feasible to collect the information;
- whether the information is readily available or collected as part of the title IV-E agency's casework; and
- what considerations should be considered when estimating the burden and benefit of collecting these data to title IV-E systems, staff, children, and families.

Data Elements Related to An Indian Child and their Family:
While we support the inclusion of five new data elements related to the Indian Child Welfare Act (ICWA) from the 2016 Final Rule, the 2019 NPRM eliminates many of the data elements that are necessary to understand unique issues Native children experiences across state child welfare systems. Further, AFCARS is the only federal data system that has the ability to capture much of this data as is legislatively mandated through ICWA,[2] which requires the collection of data and monitoring or specific title IV-E and title IV-B programs that are designed to support Native children and reduce disproportionality and disparities[3]. The removal of data elements from the 2016 Final Rule goes directly against these legislative mandates. Specifically, we request the following data elements be incorporated into the new Final Rule: date of court determination of ICWA application; transfer of jurisdiction; foster care placement preferences; adoptive placement preferences; and ICWA notice on foster care placement and termination of parental rights to tribes and parents. All of these data elements should be readily available in a case file and therefore require minimal burden to the state.

[1] SEC. 479. [42 U.S.C. 679] (d). P.L. 113–183, §208 inserted new subsection (d). Effective September 29, 2014.
[2] Some commenters note data should be collected through the Department of the Interior however this is inappropriate. The Department of Interior does not have a relationship with state child welfare agencies and does not have an operational database, or resources, to collect data on Native children in state foster care systems.
[3] FY2017 AFCARS data show that currently Native children are overrepresented in foster care by twice as much as in the general child population. This is likely an underrepresentation due to challenges in reporting and states often relying on self-reporting.

Collection of these data are even more critical now as states begin to identify gaps in their service array for candidates for foster care and their families. Research has long showed that children do best when they are able to be served in their homes and communities and public policy, specifically the *Family First Prevention Services Act (FFPSA)*, is aligned with this research. However, in order to best support Native children, youth, and families in their communities it is critical to understand their unique needs and without proper identification of these children and families, understanding their needs is impossible.

Data Elements Related to Sexual Orientation and Gender Identity

Research indicates that LGBTQ youth are involved with child welfare systems at high rates and that these youth experience poorer health, safety, and well-being outcomes compared to their cisgender, heterosexual peers. Specifically, a study in Los Angeles County found that LGBTQ youth were over represented in foster care at a rate of 1.5 to 2 times, often due to being rejected by their families, and that approximately one-fifth of youth in foster care identify along the LGBTQ spectrum.[4] In addition, the study found that LGBTQ youth are over twice as likely to report experiencing poor treatment while in care.[5] LGBTQ foster youth also suffer worse outcomes in foster care than non-LGBT youth, such as multiple placements, longer stays in residential care, and greater rates of hospitalization for emotional reasons, homelessness, and criminal justice involvement.

In order to identify and address these risks, the child welfare system must affirmatively collect information about the sexual orientation and gender identity of the children in its custody. Failure to understand these aspects of a child's identity can lead to poor decisions that seriously undermine the child's permanency, safety, and well-being. When agencies know the characteristics and experiences of youth in out-of-home care, they are able to analyze whether there are gaps in care and whether disparities are being experienced by groups of children and youth. Currently a select number of jurisdictions collect data related to the sexual orientation and gender identity of youth in foster care and while they report the positive impact these data have had on driving policy and practice improvements, it essential to collect these data within AFCARS so that it is inclusive of data from across the country. National data is critical to identifying prevention services, foster care recruitment, retention, and support strategies and evidence-based interventions to meet youth's unique needs. Within the context of *FFPSA* implementation, it is critical that states understand the demographics and needs of children who are candidates for foster care and their families in order to implement effective prevention programs. It has been documented that family rejection is one of the most commonly cited reason for LGBTQ youth entering out-of-home care.[6] Having more information about this reason for entry can inform state investments in prevention programs targeted to these families to move from rejection of their children to accepting and affirming.

---

[4] Bianca D.M. Wilson et al., *New Report: Sexual and Gender Minority Youth in Foster Care*, WILLIAMS INST., at 6 (Aug. 2014), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LAFYS_report_final-aug-2014.pdf

[5] *ACYF-CB-IM-11-03,* supra note 1 (12.9% of LGBTQ youth report being treated poorly compared to 5.8% of non-LGBTQ youth).

[6] Shannan Wilber et al., *CWLA Best Practice Guidelines for Serving Youth in Out-of-Home Care*, CHILD WELFARE LEAGUE OF AMERICA, 4 (2006), http://www.nclrights.org/wp-content/uploads/2013/07/bestpracticeslgbtyouth.pdf.

The NPRM justifies the erasure of sexual orientation data collection due to concerns related to the accuracy of the data and concerns related to confidentiality, which while being critical important, ignores the fact that child welfare systems already have in place guidelines for ensuring confidentiality related to a youth's information including abuse history, physical and mental health diagnoses, and prescribed medications. In addition, some jurisdictions (including Alleghany County, PA) have successfully developed and implemented specific guidelines for the collection of data related to a child's sexual orientation and gender identity.

The NPRM also questions the ability of case workers to collect these data from youth. The child welfare profession has acknowledged the importance of collecting sexual orientation and gender identity information about children and many systems have invested in extensive training related to the collection of sensitive information from children and youth. Further, sexual orientation and gender identity questions are currently collected through a number of national surveys with documented evidence of the quality and importance of this information in driving practice and policy improvements. Specifically, these data have been included on both the Youth Risk Behavior Surveillance Survey distributed by the Center for Disease Control and also the National Crime Victimization Survey (NCVS). Further, the Bureau of Justice Statistics has reported that the sexual orientation and gender identity items of the NCVS have been performing well with no concerns about validity or reliability. In addition, researchers have surveyed LGBTQ youth in the juvenile justice system, which has significantly increased the profession's understanding of the disproportionate numbers of LGBTQ youth in detention, as well as differences in offense and detention patterns.[7]

Guidance from ACF in 2011 confirmed and reiterated that "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".[8] In addition, these data closely align with current Congressional priorities. In June 2019, Representatives Lewis (D-GA) and Gonzalez-Colon (R-PR) and Senator Gillibrand (D-NY) introduced the *Every Child Deserves a Family Act (H.3114/S. 1791),* which mandates the data collection of the sexual orientation and gender identity of youth in care. Eliminating questions related to sexual orientation and gender identity in AFCARS keeps invisible the experiences of the LGBTQ community and leaves the Federal government blind to the unique needs of many youth to whom states have a responsibility to ensure their safety, permanency, and well-being. The absence of administrative data on the national level will obscure the experiences of these youth and will make it impossible to track whether the system is making improvements to address this significant population of youth in out-of-home care.

Data Elements Related to the Health Assessments for Children

The 2016 Final Rule included the addition of data elements related to the receipt of health care services for children placed in foster care, which are required for monitoring a state's compliance with its Title IV-B Health Oversight and Coordination Plan and aligned with the *Fostering*

[7] 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).
[8] 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.

Connections to Success and Increasing Adoption Act (Fostering Connections). We greatly appreciate the inclusion of the data element related to receipt of a health assessment however without including the date of this assessment (formerly §1355.44(b)(11)(ii)), it will be impossible to ensure children receive this assessment timely or compliance with the state's Title IV-B Health Oversight and Coordination Plan.

The inclusion of the date of a child's health assessment is particularly important given the nationwide increase in parental substance use disorders, which has resulted in more children entering the foster care system having been exposed to substances or having experienced significant trauma. Timeliness of health assessment is critical to ensuring that child welfare agencies can appropriately identify health needs such as trauma-related behavioral challenges and developmental delay and provide access to appropriate services as indicated by the assessment.

Data Elements Related to the Educational Placement and Stability of Children
Research has shown that youth in foster care graduate from high school at lower rates compared to their peers who are not in foster care and the importance of placement stability in educational success. *Fostering Connections* and the *Every Student Succeeds Act* (ESSA) mandate school stability for children in foster care and require state child welfare systems and departments of education to coordinate efforts to support these youth. While *ESSA* requires state departments of education to report on the educational performance of students in foster care, there is a gap in knowledge about efforts to stabilize educational placements for children in foster care. AFCARS is best suited to collect this data given the child welfare systems responsibility for a child's home placement and associated school placements. Further, it is the most effective way to collect national, educational stability data because it allows for straightforward quantitative reporting of how often children change schools and the reason. Documentation of a child's school placements is already required by the *Fostering Connections* and as such, reporting should not create an unnecessary burden, and will allow for better analysis of the school stability-related challenges students in foster care face.

Without AFCARS including this crucial data point on educational stability (formerly §1355.44(b)(16)) it will be nearly impossible to measure progress and trends or gauge effectiveness of policies and practices. By monitoring trends and analyzing longitudinal information about the school stability of children in care, agencies can better inform and improve their practices and policies, ensuring the educational and well-being needs of children in foster care are met.

Data Elements Related to the Living Arrangement of Children
States across the country contract to varying degrees with private agency partners to support the placement, health, and well-being of children in foster care. In order to ensure parity in practice and monitor the effective and safe use of private agency partners as well analyze innovative practice within the private sector, it is important to have national data readily available that can be analyzed based on this data element (formerly §1355.44(e)(5)). This data is readily available in any case file and/or SACWIS/CCWIS system and would not create an additional burden for staff.

Data Elements Related to Transition Plans for Youth

As of September 30, 2017 there were 442,995 children in foster care and 123,437 children waiting to be adopted. Additionally, in FY2017 19,945 children emancipated from foster care. Planning for the transition of each and every one of these children is critically important for their success and well-being in the future. In a report from the Jim Casey Youth Opportunities Initiative, they estimate the cost to society of a youth aging out of foster care to be approximately $299 thousand dollars as a result of poorer education that reduces potential earnings over a lifetime, becoming a parent earlier in life, and future involvement with the criminal justice system.[9] Planning for a youth's successful transition to adulthood can have a direct impact on each of these areas of a youth's life: school, future work, family planning, and supportive adults in the community. In addition to being critically important to the success of youth aging out of care and the arguments around cost savings at a national level, there are also legislative mandates within *Fostering Connections* and the *Preventing Sex Trafficking and Strengthening Families Act* that require systems engage in transition planning with youth early (formerly §1355.44(f)(8)). AFCARS is the most effective way to collect these data as the data of a youth's transition plan is readily available in the case file. Further, while some have suggested that this data can be collected within the National Youth in Transition Database (NYTD), because of the voluntary nature of NYTD, the data set is incomplete and not representative.

Data Elements Related to A Child's Involvement with the Juvenile Justice System

Research has suggested that youth involved with child welfare are more likely to become involved with the juvenile justice system however there is currently little coordination between these systems. Tracking juvenile justice (formerly §1355.44(f)(5)) involvement is vitally important, as dual-status youth have very specific needs that must be met. As more states work to bring practice into alignment with research and better serve youth at the intersection of these systems, national longitudinal data is necessary.

This data closely aligns with current Congressional priorities. In May, Senators Grassley (R-IA) and Peters (D-MI) introduced the *Childhood Outcomes Need New Efficient Community Teams (CONNECT) Act (S. 1465)* to encourage data collection and collaboration around dual-status youth. In his comments on the bill, Senator Grassley stated, "Youth involved in both the foster care and juvenile justice systems shouldn't face additional challenges because of a lack of coordination." Failure to track this data in AFCARS would stymie such coordination, go against Congressional priorities, and have a negative impact on the future outcomes for youth at this intersection.

Driving Child Welfare Systems Forward

Particularly in light of *FFPSA,* child welfare systems must have data to inform the development and implementation of evidence-based prevention services, reduce the reliance on congregate care, and improve recruitment and retention of foster parents. Without understanding the reasons for entry into care – for example, how many children enter foster care due to parent child conflict related to the child's sexual orientation or gender identity – child welfare systems will not be able to design prevention services to meet the needs of these candidates of foster care.

[9] Jim Casey Youth Opportunities Initiative. (May 2013). *Issue Brief: Cost Avoidance - The Business Case for Investing in Youth Aging Out of Foster Care.*

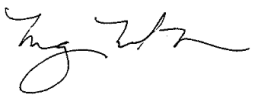
Furthermore, if child welfare systems are unable to disaggregate well-being and permanency outcomes including the reason for entry into care, placement type, length of stay in foster care, permanency goal, or receipt of health care, states' ability to make smart, data-driven investments that reduce the costs associated with placement in foster care while maximizing opportunities to promote the well-being of children and families will be hindered.

Conclusion

While the AFCARS and the NPRM are focused on specific data elements, it is critical to recognize that this is not just about data collection but, more importantly, is about children and youth who are served by child welfare. These data provide an opportunity to improve the lives – including safety, permanency, and well-being – of children who come into contact with child welfare by driving practice and policy forward. We respect ACF's calculation of the cost associated with the collection of these additional data elements, however this is about the well-being of children and, as we have discussed throughout our comments, we believe the burden to states is far outweighed by the cost of not doing so to children and families served by child welfare, taxpayers, and our country's future. Without compromising the future of this country's children and to off-set the burden to states of collecting these additional data elements, we would recommend that the Administration seek appropriation's to increase the federal match to states for activities related to implementation of the new AFCARS data elements.

We look forward to working with HHS in the future on how to best use the data available in AFCARS to promote accountability and improved outcomes for all children and youth. If you have any questions, please don't hesitate to contact me, (202) 371-1565; megan.martin@cssp.org.

Sincerely,



Megan Martin
Vice President, Director of Public Policy
Center for the Study of Social Policy

As of: September 14, 2020
Received: June 18, 2019
Status: Posted
Posted: June 18, 2019
Tracking No. 1k3-9ajs-xmwx
Comments Due: June 18, 2019
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0224
Adoption and Foster Care Analysis and Reporting System

Document: ACF-2018-0003-0309
Data Quality Campaign

Submitter Information

Name: Jane Clark
Organization: Data Quality Campaign

General Comment

See attached comments from Data Quality Campaign.

Attachments

Data Quality Campaign

June 18, 2019

Data Quality Campaign Comments on the Education Elements of the AFCARS 2016 Final Rule (84 Fed. Reg 16572)

Data Quality Campaign (DQC) appreciates the opportunity to share comments regarding the Adoption and Foster Care Analysis Reporting System (AFCARS). In particular, DQC is submitting these comments to express strong support for retaining the educational stability data element of the AFCARS. It is critical to measure effective implementation of federal child welfare and education law to ensure that it is supporting foster care students throughout their education.

ESSA and Fostering Connections Require Collaboration across Agencies to Support Students

Fostering Connections to Success and Increasing Adoptions Act of 2008 (Fostering Connections) mandates school stability for children in foster care. Under this law, child welfare agencies must take steps to place children close to the schools they have been attending. The *Every Student Succeeds Act* (ESSA) has an increased emphasis on supporting students in foster care through better sharing and use of data on these students. ESSA further promotes, among other things, school stability and interagency data sharing related to students in foster care. Foster care students are often highly mobile and need the coordinated help of education and child welfare agencies to make smooth transitions between schools. For the first time, state departments of education are required to report on the educational performance of students in foster care on their state report card. These two data collection sources – AFCARS and SEA State Report Cards – will allow for longitudinal information about the educational needs of students in foster care to be tracked and reported over time. This type of longitudinal information will enable agencies to have a more complete picture of these students' educational experiences and more effectively support them.

High Quality Data Systems are Critical for Supporting Students in Foster Care

Research on the educational performance of students in foster care overwhelmingly shows increased attention to educational issues is critical – and that students with high mobility face many educational challenges. **Including this crucial data point related to education stability in AFCARS makes it possible to measure progress and trends or gauge effectiveness of policies and practices established under ESSA to support these students.** By monitoring trends and analyzing longitudinal information about the school stability of children in care, agencies can better inform and improve their practices and policies, ensuring the educational and well-being needs of children in foster care are met.

AFCARS is an effective way to collect educational stability data because it allows for straightforward reporting of how often children change schools and the reason. Child welfare agencies are already required to keep school stability information as part of their case plans pursuant to Fostering Connections; capturing this data element via AFCARS will encourage uniformity across states, which will result in more accurate data. Since it is already being collected by states under Fostering Connections, it should not create an unnecessary burden for child welfare professionals. Further, all states are continuously updating their data systems to meet the increasing

demands of serving children and families and stay current with the latest technology and data exchange advances. Maintaining this element will further catalyze states to prioritize cross-agency collaboration as they make these important enhancements to their system.

Conclusion

DQC supports the inclusion of the education stability data point in AFCARS as it is set out in the 2016 Final Rule. This change to AFCARS is long-awaited and the result of robust and thoughtful discussion over many years. The school stability data point is critical to monitoring whether implementation of federal law serves students as intended, and it is tailored to address current areas of weakness in data collection and reporting and must be retained to ensure the safety, permanency, and especially well-being of all children in foster care.

Thank you for your consideration,

Data Quality Campaign

As of: September 14, 2020
Received: June 18, 2019
Status: Posted
Posted: June 18, 2019
Tracking No. 1k3-9ajt-sx4p
Comments Due: June 18, 2019
Submission Type: API

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0224
Adoption and Foster Care Analysis and Reporting System

Document: ACF-2018-0003-0310
Pennsylvania Dept. of Human Services

Submitter Information

Name: Susan Stockwell
Address:
Harrisburg, PA, 17105-2675
Email: sstockwell@pa.gov
Organization: Pennsylvania Dept. of Human Services, Office of Children, Youth and Families
Government Agency Type: State
Government Agency: Pennsylvania Dept. of Human Services

General Comment

Pennsylvania Department of Human Services, Office of Children, Youth and Families is submitting comments in the attached file.

Attachments

Pennsylvania Dept. of Human Services

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF HUMAN SERVICES

Ms. Kathleen McHugh, Director
Division of Policy
U.S. Department of Health and Human Services
Administration for Children and Families
330 C Street SW
Washington, DC 20024

JUN 18 2019

Re: 45 CFR Part 1355
Adoption and Foster Care Analysis and Reporting System
RIN 0970-AC72

Dear Ms. McHugh:

The Pennsylvania Department of Human Services, Office of Children, Youth and Families (OCYF) respectfully submits these comments in response to the Notice of Proposed Rule Making (NPRM) on the Adoption and Foster Care Analysis and Reporting System (AFCARS) published in the Federal Register on April 19, 2019, for the Administration for Children and Families of the U.S. Department of Health and Human Services.

General Comments

- In general, Pennsylvania agrees with the removal of approximately 89 data elements and the simplification of additional data elements in the out-of-home data file. The remaining data elements are consistent with reporting only essential information on children needed to meet the title IV-B/IV-E statutory requirements and program monitoring, Congressional reporting, or budgeting as outlined in the NPRM.

Comments related to specific data elements

- Indian Child Welfare Act (ICWA) - The reduction in the number of ICWA related elements will significantly lessen the reporting burden for Pennsylvania's 67 local jurisdictions. The data elements that were retained in this NPRM will provide the Children's Bureau with the necessary data to identify the number of children in out-of-home care who should be afforded protections under ICWA while eliminating many of the procedural related data elements.
- Sexual Orientation - The NPRM removes data elements related to the sexual orientation of the child, foster/adoptive parents, and legal guardian over concerns about individual privacy and whether AFCARS was the appropriate vehicle for collection of this information, while retaining "Family conflict related to a child's sexual orientation …" as a circumstance of a child's removal. Pennsylvania cautions that while this may clearly present itself as a circumstance for removal in some cases, this data may not be reliable in that the presenting reason for removal may

JUN 18 2019

initially appear to be unrelated to a child's sexual orientation. It may be only later in the removal episode that the agency becomes fully aware of this as an underlying reason for the family conflict.

- Removal of nonessential elements – The removal of data elements that go beyond the core purpose of the AFCARS data set will allow states to focus efforts for system modifications and training on the remaining AFCARS elements. We concur that the elements that have been removed should still be documented in the case file and be part of a qualitative review. These elements include date and time of health assessment, educational stability, juvenile justice involvement and transition plans.
- Revisions to "other living arrangement type" – The addition of "qualified residential treatment program" and the modifications to the definitions of "residential treatment center" and "child care institution" will provide important information on how states are using these placement options under the Family First Prevention Services Act.

Comments related to the implementation date

- Pennsylvania agrees that the implementation date of October 1, 2020 will not provide sufficient time to modify our state and county information systems and that a full two years should be provided for implementation. Following the publication of the final rule, the Children's Bureau will need to provide technical guidance to states before IT systems can be modified to capture and report on the new or revised data elements. In Pennsylvania, modifications to the state level system requires county system changes, as well, adding to the time that will be needed to implement the AFCARS changes. Two full years would also allow for the complete development of training materials and manuals for dissemination to county children and youth staffs responsible for entering case level information into county systems.

Comments on costs and burden hours

- Although Pennsylvania agrees that the proposed AFCARS data elements are a regular part of our county children and youth agencies' casework, the new or revised data elements are not part of an existing data exchange between our state system and the county systems. As a result, we will need to modify our existing state system and create new data exchanges with six county systems to implement the new AFCARS reporting requirements. Modifications to these systems along with staff hours for user acceptance testing is estimated at 15,624 hours at a cost of $1.95 million (blended rate of 125/hr.) and another 12,240 staff hours at a cost of $0.88 million (average rate of 72/hr.) for development and implementation of training.

Thank you for the opportunity to comment on revisions to streamline the AFCARS data elements that were finalized in the AFCARS final rule published on December 14, 2016.

Sincerely,

Amy Grippi

Amy Grippi
Acting Deputy Secretary

c: Ms. Susan Stockwell, Director, OCYF Division of Systems and Data Management

As of: September 14, 2020
Received: June 18, 2019
Status: Posted
Posted: June 18, 2019
Tracking No. 1k3-9ajt-8buv
Comments Due: June 18, 2019
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0224
Adoption and Foster Care Analysis and Reporting System

Document: ACF-2018-0003-0311
Association of Village Council Presidents

Submitter Information

Name: Vivian Korthuis
Address:
Bethel, AK, 99559
Email: janderson@avcp.org
Organization: Association of Village Council Presidents
Government Agency Type: Tribal
Government Agency: Association of Village Council Presidents

General Comment

See attached file(s)

Attachments

Association of Village Council Presidents

ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS

Raymond Watson, Chairperson | Vivian Korthuis, CEO | AVCP.org

Administration

101A Main Street, PO Box 219, Bethel, AK 99559 | T 907.543.7300 | F 907.543.3596

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

Agency: Children's Bureau; Administration on Children, Youth and Families; Administration for Children and Families; Department of Health and Human Services

Action: **Adoption and Foster Care Analysis and Reporting System;** Notice of Proposed Rulemaking (4/19/19)

Dear Ms. McHugh,

The Association of Village Council Presidents (AVCP) is a Tribal Consortium of the 56 federally recognized Tribes of the Yukon-Kuskokwim Delta. AVCP's mission is to provide community development, education, social services, culturally relevant programs, and advocacy for the people and Tribes of our Region. A focus on the family is one of AVCP's operating principles and we prioritize our work in child welfare, Indian Child Welfare Act (ICWA) compliance, and community wellness.

Because of our commitment to ICWA compliance and best outcomes for tribal children in custody, AVCP submits these comments on the 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.

By way of background, tribes, tribal organizations, and tribal advocates have long sought the inclusion of ICWA-related data points in the AFCARS because there is no other national method to track ICWA compliance, and there are few if any state systems. The initial rules were changed due to comments made by these entities and others after reviewing the Administration of Children and Families' (ACF) February 9, 2015 proposed rule. On April 2, 2015 the Agency issued a Supplemental Notice of Proposed Rulemaking (SNPRM) changing certain data elements. 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, and included the ICWA data elements.

The current NPRM seeks to modify or eliminate a significant number of the ICWA data points found in the 2016 Final Rule.

General Comments:

The Goals of the Families First Prevention Services Act and ICWA are Parallel and Support One Another.

As the current NPRM reminds us, there is a new Title IV-E prevention services program, the Families First Prevention Services Act. The 2019 Title IV-B Program Instructions state, "[c]reating a system that sees the prevention of child abuse and neglect as the goal of child welfare changes the current system toward working with families sooner through upfront prevention efforts." (ACYF-CB-PI-19-4 (2019).) Those same Program Instructions "recognize that tribes have long embraced a vision for child welfare that focuses on strengthening families and native communities and that seeks to avoid the unnecessary removal of children from home." (ACYF-CB-PI-19-4 (2019).) Indeed, for over 40 years, the Indian Child Welfare Act has required active efforts be made to prevent the breakup of the Indian family, making it the "gold standard" of child welfare practice. (81 Fed Reg. 90527.) Additionally, placement under Families First aligns with the placement preferences of ICWA. The placement goal of Families First is to place children in family foster care, only utilizing congregate care as a last resort. ICWA's placement preferences have long taken this approach, again making it the "gold standard" of child welfare practice.

The ICWA data points in AFCARS were to be a significant step in the direction of improving child welfare practices for not only AI/AN children, but for all children. As noted in the NPRM, "states with higher numbers of tribal children in their care reported that they supported including limited information related to ICWA in AFCARS because they believe child welfare programs will be enhanced by having this information to inform policy decisions and program management." (84 Fed Reg. 16574.) In its comments to the April 2018 Advanced Notice of Proposed Rulemaking, the California Department of Social Services (the state with the largest Native American population) "unequivocally supported 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."

Having data on ICWA would provide States with a valuable tool that would help to shift the system in the direction Families First intends, toward prevention, toward placement in a family setting and toward collaboration between all parties in the system.

Importantly, the 2016 Final Rule was intended to identify more effective ways for tribes, States and the federal government to work together to advance the well-being of Indian children and families. This again is directly in line with Families First, where it includes as a goal, "a strong, healthy child welfare workforce to achieve better outcomes."

To that end, all of ICWA data points included in the 2016 Final Rule should be retained. Moreover, we strongly encourage a review of the data points being revised, in order to ensure they do not inadvertently encourage non-compliance with ICWA, whereby the well-being of Indian children would be harmed.

The NPRM's One-Sided Focus on Compliance Costs is Arbitrary and Capricious

This NPRM relies on information obtained through the April 2019 ANPRM which sought information only on burdens, making a reasoned cost-benefit analysis impossible.

As required by law, the 2016 Final Rule conducted a careful analysis of the benefits and burdens, and appropriately amended the proposed rule to streamline compliance costs. 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. Executive Order 13,777 is not a sufficient basis for the Agency to reverse course. Further, Families First legislation does not amend ICWA, and so does not operate as a sufficient rationale to modify ICWA data points.

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 (HHS) to 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.

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 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.

States are already in the process of implementing these changes.

Since these regulations have been effective for over two years, 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 largest population of American Indian/Alaska Native residents, is already well under way with its implementation efforts, having relied on the Final Rule. At this stage, the proposed modification of the data collection requirements would be a waste of finite state child welfare resources, which itself is an additional burden.

The primary challenge faced by States in their implementation of ICWA data elements is the failure of ACF to provide the required data map. Through this failure, the current administration effectively blocked their implementation, seemingly pending the current streamlining action.

The NPRM "commend[s] the willingness of states to collect a more comprehensive array of information." (84 Fed Reg. 16575.) However, in the absence of a national data reporting requirement, it is guaranteed there will be variability with data elements, frustrating Section 479's mandate to create a "national," "comprehensive," and

"uniform" data collection system. 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.

Further, modification to the existing data points requires states to start over on collaborations with their tribal partners and further delays 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.

These regulations are important to us, to our families, and also to 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 that data collection is necessary to protect Indian children, 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 expected data elements. Tribes which 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) will see more of their limited resources wasted.

Specific Comments Regarding Data Elements.

While we strongly encourage retaining **all** of ICWA-related data elements of the 2016 Final Rule, we provide these specific comments to identify concerns regarding the suggested data elements and to offer methods of increasing the utility of streamlined data points.

Notice: We suggest adding the following additional data elements:

The NRPM includes a data element that would capture whether notice has been sent to a child's tribe. We recommend also including a data element that would capture the date of the notice (as found on the return receipt), as well as the date the petition was filed. These dates are easily located and are not qualitative or too detailed in nature, but do provide important additional information regarding whether notice was timely.

Placement: We suggest adding the following additional data elements:

Data points exist regarding whether a child is placed with a relative. The NPRM proposes to also collect data on whether a child is placed with a tribal member. We suggest adding these two additional data elements:

1. If the child is not placed with either a relative or a tribal member, was a good cause finding made to deviate from ICWA's placement preferences? (yes or no)

2. If yes, what was the basis of the good cause finding? (drop down list from the 2016 ICWA regulations)

This information will provide a more complete picture of what is occurring regarding placement and is consistent with the goal of Families First to place children in a family-like setting.

Transfer to Tribal Court: We suggest modifying this data element as proposed.

As written, this data element is confusing. We suggest the following set of questions:

1. Was a transfer to tribal court requested? (yes or no)
2. If so, was it granted? (yes or no)
3. If it was denied, what was the reason? (drop down menu based on 2016 ICWA regulations).

This data will enhance understanding regarding transfers to tribal court. There is no other mandatory mechanism for this data to be collected. The Court Improvement Program data would be voluntary, not mandatory.

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 far outweigh the burden.

In closing, the ICWA 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 will significantly impact tribal children and families, as well as county agencies trying to better follow the law. In the interest of increasing compliance with the ICWA, and ultimately in protecting our children and families, we respectfully submit these comments.

Sincerely,
ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS

Vivian Korthuis

Vivian Korthuis
Chief Executive Officer

As of: September 14, 2020
Received: June 18, 2019
Status: Posted
Posted: June 18, 2019
Tracking No. 1k3-9ajt-f5gg
Comments Due: June 18, 2019
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0224
Adoption and Foster Care Analysis and Reporting System

Document: ACF-2018-0003-0312
Casey Family Programs

Submitter Information

Name: Brian Clapier
Address: 98121
Email: bclapier@casey.org
Organization: Casey Family Programs

General Comment

Comments are attached

Attachments

Casey Family Programs

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

RE: Advance notice of proposed rulemaking
Docket Number: ACF-2019-07827
Docket Name: AFCARS
Docket RIN: 0970-AC72

Dear Ms. McHugh:

Thank you for the opportunity to provide comments on the U.S. Department of Health and Human Services Notice of Proposed Rule Making RIN 0970-AC72. Casey Family Programs is the nation's largest operating foundation that focuses on safely reducing the need for foster care and building communities of hope for children and families across America. We provide ongoing strategic consultation, technical assistance, data analysis and independent research, and work in all 50 states, the District of Columbia, in two U.S. territories and with more than a dozen tribal nations to assist child welfare leaders in their efforts.

We commented previously on these rules and remain committed to improving the quality and type of data collected on the families we serve in child welfare. The Adoption and Foster Care Analysis and Reporting System (AFCARS) is the only national tool for tracking children in foster care across states. As such, it is critical for monitoring trends over time, as well as key outcomes for children in care, including safety and timeliness of permanency. Significant improvements in technology and data management, along with major changes in federal law, have occurred since the inception of AFCARS. Revisiting the reports' structure and content makes sense.

This NPRM proposes revisions to streamline the AFCARS data elements that were finalized in the AFCARS final rule published in December 2016. This action is in response to E. O. 13777 that directed federal agencies to review existing regulations to make recommendations regarding their repeal, replacement, or modification. The implementation of the first AFCARS report period under the December 2016 final rule was delayed for two fiscal years (until October 2021). This occurred so that public feedback concerning which data elements should be streamlined or removed could be received. Specifically this NPRM responds to feedback received and proposes to streamline data elements in the out-of-home care data file related to child information, placements, and permanency planning.

Recommendations regarding specific data elements

Child Well-being

The NPRM proposes the simplification or removal of data elements related to child health assessments, child financial and medical assistance, educational stability, and juvenile justice involvement. We appreciate the desire to reduce the burden and cost related to collecting these data and understand the need to move away from data elements that are too detailed or qualitative for a national data set.

With this in mind we strongly encourage the Children's Bureau to instead modernize the approach to data transfer and structure as well as the electronic retrieval and linking of information from other federal data repositories. The burden for this electronic transfer and file linkage is on ACF; states should be mandated to provide information on children in the care of the state Title IV-E agency (whether in placement or in their own homes), but should not be responsible for conducting linkages with Medicaid, behavioral health or education. We encourage the Children's Bureau to consider a modernization effort that integrates the regulatory mandates of FFPSA with the flexibility of CCWIS. This would optimize technology to create and maintain a longitudinal file structure to track children from first allegation through prevention and in-home services, placement and return home and, when necessary, back into care and possibly to adulthood.

Sexual Orientation and Gender Identity

The current NPRM removes data elements related to sexual orientation from the AFCARS data set, taking into consideration the need to validate the information collected and ensure it remains private. The NPRM communicates that information is more appropriately collected through other means that allow for a thoughtful approach to information collection and staff training. We agree that a thoughtful approach to the collection of these data are important and encourage further exploration regarding about how this information can be included in a national data set.

Indian Child Welfare Act

ICWA compliance is a challenge for many jurisdictions, even 40 years after its enactment. There has been limited national data collected on children subject to ICWA, making it challenging to appropriately assess the experience of American Indian/Alaska Native children in child welfare systems across the country. It is appropriate and necessary for HHS to collect these data for the purpose of improving the availability of information related to ICWA compliance.

The 2016 ICWA AFCARS changes were adopted based upon a recognition of the need to understand how ICWA is being implemented and to identify more effective ways for tribes, states and the federal government to work together to advance the well-being of Indian children and families. As stated in a 2005 GAO Study, "Gathering additional data from states about children subject to ICWA could provide a clearer picture about ICWA's effect on children's experiences in foster care and help determine the extent of any systemic problems with state implementation of the law."

This NPRM continues to include the collection of a limited list of new data, including: 1) whether the state title IV-E agency made inquiries of whether the child is an Indian child as defined in ICWA, 2) the child's tribal membership and all federally recognized tribes that may potentially be the Indian child's tribe, 3) whether ICWA applied to the child and the date that the state title IV-E agency was notified by the Indian tribe or state or tribal court that ICWA applies, 4) whether the Indian child's tribe(s) was sent legal notice in accordance with 25 U.S.C. 1912(a), and 5) the tribal membership of mother, father, foster parents, adoptive parents, and legal guardians. We support the inclusion of these elements and agree that it is ACF's responsibility to collect ICWA data.

Additional data elements related to ICWA and proposed in the December 2016 final rule are recommended for removal in the most recent NPRM. We support the inclusion of as many of

the these data elements as possible. We specifically recommend three critical adjustments related to areas of particular importance to these measures:

1) Notice: The current NPRM includes whether the child's tribe was sent legal notice but does not allow for determining whether or not this notice was timely. We recommend including both the date on which the child custody petition was filed and the date the tribe was sent notice of the custody petition as data elements so that compliance with this portion of 25 U.SC. 1912 (a) can be assessed.

2) Placement Preferences: Data elements included the current NPRM will provide information regarding whether a child was placed in a preferred placement (i.e. whether the foster or adoptive parents are related to the child) and also request information about tribal membership but falls short of providing information about the reasons for deviating from the placement preferences. We recommend that collecting data regarding whether good cause to deviate was found and that the basis for that determination (from a list of options) also be included. .

3) Transfer to Tribal Court: Data elements included in the current NPRM will provide information related to transfer to a tribal court in the context of a change of placement. Because a transfer to a tribal court does not always result in a change of placement and as a result will not capture the full universe of transfers to tribal court, we recommend adjusting this measure to instead include: 1) whether or not a transfer was requested, regardless of a change in placement, 2) whether the requested transfer was granted, and 3) if denied, the reason for denial (from a picklist of options). .

Overarching recommendations

Reporting Population

The final rule includes two reporting populations: children in out-of-home care and those receiving adoption or guardianship assistance payments. We support collecting data on both of these populations.

In addition, with the passage of the Family First Prevention Services Act (FFPSA), it will be necessary for ACF to develop or adjust existing data elements for the new population of children and families that will be served under this legislation — particularly those children with open cases, as well as their parents or kinship caregivers served in their home with prevention services or receiving post reunification services aimed at reducing re-entry into foster care.

File Structure

Significant changes are underway in child welfare technology as states begin to explore and implement provisions of the Comprehensive Child Welfare Information System (CCWIS) funding environment. As noted above, passage of the FFPSA also will require collection of data when cases are opened, not only at the point of placement out of home. In addition to new data being required, more children will be subject to reporting as IV-E supported services begin earlier in a case and are provided to more children and families.

We recognize that the Children's Bureau is currently considering a delay in the compliance and effective dates for implementing the 2016 final rule. The idea of states continually appending an incredibly large rectangular file with additional data elements and the ongoing tracking of post-permanency assistance recipients is difficult, so we appreciate your thoughtful consideration of

how best to approach this. At the same time, the use of data for policy and planning is growing at an exponential rate. We can expect the same trends in child welfare as statutory requirements and public expectations for integrated systems and services continue to grow.

We recommend that the Children's Bureau seriously assess the most efficient and sustainable method for states and tribes to transmit data and other information. The notion of a flat file transfer every six months was conceived of more than two decades ago. With advances in technology, this is inefficient. We encourage the Children's Bureau to explore alternate methods of data submission, such as monthly (or even weekly) automated data transfers. Data storage could be cloud based with system components modularized.

Thank you for the opportunity to submit comments on this important regulation. Please contact Brian Clapier, Senior Director, Systems Improvement at 206-352-4216728-2001 if you have any questions.

Sincerely,

David Sanders
Executive Vice President
Systems Improvement

As of: September 14, 2020
Received: June 18, 2019
Status: Posted
Posted: June 18, 2019
Tracking No. 1k3-9aju-mbrf
Comments Due: June 18, 2019
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0224
Adoption and Foster Care Analysis and Reporting System

Document: ACF-2018-0003-0313
ZERO TO THREE

Submitter Information

Name: Myra Jones-Taylor
Address:
Washington, DC, 20037
Email: kkeating@zerotothree.org
Organization: ZERO TO THREE

General Comment

Comments uploaded in attachment below.

Attachments

ZERO TO THREE

ZERO TO THREE
Early connections last a lifetime

June 18, 2019

Attn:
Kathleen McHugh
Director, Policy Division
Children's Bureau
330 C Street, SW
Washington, DC 20201

From:
Myra Jones-Taylor
Chief Policy Officer
ZERO TO THREE
1255 23rd Street, NW #350
Washington, DC 20037

RE: Proposed rulemaking for Adoption and Foster Care Analysis and Reporting System (AFCARS) amending regulations requiring collection and reporting of data on children in out-of-home care, who exit out-of-home care to adoption or legal guardianship, and children who are covered by a title IV-E adoption agreement

Issued 04/19/2019

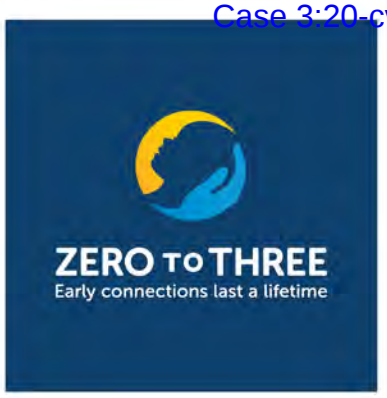
DOCKET NUMBER: ACF-2018-0003

DOCKET NAME: AFCARS 2019 NPRM

AGENCY: Administration for Children and Families

RIN: 0970-AC72

On behalf of ZERO TO THREE, I want to express my concern with the proposed amendments to the AFCARS Final Rule issued 12/14/16 (81 FR 90524) (1355.44). The 2016 AFCARS Final Rule—which reflects new data requirements put in place by recent child welfare laws—represents significant progress in helping to better understand the experiences of children in a variety of settings nationally and how they vary from state to state. These data provide the opportunity to learn critical information about the experiences of children and families in the child welfare system, the services being received, how different practices impact performance, and the relationship of improved outcomes to policies that are in place. At ZERO TO THREE, the success of our Safe Babies Court Team™ (SBCT) approach—which builds knowledge of effective, collaborative court team interventions that transform child welfare systems—centers on using data to systematically review performance measures and outcomes and create plans for improvement within court team sites and the broader system. We use the data collected with our court teams around the



country to determine whether services, processes, and activities meet program expectations of quality and progress and ensure that practices are supported by evidence of efficacy and a strong theory of change with infants, toddlers, and families in the child welfare system.

Founded more than 40 years ago, ZERO TO THREE is a national nonprofit organization, located in Washington, DC, whose mission is to ensure that all babies and toddlers have a strong start in life. We translate the science of early childhood development into useful knowledge and strategies for parents, practitioners, and policymakers. We work to ensure that babies and toddlers benefit from the family and community connections critical to their wellbeing and healthy development.

ZERO TO THREE has focused intensely at both the policy and practice level on information-sharing and knowledge-building to help ensure jurisdictions and states have the tools necessary to identify and address the underlying challenges faced by families in the child welfare system and to ensure that infants, toddlers, and families have access to high-quality, evidence-based services. Ultimately, this work can empower families to develop the skills necessary to support the health, safety, development, and stability of their very young children.

The outcomes of your decision around the 2016 Final Rule are particularly important to our work with infant-toddler court teams across the country. Children under age 3 make up an alarming proportion of children who enter the child welfare system, comprising 28 percent of all children who are abused or neglected. Young children are also most likely to be removed from their homes and placed in foster care. Of the children who entered foster care in FY 2017, infants and toddlers were 33 percent of placements (infants alone were 19 percent). Many infants and toddlers and their families face multiple risk factors yet are often not identified until their problems become severe. Where these families are identified, the supports and services needed to address their problems and keep their children safe and healthy may not exist or are not up to the task of providing the intensity of services called for. Using the ZERO TO THREE SBCT approach, we have worked in courts and communities from Alaska to Florida to transform how we work with infants, toddlers, and families in the child welfare system. This work is fueled by robust data collection that allows for responsive care management, continuous quality improvement, and a clear picture of child well-being.

ZERO TO THREE
Early connections last a lifetime

ZERO TO THREE's ongoing data collection and quality improvement, combined with our firsthand experiences from our evidence-based community approach, form the basis for my comments. Our recommendation is focused on the critical need for implementation of the data collection and reporting as was included in the December 2016 AFCARS Final Rule. These data represent significant progress in helping move the child welfare field toward appropriate and tailored services, supports, and policies for very young children. The benefit to collecting these data at the local, state, and national level will be immeasurable, and yet not insurmountable.

AFCARS As A Vehicle for Data Collection

We believe the AFCARS reporting system is the appropriate mechanism for collecting the data in the 2016 Final Rule, as it will assure that the data collected are reliable and consistent over time and across states. Although there are other vehicles for gathering data, such as surveys and research, we would like to underscore the importance of data gathered with uniform definitions and methodologies that ensure both reliability and validity as we compare child welfare practices across the states. While we acknowledge the concern that an expansion of AFCARS could pose a burden to states, advances in digitization of data points, greater storage of records on easily-utilized platforms, as well as the ease of data collection, aggregation, and analysis has grown by leaps and bounds over the past five years.

AFCARS is the appropriate system for gathering comprehensive national information on the demographic characteristics of adopted and foster children and their parents (biological, foster and/or adoptive parents); 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); the number and characteristics of children placed in or removed from foster care; children adopted or those for whom adoptions have been terminated; children placed in foster care outside the state which has placement and care responsibility; and, the extent and nature of assistance provided by Federal, State and local adoption and foster care programs and the characteristics of the children to whom such assistance is provided.

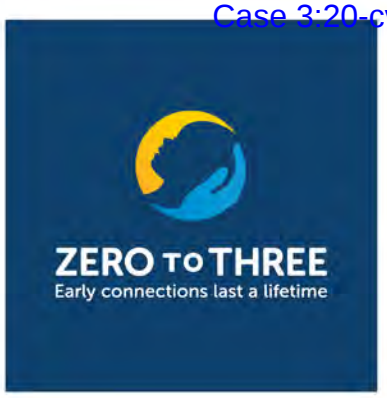
We not only know that collection of the data elements in the AFCARS 2016 Final Rule are feasible, we know how they facilitate strong case and program management. The collection of these data has become routine as the capacity of states to manage data has improved.

ZERO TO THREE
Early connections last a lifetime

Recommendation for Keeping Data Elements Outlined in the 2016 Final Rule

ZERO TO THREE recommends keeping all data elements outlined in the AFCARS Final Rule. Many of these data elements are used in our work implementing our aforementioned evidence-based approach, SBCT. These data allow us to provide specialized support for children at imminent risk of out-of-home care or who are already in out-of-home care, by connecting babies and their families with the support services they need to ensure healthy development and lasting permanency. SBCT sites work with families at different points in the child welfare system. Our work to address service gaps and disparities hinges on the use of continuous quality improvement. This collection and ongoing analysis of data is critical in understanding the children and families served, monitoring program performance, responding flexibly to resource gaps, tailoring programming to community-specific needs, identifying gaps in resources, and responding in ways that improve outcomes and support practice changes. Below are examples of several data elements that are salient to the field for supporting the youngest and most vulnerable children in foster care, which we urge to keep in the final AFCARS data set:

- *Data elements related to the Indian Child Welfare Act (ICWA)* Research shows children of color—including Native American children—are disproportionately represented at all levels of the child welfare system and, once involved, experience disparate treatment and outcomes.[i] Their families are less likely to receive family preservation services, and the children are more likely to be removed from their homes. Once removed from their families, these children are more likely to experience disparately negative outcomes. If we strive to mitigate these persistent and long-term poor outcomes, we must recognize that Native children have unique needs. Native families face a unique set of challenges due to historical and intergenerational trauma and disparities in health care and education services, coupled with high exposure to risk factors such as poverty and substance abuse.[ii] Recent studies have shown the strengths of the communities to which these children are born—communities rich in culture, deeply committed to family, kinship and intergenerational ties—play an important role in mitigating trauma and increasing resiliency in American Indian and Alaska Native families.[iii]

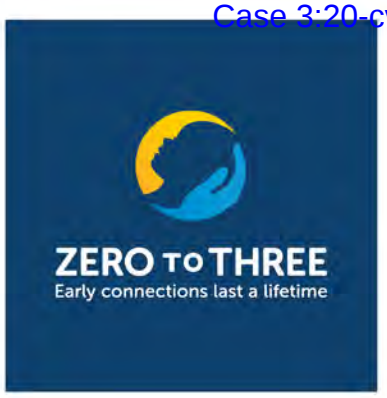


To advance equity and compliance with the intent and requirements of ICWA, it is critical that we are fully informed about the issue and thus review national data and trends. These national data trends are the only way we can identify priorities areas, develop strategies to address disparities, engage in continuous learning, and identify opportunities to institutionalize and scale effective strategies. The data required by the 2016 Final Rule is critical in allowing us to understand detailed information when Native children enter the foster care system, how relatives or kin are used for their foster care placement, and the barriers to permanency for Native children.

The 2019 NPRM eliminates many of the data elements that are needed to understand the unique issues that American Indian and Alaska Native children experience related to poor outcomes in state child welfare systems. Many of the ICWA data elements proposed for elimination make it more difficult to ensure compliance with the requirements of ICWA, such as active efforts and timely notice of proceedings. The data elements put forth in the 2016 AFCARS Final Rule would provide a consistent set of data that tribes and states could use to address ICWA challenges and other child welfare issues.

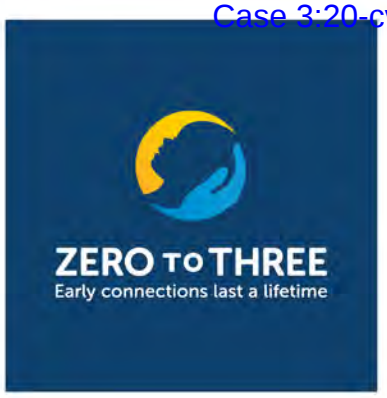
- *Data elements on health assessment*
  Timely identification of needs and referral to services in early childhood is essential for building a foundation of health and well-being; the 2016 Final Rule changes to AFCARS are important in providing meaningful case-level information that will drive case planning that effectively supports this foundation. The revised data structure would also allow analysis of the child's entire experience in out-of-home care, allowing for longitudinal analysis of needs, services, and child welfare outcomes. The data elements on health assessments are particularly salient for supporting more accurate assessment of the health and well-being of the very youngest and most vulnerable children in foster care. Removing the data elements on the date of the health assessment will result in the inability to measure the timeliness of the health assessment; we can only determine timeliness using the date of child removal and the date of the child's health assessment.

  Timeliness of health assessment is critical to ensuring that child welfare agencies can appropriately identify health needs such as trauma-related behavioral challenges and



developmental delay and provide access to appropriate services as indicated by the assessment. By having a greater understanding of how this trauma is affecting children, they can receive needed services sooner and better heal from the trauma that they have experienced. This is particularly important given the prevalence of infants and toddlers in the child welfare system experiencing Fetal Alcohol Spectrum Disorder (FASD), as well as the prevalence of exposure to other substances, including opioids. As FASD is much easier to diagnose in young children than adults, monitoring for problems and intervening early dramatically improves the child's life opportunities.[iv]

- *Data elements on the child's relationship to foster parent(s) and the child's relationship to adoptive parent(s) or guardian(s)*
  The current proposal to simplify the response options from the 2016 Final Rule from seven options to three: "relative(s)", "nonrelative(s)", and "kin" will result in a lack of rich data on a child's relationship and attachment. Including the original seven responses from the 2016 Final Rule is important in helping states track their progress on placing infants and toddlers with specific relatives and kin. The seven data categories, which include a delineation of the five specific relative types with which the child has been placed (paternal grandparent(s), maternal grandparent(s), other paternal relative(s), other maternal relative(s), sibling(s)), are important in understanding how a child's placement type is ensuring the child maintains connections with his or her family. We have made progress nationally in encouraging placement of children with relatives and kin and in helping to ensure that a young child's first placement is their last placement; federal law now requires child welfare agencies to give preference to a suitable relative when a child is in need of out-of-home care. In ZERO TO THREE court teams, case planning takes place with both parents present—with fathers seen as active participants—so that the parties involved are equal decision-makers. We exercise creativity in diligent search and inquiry as we work with caseworkers to actively seek family and next relative information on not only the maternal side of the family but on the paternal sides of the family. The founding Safe Babies Court Teams were able to make substantive changes to the way cases involving infants and toddlers were handled by focusing on decision making that



supported the needs of young children and families while working to close some of the service gaps they confronted; a critical component in this process was looking at extended family members and the biological father and his family as possible foster parents and permanency resources.

The detail allowed for in the original seven data categories proposed in the 2016 Final Rule is critical in getting a broader picture of whether child welfare agencies are utilizing kin and relatives from both sides of a child's family. As very young children develop in the context of their families, where stability and supportive relationships best nurture their growth, it is important to gather data that explicitly reports with which type of relative a child has been placed.

- *Data elements related to sexual orientation and gender identity and expression*
  The data elements related to sexual orientation, gender identity, and gender expressions should all be maintained 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.

- *Data elements on educational stability*
  Ensuring the educational stability of a child in out-of-home care through a plan that includes 1) an assurance that the child's placement in out-of-home care takes into account the appropriateness of the current educational setting and the proximity to the school the child was enrolled in at the time of placement; and, 2) an assurance that the title IV-E agency has coordinated with the local education agency or agencies to ensure the child can remain in that school, or if remaining in that school is not in the best interests of the child, an assurance

ZERO TO THREE
Early connections last a lifetime

to enroll the child immediately in a new school with all of his or her educational records is imperative in ensuring consistency in a child's life when they are placed in care. Data on the educational stability plans helps to determine if there are seamless transitions for children and, when children do not remain in the same school, the reason for the change in enrollment. This is important in the development of a standard process for determining the best interest of the child, and ensuring the appropriate parties—such as the child, school personnel or education advocates, resource parents, the child's attorney, guardian ad litem, and other persons involved in case planning—are involved in the educational stability planning process. AFCARS is the best vehicle for collecting data on educational stability on a national scale.

The 2016 Final Rule and new data collection requirements were thoughtfully considered and seek to ensure child welfare agencies are gathering data on all the critical child and family-related outcomes to ensure safety, permanency, and well-being. The Final Rule brings child welfare data collection in line with statutory changes and requirements enacted since 1993. These changes were long overdue and will support agencies to provide accurate and consistent data across states on key outcome areas. Most important, they will improve the ability to ensure positive outcomes for the babies, young children, and youth who are in the care of the child welfare system. For the reasons outlined above, we urge the U.S. Department of Health and Human Services, ACYF, ACF, Children's Bureau to retain all the data elements in the 2016 AFCARS Final Rule. We appreciate the opportunity to comment on the benefits of these data elements.

Sincerely,

Myra Jones-Taylor
Chief Policy Officer
ZERO TO THREE

ZERO TO THREE
Early connections last a lifetime

[i] Quality Improvement Center for Research-Based Infant-Toddler Court Teams. *Advancing Equitable Outcomes for Infants and Toddlers in Child Welfare.* http://www.qicct.org/sites/default/files/QIC-CT-RaceEquityBrief%205.2018.pdf

[ii] Pratt, Julie and Chapman, Robyn. Administration for Children and Families. *Culture, Collaboration, and Innovation: How Tribal Home Visiting Programs Are Working to Improve Outcomes for Children, Families, and Communities.* https://www.acf.hhs.gov/sites/default/files/ecd/4478_thv_culture_collaboration_and_innovation_synthesis_report_final.pdf

[iii] Martin, Megan and Connelly, Dana. *Achieving Racial Equity: Child Welfare Policy Strategies to Improve Outcomes for Children of Color.* https://ncwwi.org/files/Cultural_Responsiveness__Disproportionality/Achieving_Racial_Equity.pdf

[iv] Quality Improvement Center for Research-Based Infant-Toddler Court Teams. *Improving Outcomes for Families Affected by Prenatal Alcohol Exposure.* http://www.qicct.org/family-needs

As of: September 14, 2020
Received: June 18, 2019
Status: Posted
Posted: June 18, 2019
Tracking No. 1k3-9aju-jax9
Comments Due: June 18, 2019
Submission Type: E-mail

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0224
Adoption and Foster Care Analysis and Reporting System

Document: ACF-2018-0003-0314
Missouri Dept of Social Services

Submitter Information

Name: Julie Starr
Address:
Jefferson City, MO,
Organization: Missouri Department of Social Services
Government Agency Type: State
Government Agency: Missouri Department of Social Services

General Comment

See attached

Attachments

Missouri Dept of Social Services

MICHAEL L. PARSON, GOVERNOR • JENNIFER TIDBALL, ACTING DIRECTOR

Missouri Department of SOCIAL SERVICES
Your Potential. Our Support.

DAVID B. KURT, DIRECTOR
CHILDREN'S DIVISION
P.O. BOX 88 • JEFFERSON CITY, MO 65103-0088
WWW.DSS.MO.GOV • 573-522-8024 • 573-526-3971 FAX

June 14, 2019

Missouri Children's Division Comments on Proposed AFCARS Rule Changes
Regulatory Information Number: 0970-AC72

The State of Missouri, Children's Division appreciates the opportunity to respond to the current NPRM. While Missouri was relieved to see the changes had far fewer data elements proposed, we have further feedback to share below.

Almost all of the proposed data elements would need added to our current SACWIS system. We are working internally to minimize any costly modifications to our current SACWIS system while trying to move towards planning, development and future implementation of CCWIS. If proposed changes are implemented, 98 new fields would need developed and added to the system with additional changes to 5 more fields where we capture the information but would need more drop-down response choices. Beyond the financial burden of implementing these system changes it could set us back in current planning and development for CCWIS. We estimate those changes will take 1,720 hours for analysis, design, development, unit testing, Quality Assurance testing, Business Analyst Work, Joint Application Designs (JAD), Mock-ups, High Level Designs, User Acceptance Testing Support and implementation tasks. This estimate does not include time for Department of Social Services personnel JAD's and testing. Additionally, our IT staff are concerned specifically about the volume of fields to add, issues regarding possible multiple lines per child, definitions of placement instances not being specific enough and possible "tables" in the output of data.

Based on the number and detail of the proposed data elements, our current Data Training would need updated and uploaded for an online 1 ½ hour training session that would be required of all frontline staff, supervisors and specialists who are responsible for data entry, in order to reduce entry errors and increase data integrity. The estimate for developing/updating the training and implementing the new training protocol on an annual basis for 1,579 staff is $44,066.

In Missouri, the total annual average of new entries into foster care based on SFY2016, SFY2017, and SFY2018 was 7,158 children. On May 31, 2019, there were 13,734 total children in foster care in Missouri. Based on the increased amount of time for data entry on the current average # of new entries into foster care, the cost would be an additional $7,357. If we were to go back and update the system for the total foster care population the cost would total $ 14,116.

One strength Missouri can identify in this is that we already collect almost all of the proposed data elements in our assessment process except for the ICWA information on Foster Parents. There would be an additional cost piece for the current application and assessment forms to be updated and implemented.

In conclusion, the total cost burden on Missouri would be $65,539. If the proposed rules are incorporated Missouri strongly feels like the original timeline should be reinstated to the October 1, 2021 date rather than the proposed October 1, 2020 deadline, in order for all system & training upgrades to be incorporated.

As of: September 14, 2020
Received: June 18, 2019
Status: Posted
Posted: June 18, 2019
Tracking No. 1k3-9aju-3bcl
Comments Due: June 18, 2019
Submission Type: E-mail

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0224
Adoption and Foster Care Analysis and Reporting System

Document: ACF-2018-0003-0315
Equality Ohio

Submitter Information

Name: Alana Jochum
Address:
OH,
Organization: Equality Ohio

General Comment

See attached

Attachments

Equality Ohio

June 17, 2019

Kathleen McHugh
U.S. Department of Health and Human Services
Administration for Children and Families
Director, Policy Division
330 C Street S.W.
Washington, D.C. 20024
cbcomments@acf.hhs.gov

Re: Proposed Rulemaking amending the Adoption and Foster Care Analysis and Reporting System (AFCARS) System to remove questions relating to sexual orientation (Apr. 19, 2019) [RIN 0970-AC72]

Dear Ms. McHugh:

Thank you for the opportunity to comment on the Notice of Proposed Rulemaking (NPRM) at 84 FR 16572 that proposes to eliminate data collection on sexual orientation for LGBTQ youth and prospective parents in the Adoption and Foster Care Analysis and Reporting System (AFCARS).

The collection of LGBTQ data from foster youth and adoptive families is critical to help identify trends in types of placements, rate of disruptions and the number of foster placements within LGBTQ families that will translate into permanent adoptive placements, and the data will inform federal law, policy and funding determinations. Eliminating this national dataset will undermine the ability to track demographic trends and identify gaps in services and will place LGBTQ youth and prospective parents at continued risk of harassment and discrimination. We urge you to retain the questions on sexual orientation for foster youth, parents, and guardians. We also urge you to add gender identity questions for foster youth, parents and guardians to the Adoption and Foster Care Analysis and Reporting System (AFCARS).

Equality Ohio works with many youth-serving systems and organizations. To best advise and consult with these institutions, we need to determine effective practices to increase health and wellness outcomes for LGBTQ youth. In order to do that, we need LGBTQ youth data from foster youth and adoptive families—the exact dataset that is proposed for elimination here.

The Exclusion of Data Elements Related to Foster Youth Sexual Orientation and Gender Identity and Expression Would Negatively Impact the Safety, Permanency, and Well-being of LGBTQ Children

The lack of federal data related to the number and unique needs of LGBTQ youth in foster care is deeply troubling in light of the fact that LGBTQ youth are disproportionately represented in out-of-home care. This data is critical to understanding how LGBTQ youth experience the child welfare system and how states can best serve them.

Guidance from the Health and Human Services Administration on Children, Youth and Families agency (ACF) in 2011 confirmed and reiterated that "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."[1] ACF further stated that LGBTQ youth in foster care are overrepresented and in the population of youth experiencing homelessness.[2] A federally-funded study from 2013 of Los Angeles county's foster care system similarly found that nearly 20% of youth identified as LGBTQ -- almost twice the percentage of LGBTQ youth estimated to be living outside of foster care.[3]

In addition to showing that LGBTQ youth are disproportionately represented in the system, the study also found that LGBTQ youth are over twice as likely to report being treated poorly by the foster care system.[4] LGBTQ foster youth also suffer worse outcomes in foster care than non-LGBTQ youth, such as multiple placements, longer stays in residential care, and greater rates of hospitalization for emotional reasons, homelessness, and criminal justice involvement. These findings are consistent with the growing body of research demonstrating that LGBTQ youth suffer from a range of health and mental health disparities associated with family rejection, school bullying, and societal stigma and discrimination.[5] In fact, family rejection is one of the most commonly cited reason for LGBTQ youth entering out-of-home care.[6]

In order to identify and address these risks, the child welfare system must affirmatively collect information about the sexual orientation and gender identity of the children in its custody. Failure to understand these aspects of a child's identity can lead to poor decisions that seriously undermine the child's permanency, safety, and well-being. When agencies know the characteristics and experiences of youth in out-of-home care, they are able to analyze whether there are gaps in care and whether there are certain groups experiencing disparities. Eliminating questions related to sexual orientation and gender identity in AFCARS keeps invisible the experiences of the LGBTQ community and leaves the Federal government blind to the unique needs of the LGBTQ community. The absence of administrative data on the national level will obscure the experiences of this vulnerable population and will make it impossible to track whether the system is making improvements to address this significant population of youth in

---

[1] 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 [hereinafter "*ACYF-CB-IM-11-03*"]. .

[2] *Id.*

[3] Bianca D.M. Wilson et al., *New Report: Sexual and Gender Minority Youth in Foster Care*, WILLIAMS INST., at 6 (Aug. 2014), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LAFYS_report_final-aug-2014.pdf [hereinafter "*Sexual and Gender Minority Youth*"].

[4] *ACYF-CB-IM-11-03,* supra note 1 (12.9% of LGBTQ youth report being treated poorly compared to 5.8% of non-LGBTQ youth).

[5] *Sexual and Gender Minority Youth*, at 11 ("LGB young adults who reported higher levels of family rejection during adolescence were 8.4 times more likely to report having attempted suicide, 5.9 times more likely to report high levels of depression, 3.4 times more likely to use illegal drugs, and 3.4 times more likely to report having engaged in unprotected sexual intercourse, compared to their peers who reported no to low levels of family rejection.") (citing Caitlyn Ryan, David Huebner, Rafael M. Diaz, & Jorge Sanchez, *Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay, and Bisexual Young Adults*, 123 PEDIATRICS 346 (2009)).

[6] Shannan Wilber et al., *CWLA Best Practice Guidelines for Serving Youth in Out-of-Home Care*, CHILD WELFARE LEAGUE OF AMERICA, 4 (2006), http://www.nclrights.org/wp-content/uploads/2013/07/bestpracticeslgbtyouth.pdf.

out-of-home care. More data about the experiences and needs of LGBTQ youth is needed, not less.

Having more longitudinal data will allow for a better for a better understanding of LGBTQ youth experiences in care and will inform evidence-based policies and practices. Collecting data from foster youth will help identify trends in types of placements, rates of disruption, and other key findings. Eliminating data collection on LGBTQ youth also eliminated the ability to measure efforts to reduce disparities and improve care and outcomes and places LGBTQ children at great risk.

The sexual orientation and gender identity and expression data elements of foster youth can be administered effectively, and agencies should provide training and resources to states and tribes to do so.

The NPRM justifies the erasure of sexual orientation data collection of LGBTQ youth upon an unsubstantiated conclusion—unsupported by empirical evidence—that the collected data would be inaccurate and that the data could lead to breaches of confidentiality because a case worker would be gathering the information.[7]

The child welfare profession has acknowledged the importance of collecting sexual orientation and gender identity and expression (SOGIE) 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 SOGIE information in child welfare systems.[8] The guidelines address the need to collect SOGIE 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 SOGIE information on youth without experiencing the speculative harms cited in the NPRM. Sexual orientation questions have been included on school-based surveys of adolescents for decades through versions of the current Youth Risk Behavior Surveillance Survey distributed by the Center for Disease Control, and sexual orientation and gender identity and expression (SOGIE) 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.[9] The regulations promulgated under the Prison Rape Elimination Act (PREA) require youth and adult correctional officers to collect SOGIE information as part of their initial screening process to identify inmates who may be vulnerable to sexual assault.[10] More and more state and local child welfare and juvenile justice agencies, as

---

[7] 45 C.F.R. § 1355 (2019) 16576

[8] 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.

[9] 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).

[10] National Standards to Prevent, Detect and Respond to Rape, 28 CFR § 115 (2012).

well has providers serving youth experiencing homelessness, have developed policies requiring the collection of SOGIE data.

In addition, child welfare agencies are comfortable and competent in collecting, holding and managing sensitive information. Case workers collect data about information that is highly personal, private and confidential, such as sexual abuse backgrounds, mental health diagnoses and medications. Sexual orientation and gender identity questions should not be handled any differently from the sort of sensitive information case workers have been collecting and managing for decades. Information in state and tribal systems, like all personal information, is protected by confidentiality requirements.

The child welfare profession has acknowledged the importance of collecting SOGIE information about children in order to tailor an individualized case plan. Indeed, the NPRM confirms that states agree that knowing this data about children and families they work with would help in assisting families, but falls back upon the position that there is no statutory requirement that it be reported to an administrative data set.[11] However, the law clearly does not prohibit the collection of this data and, in fact, Congress enacted statutes requiring the Children's Bureau to add data elements to AFCARS and agencies have an obligation that the national data set be comprehensive.[12]

Agencies Should Retain the Sexual Orientation Question for Adoptive and Foster Parents and Guardians

There is a chronic shortage of foster homes in the United States. Efforts to recruit and retain all qualified families—including LGBTQ families—should be a core part of an agency's recruitment strategy. The LGBTQ community continues to serve as an untapped resource for finding permanent families for children and youth in foster care, and obtaining key data on this population is an essential part of broadening the number of prospective families available for the large number of children seeking stable families.

Increasing numbers of LGBTQ adults are interested in and actively creating their families through foster care and adoption. A 2001 national survey found that almost two million LGBTQ adults expressed interest in adopting children.[13] According to a 2007 study, GLB foster parents are raising six percent of foster children in the United States.[14] A 2018 study from the Williams Institute found that same-sex couples are seven times more likely to be raising foster and adoptive children than different-sex couples.[15] Yet fear of discrimination causes many prospective LGBTQ parents to turn away from foster and adoption agencies. Many LGBTQ parents express uncertainty about their ability to find an agency that would welcome them as

---

[11] 16577

[12] *See* Fostering Connections to Success and Increasing Adoptions Act (public Law 110-351, 2008) and the Preventing Sex Trafficking and Strengthening Families Act (Public Law 113-183, 2014); See 42 U.S.C.A. § 679(d) of the Social Security Act.

[13] 45 C.F.R. § 1355 (2016), available at https://www.gpo.gov/fdsys/pkg/FR-2016-12-14/pdf/2016-29366.pdf

[14] https://www.urban.org/sites/default/files/publication/46401/411437-Adoption-and-Foster-Care-by-Lesbian-and-Gay-Parents-in-the-United-States.PDF

[15] Shoshana K. Goldberg & Kerith J. Conron, *How Many Same-Sex couples are Raising Children?*, WILLIAMS INST. (July 2018), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Parenting-Among-Same-Sex-Couples.pdf.

parents. And for good reason -- a 2011 national survey of 158 gay and lesbian adoptive parents, nearly half of respondents reported experiencing bias or discrimination from a child welfare worker or birth family member during the adoption process.[16]

Requiring sexual orientation data collection of foster and adoptive parents would encourage training that would lead LGBTQ parents to have more confidence that they would not be discriminated against and would lead to broader efforts to recruit and utilize LGBTQ families, ensuring a more thorough matching and placement process that would provide the greatest chance for success and permanency.

Almost 40 years of research has demonstrated that children raised by same-sex couples are as healthy and psychologically sound as children raised by heterosexual parents.[17] Tracking the data of these prospective parents will promote routine discussions between prospective foster parents and title IV-E agencies, normalize conversations about sexual orientation and signal increased acceptance of LGBTQ caregivers. A national data set capturing information about prospective LGBTQ parents would assist agencies in recruiting, training, and retaining an increased pool of foster care providers who can meet the needs of children in foster care.

In contrast, eliminating the collection of this data will eliminate the benefits both for same-sex couples seeking to foster or adopt and for children who are seeking permanent homes.

The Children's Bureau Should Add Gender Identity Questions for Foster Youth 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 recent 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."[18] Because of the particular challenges faced by

---

[16] David M. Brodzinsky & Evan B. Donaldson, *Expanding Resources for Children III: Research-Based Best Practice in Adoption by Gays and Lesbians*, EVAN B. DONALDSON ADOPTION INSTITUTE (2011), https://www.adoptioninstitute.org/wp-content/uploads/2013/12/2011_10_Expanding_Resources_BestPractices.pdf.

[17] *See* Alicia Crowl et al, *A Meta-Analysis of Developmental Outcomes for Children of Same-Sex and Heterosexual Parents*, JOURNAL OF GLBT FAMILY STUDIES (Jan. 9, 2007), *available at* https://www.tandfonline.com/doi/abs/10.1080/15504280802177615 ("extensive data available from more than 30 years of research reveal that children raised by gay and lesbian parents have demonstrated resilience with regard to social, psychological, and sexual health despite economic and legal disparities and social stigma."); Ellen C. Perrin, Benjamin S. Siegel, *Promoting the Well-Being of Children Whose Parents are Gay or Lesbian*, AMERICAN ACADEMY OF PEDIATRICS (Apr. 2013), *available at* https://pediatrics.aappublications.org/content/131/4/e1374. ("Analyses revealed statistically significant effect size differences between groups for one of the six outcomes: parent-child relationship. Results confirm previous studies in this current body of literature, suggesting that children raised by same-sex parents fare equally well to children raised by heterosexual parents.")

[18] Robinson, Brandon Andrew *"Child Welfare Systems and LGBTQ Youth Homelessness: Gender Segregation, Instability, and Intersectionality."* CHILD WELFARE 96(2), 47-74 (2018). 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)."

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).

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

When the Department of Health and Human Services released the proposed rule in 2016, the rule went through an extensive notice and comment period, during which, the burden of all data elements were discussed and addressed by scores of researchers, advocates, and child welfare and social service experts. The rule considered and dismissed the purported reasons given in the 2019 NRPM for eliminating this data. We recommend that the data elements in the Final Rule be retained and not further streamlined.

The 2016 Final Rule already 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. Reducing instability and achieving permanency for LGBTQ children through placement with affirming, supportive families and providing needed supportive services could also provide cost savings. A recent Center for American Progress estimate indicates that a child adopted from foster care costs the state only 25% per year as much as a child who remains in foster care, amounting to a $29,000 cost savings per year.[19]

Because AFCARS has not been updated since 1993, data elements added in the 2016 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). 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

[19] Frank J. Bewkes et al, *Welcoming All Families: Discrimination Against LGBTQ Foster and Adoptive Parents Hurts Children*, CENTER FOR AMERICAN PROGRESS (Nov. 20, 2018), https://www.americanprogress.org/issues/lgbt/reports/2018/11/20/461199/welcoming-all-families/.

implementing the recently passed Family First Prevention Services Act ("Family First," P.L 115-123).

Conclusion

For these reasons, we strongly oppose the elimination of the collection of sexual orientation information for youth and adults, and we urge ACF and HHS to add gender identity data points for foster youth, parents, and guardians. Without the data in the 2016 AFCARS Final Rule there is no national data on LGBTQ foster youth or prospective parents to measure and improve outcomes for LGBTQ foster youth and families. We welcome the opportunity to work with ACF to assist the implementation of these important reforms.

Sincerely,
Alana Jochum, Esq., Executive Director, Equality Ohio

As of: September 14, 2020
Received: June 18, 2019
Status: Posted
Posted: June 18, 2019
Tracking No. 1k3-9aju-od5m
Comments Due: June 18, 2019
Submission Type: E-mail

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0224
Adoption and Foster Care Analysis and Reporting System

Document: ACF-2018-0003-0316
National Indian Education Association

Submitter Information

Name: Robin Butterfield
Address:
Washington, DC,
Organization: National Indian Education Association

General Comment

See attached

Attachments

National Indian Education Association

NATIONAL INDIAN EDUCATION ASSOCIATION

June 18, 2019

Kathleen McHugh, Director,
Policy Division, Children's Bureau
Administration for Children and Families
U.S. Department of Health and Human Services
330 C St SW
Washington, DC 20201

Re: Proposed Changes to Indian Child Welfare Act (ICWA) Data Elements in the Adoption and Foster Care Analysis and Reporting System (AFCARS) – [Docket ID: ACF-2018-0003, RIN: 0970-AC72]

Dear Director McHugh:

On behalf of the National Indian Education Association (NIEA), I respectfully submit the following written comments in response to the Administration for Children and Families' (ACF) proposed changes to current data collection requirements related to Native children and the Indian Child Welfare Act (ICWA) in the Adoption and Foster Care Analysis and Reporting System (AFCARS).

NIEA is the nation's most inclusive organization advocating for improved educational opportunities for American Indians, Alaska Natives, and Native Hawaiians. Our mission centers on ensuring that Native students have access to a high-quality academic and cultural education, a goal that is only possible if ACF upholds the federal trust responsibility, a moral obligation towards tribes.

On April 19, 2019, ACF published a notice of proposed rulemaking (NPRM) which proposes to eliminate 90 percent of the AFCARS data elements relating to Native children in state child welfare systems and applicable requirements of ICWA. Following a rulemaking process in 2016, ACF has begun to implement a final rule that contained approximately 60 data elements related to ICWA. Though states are only now beginning to see the first results from this implementation process, ACF has proposed to retain only five of these data elements in the current NPRM. NIEA urges ACF to reconsider the elimination of these critical data elements, which support effective child welfare systems and implementation of federal statute.

Federal Trust Responsibility

Established through treaties, federal law, and U.S. Supreme Court decisions, ACF has a federal trust responsibility to provide parity in access to excellent education options to all American Indians and Alaska Natives, regardless of where they live or attend school. Federal services and programs that support strong, healthy students are critical to ensuring equity in education for Native children across the country. ACF and the U.S. Department of Health and Human Services have a unique responsibility to fulfill this federal trust relationship by ensuring access to services and programs that support strong, healthy students prepared to thrive in the classroom and beyond.

1514 P St NW, Suite B, Washington DC, US 20005
www.niea.org (202) 544-7290

Lack of Meaningful Tribal Consultation

NIEA is deeply concerned that tribal consultation has not occurred in accordance with ACF principles for working with federally-recognized tribes. In the 2016 final rule, these principles explicitly state that:

> *"ACF recognizes that the government-to-government relationship with Indian tribes merits regular, meaningful, and informed consultation with AI/AN tribal officials in the development of new or amended funding; amended funding formulas; and programmatic policies, regulations, and legislative actions initiated by ACF that affect or may affect tribes."*

By making the decision to eliminate 90 percent of data elements related to ICWA and Native students, ACF has failed to meet the threshold for "regular, meaningful, and informed consultation" with tribes. The current NPRM lists several meetings as consultation, but ACF did not inform tribes that these meetings would constitute consultation or specifically address the issues of concern to tribal leaders and representatives in attendance. In addition, both the advanced notice of proposed rulemaking and NPRM focused almost entirely on the perceived burden to states with little consideration given to the benefits of data collection for Native families. Such conduct does not meet the definition of meaningful or informed consultation and fails to uphold the ACF's federal trust responsibility to tribes.

Importance of Current ICWA Data Elements

Tribes, states, federal agencies, and legislators must have access to strong data systems to fully inform policies and programs that serve Native children and families. Though the current NPRM retains five data elements related to Native children, the 56 eliminated elements are critical to fulfilling statutory requirements under ICWA and understanding the unique issues that impact Native children in state welfare systems.

Under ICWA, ACF is charged with ensuring that states consult with tribes on state actions to comply with the law.[1] ICWA data elements from the 2016 rule remain critical to assessing state engagement with tribes to support ICWA implementation and opportunities for improvement. In addition, many ICWA data elements slated for elimination have the potential to support implementation of the Family First Prevention Services Act in tribal communities.

Since AFCARS is the only federal data system with the ability to capture data related to child placement, ACF is best positioned to collect critical data to support Native children and families in child welfare systems. Other federal agencies, including the Department of Interior and Bureau of Indian Affairs, do not have necessary state partnerships, databases, or resources to collect data on Native children in state foster care systems. Unfortunately, many states do not collect this data and local data remains scarce. Though ACF indicates that alternative research or surveys could fill this data collection void, such methodologies have historically produced unreliable and inconsistent data related to Native children and communities.

Due to these issues, tribes are forced to piece together bits of information from whatever sources are available to identify discrepancies in state ICWA caseloads or to identify practice issues that need

[1] 42 U.S.C.(b)(9).

improvement. The 2016 AFCARS data elements sought to address these challenges and provide a consistent set of data to address ICWA challenges and other child welfare issues.

Several of the 2016 ICWA data elements proposed for elimination provide important information that inform case planning and efforts to improve outcomes for Native children in child welfare systems. Much of this data, including the elements highlighted below, should be easily retrievable from any case file and have the potential to improve child welfare service delivery and implementation across the nation.

- **Date of court determination of ICWA application.** ACF has proposed to eliminate this element, which indicates significant differences state court and state IV-E agency confirmation of ICWA applications and provides insight into the impact of such differences on implementation of federal statute.

- **Transfer of jurisdiction.** ACF has proposed to eliminate data elements that provide critical information on the status and basis for denial of a transfer of jurisdiction, a decision that would obscure the reasoning and impact of transfers on service provision or case planning.

- **Foster care placement preferences**. Though proposed changes would identify whether a placement involves a relative or someone that is a member of a tribe, proposed data elements fail to provide information regarding whether a tribal placement preference was used that could be different than ICWA's, whether there was a good cause to deviate from the placement preferences, and the basis for good cause. In addition, proposed changes would not indicate whether a tribe approved of the placement if in a congregate care setting.

- **Adoptive placement preferences.** While the NPRM proposes to identify whether a placement involves a relative or someone that is a member of a tribe it does not provide information on whether a tribal placement preference was used that could be different than ICWA's, whether the good cause was found to deviate from the placement preferences, and the basis for good cause.

- **ICWA notice on foster care placement and termination of parental rights to tribes and parents.** ACF has proposed to only track whether notice was sent by the state IV-E agency, creating flaws by modifying the current data element. Such a proposal would not provide information on whether the notice was sent within ICWA's statutory timelines, or whether it was sent to both parents and the child's tribe. These notifications are critical to ensuring that parents and tribes have the ability to participate in case planning, placement decisions, and court proceedings. Analyzing data from the proposed data element could lead to erroneous conclusions regarding whether states met statutory requirements under ICWA. In addition, the modified notice data element also does not track if the notice was sent by the state court instead of the state IV-E agency.

Current ICWA Data Collection Requirements are Manageable for State IV-E Agencies

When negotiating current rules, ACF already weighed and addressed the data collection burden placed on states. In 2016, ACF concluded the burden placed on states was manageable and necessary due to the lack of basic data for Native children and the benefits for policy development, technical assistance and training, and programming.

In addition, ACF and state estimates of burden are based in part upon a misunderstanding of ICWA application. Only three of the ICWA data elements from the 2016 final rule would need to be asked of every child in state custody.

1) Was inquiry into whether the child is a member or eligible for membership within a federally-recognized tribe conducted?
2) Is the child a member or eligible for membership in a federally-recognized tribe and if so, which tribe(s)?
3) Does ICWA apply?

The questions above are necessary to determine if ICWA applies, while other data elements in the 2016 final rule would only be required if ICWA does apply. Only nine states have foster care placement rates where ICWA might apply to over 4 percent of the total state foster care population.

As states have begun integrating the 2016 Final Rule ICWA data elements, many have found the resulting data helpful in addressing ICWA implementation challenges, policy development, and program management effectively. NIEA urges ACF to maintain all of the current data requirements, which are critical to supporting our children through healthy child welfare systems and effective implementation of federal statute.

Conclusion

Data collection regarding Native children and ICWA implementation is critical to supporting healthy students that thrive in the classroom and beyond. NIEA urges ACF to reconsider the elimination of critical data elements that support children in tribal communities and to engage in "regular, meaningful, and informed consultation" with tribes on any future proposal to eliminate or modify such data. We look forward to working with ACF to ensure that the federal government is fulfilling its trust responsibility to tribes and their citizens.

For more information or inquiries, please contact Adrianne Elliott, NIEA Legislative Analyst, at *aelliott@niea.org*.

Sincerely,

Robin Butterfield
President

As of: September 14, 2020
Received: June 18, 2019
Status: Posted
Posted: June 18, 2019
Tracking No. 1k3-9aju-pxiu
Comments Due: June 18, 2019
Submission Type: E-mail

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0224
Adoption and Foster Care Analysis and Reporting System

Document: ACF-2018-0003-0317
Puyallup Tribe of Indians

Submitter Information

Name: Vanessa Ray-Hodge
Address:
Albuquerque, NM,
Organization: Puyallup Tribe of Indians
Government Agency Type: Tribal
Government Agency: Puyallup Tribe of Indians

General Comment

See attached

Attachments

Puyallup Tribe of Indians

LAW OFFICES
SONOSKY, CHAMBERS, SACHSE,
MIELKE & BROWNELL, LLP
500 MARQUETTE AVENUE, NW, SUITE 660
ALBUQUERQUE, NEW MEXICO 87102
TEL (505) 247-0147 | FAX (505) 843-6912
WWW.SONOSKY.COM

MARVIN J. SONOSKY (1909-1997)
REID PEYTON CHAMBERS
WILLIAM R. PERRY (RET.)
LLOYD BENTON MILLER
DOUGLAS B.L. ENDRESON
DONALD J. SIMON
MARY J. PAVEL
DAVID C. MIELKE*
GARY F. BROWNELL*
COLIN C. HAMPSON
RICHARD D. MONKMAN
MATTHEW S. JAFFE
WILLIAM F. STEPHENS
VANESSA RAY-HODGE*
FRANK S. HOLLEMAN
REBECCA A. PATTERSON
KENDRI M. M. CESAR
MATTHEW L. MURDOCK*
WHITNEY A. LEONARD
NATHANIEL AMDUR-CLARK
CHARLES J. KIDD

OF COUNSEL
HARRY R. SACHSE
ANNE D. NOTO
MYRA M. MUNSON
JAMES E. GLAZE
ARTHUR LAZARUS, JR.
KAY E. MAASSEN GOUWENS
ROGER W. DUBROCK

ANCHORAGE OFFICE
725 EAST FIREWEED LANE, SUITE 420
ANCHORAGE, ALASKA 99503
(907) 258-6377
FAX (907) 272-8332

JUNEAU OFFICE
302 GOLD STREET, SUITE 201
JUNEAU, ALASKA 99801
(907) 586-5880
FAX (907) 586-5883

SAN DIEGO OFFICE
145 WILLOW STREET, SUITE 200
BONITA, CALIFORNIA 91902
(619) 267-1306
FAX (619) 267-1388

WASHINGTON OFFICE
1425 K STREET, NW, SUITE 600
WASHINGTON, DC 20005
(202) 682-0240
FAX (202) 682-0249

*ADMITTED IN NEW MEXICO

June 18, 2019

VIA E-MAIL SUBMISSION
CBComments@acf.hhs.gov

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

Re: Children's Bureau; Administration on Children, Youth and Families; Administration for Children and Families; Notice of Proposed Rulemaking; Adoption and Foster Care Automated Reporting System 2016 Final Rule; RIN 0970-AC72.

Dear Ms. McHugh:

On behalf of the Puyallup Tribe of Indians ("Puyallup Tribe"), I am submitting these comments on the proposed rule changes regarding the final Adoption and Foster Care Automated Reporting System ("AFCARS") rule promulgated on December 14, 2016. 81 Fed. Reg. 90,524 (Dec. 14, 2016) ("Final Rule"). Most of the Final Rule became effective on January 17, 2017, but agencies were given two fiscal years to comply. *Id.* at 90,524 & 90,529. However, since April 2016 the Administration for Children and Families ("ACF") has sought not only to delay implementation of the Final Rule, but twice engaged (2017 and 2018) in the collection of public comments with the apparent goal of limiting the Final Rule's collection of certain data. Indeed, ACF now proposes to limit the collection of data that agencies must collect relating to compliance

with the Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901-1963. 84 Fed. Reg. 16572 (Apr. 19, 2019).

The Puyallup Tribe opposes the proposed changes to the ICWA-related data that were originally included in the Final Rule. Tribes, tribal organizations, and tribal advocates have long sought the inclusion of ICWA-related data points in the AFCARS because there is no other national method to track ICWA compliance, and there are few if any state systems. The Goals of the Families First Prevention Services Act and ICWA are parallel and support one another. And the ICWA data points in AFCARS were to be a significant step in the direction of improving child welfare practices for not only AI/AN children, but for all children. As noted in the NPRM, "states with higher numbers of tribal children in their care reported that they supported including limited information related to ICWA in AFCARS because they believe child welfare programs will be enhanced by having this information to inform policy decisions and program management." 84 Fed. Reg. 16574. Having data on ICWA would provide states with a valuable tool that would help to shift the system in the direction Families First intends — toward prevention, toward placement in a family setting and toward collaboration between all parties in the system.

The Puyallup Tribe is pleased that ACF is proposing to retain the 2016 AFCARS Final Rule data elements that ask whether the state inquired as to whether the child is Indian, the child and parent's tribal affiliation, and whether the state notified the tribe of court proceedings. However, ACF is proposing to eliminate most of the other data elements for Indian children from the 2016 Final Rule. Elimination of many of the ICWA data elements goes beyond streamlining and undermines tribes, states, and federal policymakers' ability to understand whether and how ICWA is being implemented nationwide and in individual states. This is because the only data elements being retained primarily go to whether ICWA applied in a case and if the tribe was notified. All the data elements that allow policymakers to determine whether ICWA was followed throughout a case when it did apply are being proposed for deletion. This will not aid in any quantitative understanding of how states are serving Indian children and families in a manner consistent with ICWA. As such, ACF will continue to be guessing at whether states are implementing ICWA properly.

It appears that ACF determined that the estimated increase in time and costs that it would take to report on ICWA outweighed retaining most of the ICWA-related data elements. *See id.* (200-25,000 hours to accomplish ICWA tasks due to an asserted need to modify policy, rules, case management systems and search, obtain and enter the information into records systems). ACF itself acknowledged that while states desired streamlining the AFCARS data, "they also expressed that the 2016 final rule was a considerable improvement to the current AFCARS, will improve data reporting, and provide national information on a number of new topics, including ICWA, health needs, and permanency. States recognized that more comprehensive data allows them to better understand the children and families they serve." 84 Fed. Reg. at 16573. The wholesale removal of most of the ICWA data elements contained in the Final Rule is not streamlining (or as ACF suggests even removing duplications), nor can it be reasonably justified as such.

Removing ICWA data elements merely because they may require additional time, training and reporting is not only arbitrary and capricious, but particularly concerning given that ICWA is a federal statute that all states must follow and implement. Thus, irrespective of whether states currently have rules, policies or systems to record ICWA related information, ICWA must be followed and adhered to in all cases involving an Indian child. It is also important to keep in mind that compliance with ICWA, which provides for minimum standards that are different than state law standards, will likely require additional time to investigate and/or meet. This is not a product of having AFCARS ICWA data elements, but meeting the statutory requirements of federal law. It is therefore difficult to understand how reporting on the substantive requirements of ICWA that apply throughout a case with an Indian child significantly adds to the burden posed on states. To the extent that states will have to modify or expand their electronic reporting systems, it also seems to be cost-effective to have states make these adjustments now when those systems must be adjusted or expanded anyway to account for the new data elements that the proposed rule seeks to retain.

Retaining more of the ICWA data elements in AFCARS can aid states in ensuring that steps are taken consistent with federal law where there may not otherwise be existing guidance. This includes the requirement under Title IV-B that requires states to consult with tribes on the implementation of ICWA, which ACF is responsible for providing oversight on. 42 U.S.C. § 622(b)(9). Moreover, at least 15 states have enacted their own statutes, regulations and rules governing state court proceedings incorporating the requirements of ICWA. At least 15 States have enacted statutes incorporating the requirements of ICWA (Alaska, California, Colorado, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, Montana, New Mexico, Oregon, Utah, Washington, and Wisconsin), and 5 of these also enacted detailed procedures for state agencies to collaborate with tribes (California, Illinois, Maine, New Mexico, and Washington). At least 20 more States specifically mention ICWA in their statutes (Alabama, Arizona, Delaware, Florida, Idaho, Kansas, Louisiana, Mississippi, Missouri, Nebraska, Nevada, New York, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Vermont, and Wyoming). So reporting in these states should be relatively easy.

The proposed rule also fails to recognize that in other states the increase in time and resources necessary to report on additional ICWA data elements will subside over time for at least two reasons. First, once systems are updated to reflect the new data elements and states become more familiar with the requirements, reporting time will be reduced. Second, in states where there is a low population of Indian children, those states will not have to spend much time answering the ICWA data elements beyond initially determining whether a child is an Indian child. For example, ACF mentioned that "four states reported that their out-of-home care populations were well under one percent (1%)." 84 Fed. Reg. at 16574. In those states the more detailed ICWA data elements will not be applicable. At the same time, however, it is important that ICWA is being applied in the limited instances where an Indian child is in out-of-home care in those states. To that end, more detailed AFCARS data regarding ICWA implementation will allow for a better understanding of when and how ICWA is being applied in states with low Indian children populations in out-of-home care (as well as states with high Indian children populations).

Indeed, ICWA was enacted because Congress found that "an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted of their children . . . and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions." 25 U.S.C. § 1901(4). Since ICWA's enactment over 40 years ago, our children have continued to be represented disproportionally in state foster and adoptive proceedings across the country. And our families still experience biased treatment in state child welfare systems. Without consistent and reliable data relating to ICWA's implementation it will be nearly impossible to address these serious problems.

To that end, all of ICWA data points included in the 2016 Final Rule should be retained. Moreover, we strongly encourage a review of the data points being revised, in order to ensure they do not inadvertently encourage non-compliance with ICWA, whereby the well-being of Indian children would be harmed. At a minimum, we strongly suggest that ACF add back the following streamlined ICWA data elements (rather than eliminating them in their entirety):

- Require reporting of the date the court determined ICWA applied.

- If the case involves an Indian child, ask whether a request to transfer the case to the tribal court was made (yes or no); and if so, was the request granted (yes or no). If the request was not granted, include a drop-down box with the following choices: (1) either parent objected (2) tribal court declined transfer (3) state court found good cause not to transfer; or (4) other choices not applicable.

- Add to the new foster care questions already being proposed, a question that applies to Indian children in foster care and whether ICWA's placement preferences were met (yes or no). If no, provide a follow-up question that provides the following choices (1) the court found good cause to deviate from the placement preferences; (2) followed tribe's placement preferences;[1] or (3) placement consistent with parent or Indian child preference.[2] If yes, provide a drop-down box that specifies which placement preference was applied.[3]

- Add to the new elements already being proposed that require reporting of whether termination of parental rights was voluntary or involuntary, a question that applies to

[1] *See* 25 U.S.C. § 1915(c).
[2] *Id*.
[3] ICWA's foster care placement preferences are as follows: (1) member of the Indian child's extended family; (2) a foster home licensed, approved or specified by the Indian child's tribe; (3) an Indian foster home licensed or approved by an authorized non-Indian authority; or (4) 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. 25 U.S.C. § 1915(b).

Indian children, which asks whether there was a court finding that active efforts were made prior to the involuntary termination of parental rights (yes or no).

- Add to the new adoptive placement questions already bring proposed, a question that applies to Indian children, which asks whether ICWA's adoptive placement preferences were met (yes and no). If no, provide a follow-up question that provides the following choices (1) the court found good cause to deviate from the placement preferences; (2) followed tribe's placement preferences;[4] or (3) placement consistent with parent or Indian child preference.[5] If yes, provide a drop-down box that specifies which preference was applied.[6]

- Ask whether, in involuntary proceedings, the required ICWA notices to the Indian tribe(s), parent(s) and/or Indian custodian was sent (yes or no).

The above-mentioned data elements are core minimum standards mandated by Congress to be applied in cases where ICWA applies. These are all quantitative data elements and should appear in any well-maintained case file. In fact, when ICWA applies, states regularly report on each of these issues to the court and court determinations are readily available and easy to include in a case file. These additional data elements shouldn't overly burden state child welfare systems. This is particularly true in the vast majority of states where Indian children do not make up a large percentage of children in out-of-home care. Because, as noted above, once it is established that a child is not an Indian child under ICWA, which is only one data element, no other data elements have to be completed.

Moreover, collecting ICWA-related data in AFCARS will accomplish the following:

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] *See* 25 U.S.C. § 1915(c).
[5] *Id*.
[6] ICWA's adoptive care placement preferences are as follows: (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

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.

In sum, the proposed rule should include additional ICWA data elements in order to close the gap on much needed data relating to national implementation and compliance with ICWA. Stronger information will lead to better practice, and ultimately greater compliance with this critical law. With this data, federal, state and tribal governments can better understand not only the number of Indian children in out-of-home care, but whether these children are receiving ICWA's 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.

Thank you.

Sincerely,

Vanessa L. Ray-Hodge

As of: September 14, 2020
Received: June 18, 2019
Status: Posted
Posted: June 18, 2019
Tracking No. 1k3-9aju-n3sk
Comments Due: June 18, 2019
Submission Type: E-mail

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0224
Adoption and Foster Care Analysis and Reporting System

Document: ACF-2018-0003-0318
Pokagon Band of Potawatomi Indians

Submitter Information

Name: Matthew Wesaw
Address:
Dowagic, MI,
Organization: Pokagon Band of Potawatomi Indians
Government Agency Type: Tribal
Government Agency: 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 18, 2019

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

Agency: Children's Bureau; Administration on Children, Youth and Families; Administration for Children and Families; Department of Health and Human Services

Action: **Adoption and Foster Care Analysis and Reporting System;** Notice of Proposed Rulemaking (4/19/19)

To whom it may concern:

The Pokagon Band of Potawatomi Indians ("Pokagon Band") submits this letter in response to the notice of proposed rulemaking ("NPRM") published April 19, 2019 (Federal Register Vol. 84, No 76) 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"). In doing so, the Pokagon Band incorporates the comments previously submitted in May 2016 and June 2018. For reasons discussed more fully in this letter, the Pokagon Band once again urges maintenance of all the ICWA data points in the AFCARS December 2016 Final Rule ("2016 Final Rule") and urges some modification of data points as explained in this letter.

Response to the NPRM: Collection of data as required in the 2016 Final Rule enhances accountability in the application of ICWA, which enhances safety of Indian children.

Despite nearly three years since the issuance of the 2016 Final Rule and over forty years since the passage of ICWA, there is no national method to track ICWA compliance. In the small sample that makes up cases involving Pokagon Band children, it is frustrating

to note the inconsistency in the application (and sometimes lack of awareness of) ICWA. Inconsistent compliance ranges from strict adherence to ignorance of ICWA. In those instances where ICWA awareness is lacking, children and their parents do not receive the full protection of the law as Congress intended forty years ago.

Nationally, nothing has changed since United States Department of Health and Human Services, Administration for Children and Families made clear that data collection is necessary to protect Indian children, families and their tribes. There remains a pressing need for comprehensive national data on ICWA implementation. Congress has not amended ICWA's data collection provisions. And there have been no changes in circumstances that would alter the burdens or benefits of the 2016 Final Rule's data collection requirements.

Congress enacted the Families First Prevention Services Act ("Families First Act") which is a new Title IV-E prevention services program. Elements of the Families First Act align with the intent of ICWA to prevent the break up of families. And when prevention has not been successful, the Families First Act ensures children are placed with their families—similar to the placement preferences found in ICWA at 25 USC § 1915. Forty years after the passage of ICWA, the Families First Act also recognizes congregate care as a placement of last resort for all children. Complete data on ICWA compliance will provide States with a valuable tool to shift the system in the direction Families First Act intends, toward prevention, toward placement in a family setting, and toward collaboration between all parties in the system.

Importantly, the 2016 Final Rule was intended to identify more effective ways for Tribes, States, and the federal government to work together to advance the well-being of Indian children and families. This again is directly in line with the Families First Act, where it includes as a goal, "a strong, healthy child welfare workforce to achieve better outcomes."

To that end, all ICWA data points included in the 2016 Final Rule should be retained. The Pokagon Band strongly encourage a review of the data points, to ensure they do not inadvertently encourage non-compliance with ICWA, whereby the well-being of Indian children would be harmed.

Comments regarding time and costs expended in collecting data.

The NPRM also requests comments requesting costs and time burdens associated with collection of ICWA data. The Pokagon Band is not a Title IV-E agency, but as a government with a fiduciary obligation to Pokagon Band citizens, the Pokagon Band has the same obligation of any government to avoid wasting time and money. Given the benefits of complete ICWA data collection in balance with the lack of compliance with the ICWA, the Pokagon Band supports inclusion of all the AFCARS ICWA data points in the 2016 Final Rule and considers the time and money in collecting such data well spent.

The time and money spent collecting the data enhances the ability of States and tribes to work together to for all children. Most of the data points, and especially those discussed in this letter, expand on data already collected with a "yes" or "no" response. The data points do not require additional research or interviews but are largely found in the information already in a case involving an Indian child. And, in those cases where inquiry is made and the child is not an Indian child, there is no additional burden or cost. The data contemplated by the 2016 Final Rule not only enables more accurate reporting and accountability, but allows Tribal governments the opportunity to partner with States to encourage and enhance compliance with ICWA.

Comments as to Specific Data Points.

The NPRM seeks to modify or eliminate a significant number of the ICWA data points found in the 2016 Final Rule. The Pokagon Band joins other tribes and tribal organizations in suggesting additional data points or clarification of data points.

Notice: The NRPM includes a data element that would capture whether notice has been sent to a child's tribe, but there is no way to determine the timing of the notice. The Pokagon Band recommend also including a data element to capture the date of the notice to the Tribe (as found on the return receipt), as well as the date the petition was filed. These dates are easily located and provide important additional information regarding whether notice was timely.

Timely notice allows the child's Tribe to become involved as early as possible. Early involvement by the child's Tribe can be critical to enabling a court to apply the ICWA for issues such as assessing active efforts, relative placements or placements consistent with the placement preferences. When reunification is not possible, timely participation of the child's Tribe enhances permanence for a child.

Placement: The proposed data elements allow tracking of the child's placement in keeping with the preferred placement required by ICWA. Data points exist regarding whether a child is placed with a relative. The NPRM proposes to also collect data on whether a child is placed with a tribal member. The Pokagon Band suggest adding two additional data elements:

1. If the child is not placed with either a relative or a tribal member, was a good cause finding made to deviate from ICWA's placement preferences? (yes or no)
2. If yes, what was the basis of the good cause finding? (drop down list from the 2016 ICWA regulations)

This information will provide a more complete picture of what is occurring regarding placement and is consistent with the goal of the Families First Act to place children in a family-like setting. In the experience of the Pokagon Band, placement issues are difficult

to address later in the life of a case. Requiring these two additional elements provides better information about the child's placement.

Transfer to Tribal Court: The 2016 Final Rule includes transfer to tribal courts in the context of a change of placement. As written, this data element is confusing. The Pokagon Band suggest the following set of questions be included:

1. Was a transfer to tribal court requested? (yes or no)
2. If so, was it granted? (yes or no)
3. If it was denied, what was the reason? (drop down list based on 2016 ICWA regulations).

This data will enhance understanding regarding transfers to tribal court. There is no other mandatory mechanism for this data to be collected. The Court Improvement Program data would be voluntary, not mandatory.

Conclusion.

Pokagon Band children are found across the United States. As a tribal government with the responsibility to all citizens regardless of age and location, the collection of all the data elements in the 2016 Final Rule will enhance well-being of our children and this tribal government. In turn, the Pokagon Band can work closely with States and agencies to ensure the Pokagon Band are strong partners in protecting all children. Forty years is a very long time for a statute to be in place without verifiable means to measure compliance. In the interest of increasing compliance, and ultimately in protecting our children and families, the Pokagon Band respectfully submit these comments.

Respectfully,

Pokagon Band of Potawatomi Indians

Matthew Wesaw
Tribal Council Chairman

As of: September 14, 2020
Received: June 18, 2019
Status: Posted
Posted: June 18, 2019
Tracking No. 1k3-9aju-z43d
Comments Due: June 18, 2019
Submission Type: E-mail

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0224
Adoption and Foster Care Analysis and Reporting System

Document: ACF-2018-0003-0319
Yurok Tribe

Submitter Information

Name: Joseph James
Address:
Klamath, CA,
Organization: Yurok Tribe
Government Agency Type: Tribal
Government Agency: Yurok Tribe

General Comment

See attached

Attachments

Yurok Tribe

YUROK TRIBE
190 Klamath Boulevard • Post Office Box 1027

Sent via first class mail and email

June 17, 2019

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

Agency: Children's Bureau; Administration on Children, Youth and Families; Administration for Children and Families; Department of Health and Human Services

Action: **Adoption and Foster Care Analysis and Reporting System;** Notice of Proposed Rulemaking (4/19/19)

Dear Sir or Madam,

The Yurok submits these comments on the 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.

By way of background, tribes, tribal organizations, and tribal advocates have long sought the inclusion of ICWA-related data points in the AFCARS because there is no other national method to track ICWA compliance, and there are few if any state systems. The initial rules were changed due to comments made by these entities and others after reviewing the Administration of Children and Families' (ACF) February 9, 2015 proposed rule. On April 2, 2015 the Agency issued a Supplemental Notice of Proposed Rulemaking (SNPRM) changing certain data elements. 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, and included the ICWA data elements. The current NPRM seeks to modify or eliminate a significant number of the ICWA data points found in the 2016 Final Rule.

General Comments:

The Goals of the Families First Prevention Services Act and ICWA are Parallel and Support One Another.

As the current NPRM reminds us, there is a new Title IV-E prevention services program, the Families First Prevention Services Act. The 2019 Title IV-B Program Instructions state, "[c]reating a system that sees the prevention of child abuse and neglect as the goal of child welfare changes the current

system toward working with families sooner through upfront prevention efforts." (ACYF-CB-PI-19-4 (2019).) Those same Program Instructions "recognize that tribes have long embraced a vision for child welfare that focuses on strengthening families and native communities and that seeks to avoid the unnecessary removal of children from home." (ACYF-CB-PI-19-4 (2019).) Indeed, for over 40 years, the Indian Child Welfare Act has required active efforts be made to prevent the breakup of the Indian family, making it the "gold standard" of child welfare practice. (81 Fed Reg. 90527.) Additionally, placement under Families First aligns with the placement preferences of ICWA. The placement goal of Families First is to place children in family foster care, only utilizing congregate care as a last resort. ICWA's placement preferences have long taken this approach, again making it the "gold standard" of child welfare practice.

The ICWA data points in AFCARS were to be a significant step in the direction of improving child welfare practices for not only AI/AN children, but for all children. As noted in the NPRM, "states with higher numbers of tribal children in their care reported that they supported including limited information related to ICWA in AFCARS because they believe child welfare programs will be enhanced by having this information to inform policy decisions and program management." (84 Fed Reg. 16574.) In its comments to the April 2018 Advanced Notice of Proposed Rulemaking, the California Department of Social Services (the state with the largest Native American population) "unequivocally supported 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."

Having data on ICWA would provide States with a valuable tool that would help to shift the system in the direction Families First intends, toward prevention, toward placement in a family setting and toward collaboration between all parties in the system.

Importantly, the 2016 Final Rule was intended to identify more effective ways for tribes, States and the federal government to work together to advance the well-being of Indian children and families. This again is directly in line with Families First, where it includes as a goal, "a strong, healthy child welfare workforce to achieve better outcomes."

To that end, all of ICWA data points included in the 2016 Final Rule should be retained. Moreover, we strongly encourage a review of the data points being revised, in order to ensure they do not inadvertently encourage non-compliance with ICWA, whereby the well-being of Indian children would be harmed.

The NPRM's One-Sided Focus on Compliance Costs is Arbitrary and Capricious

This NPRM relies on information obtained through the April 2019 ANPRM which sought information only on burdens, making a reasoned cost-benefit analysis impossible.

As required by law, the 2016 Final Rule conducted a careful analysis of the benefits and burdens, and appropriately amended the proposed rule streamline compliance costs. 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. Executive Order 13,777 is not a sufficient basis for the Agency to reverse course. Further, Families First legislation does not amend ICWA, and so does not operate as a sufficient rationale to modify ICWA data points.

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 (HHS) to 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.

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 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.

States are already in the process of implementing these changes.

Since these regulations have been effective for over two years, 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 largest population of American Indian/Alaska Native residents, is already well under way with its implementation efforts, having relied on the Final Rule. At this stage, the proposed modification of the data collection requirements would be a waste of finite state child welfare resources, which itself is an additional burden.

The primary challenge faced by States in their implementation of ICWA data elements is the failure of ACF to provide the required data map. Through this failure, the current administration effectively blocked their implementation, seemingly pending the current streamlining action.

The NPRM "commend[s] the willingness of states to collect a more comprehensive array of information." (84 Fed Reg. 16575.) However, in the absence of a national data reporting requirement, it is guaranteed there will be variability with data elements, frustrating Section 479's mandate to create a "national," "comprehensive," and "uniform" data collection system. 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.

Further, modification to the existing data points requires states to start over on collaborations with their tribal partners and further delays 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.

These regulations are important to us, to our families, and also to 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 that data collection is necessary to protect Indian children, 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 expected data

elements. Tribes which 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) will see more of their limited resources wasted.

Specific Comments Regarding Data Elements.

While we strongly encourage retaining **all** of ICWA-related data elements of the 2016 Final Rule, we provide these specific comments to identify concerns regarding the suggested data elements and to offer methods of increasing the utility of streamlined data points.

Notice: We suggest adding the following additional data elements:

The NRPM includes a data element that would capture whether notice has been sent to a child's tribe. We recommend also including a data element that would capture the date of the notice (as found on the return receipt), as well as the date the petition was filed. These dates are easily located and are not qualitative or too detailed in nature, but do provide important additional information regarding whether notice was timely.

Placement: We suggest adding the following additional data elements:

Data points exist regarding whether a child is placed with a relative. The NPRM proposes to also collect data on whether a child is placed with a tribal member. We suggest adding these two additional data elements:

1. If the child is not placed with either a relative or a tribal member, was a good cause finding made to deviate from ICWA's placement preferences? (yes or no)
2. If yes, what was the basis of the good cause finding? (drop down list from the 2016 ICWA regulations)

This information will provide a more complete picture of what is occurring regarding placement and is consistent with the goal of Families First to place children in a family-like setting.

Transfer to Tribal Court: We suggest modifying this data element as proposed.

As written, this data element is confusing. We suggest the following set of questions:

1. Was a transfer to tribal court requested? (yes or no)
2. If so, was it granted? (yes or no)
3. If it was denied, what was the reason? (drop down menu based on 2016 ICWA regulations).

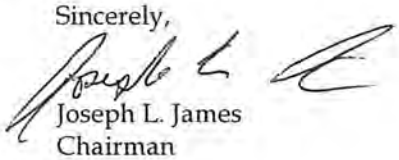
This data will enhance understanding regarding transfers to tribal court. There is no other mandatory mechanism for this data to be collected. The Court Improvement Program data would be voluntary, not mandatory.

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 far outweigh the burden.

In closing, the ICWA 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 will significantly impact tribal children and families, as well as county agencies

trying to better follow the law. In the interest of increasing compliance with the ICWA, and ultimately in protecting our children and families, we respectfully submit these comments.

Sincerely,



Joseph L. James
Chairman

As of: September 14, 2020
Received: June 18, 2019
Status: Posted
Posted: June 18, 2019
Tracking No. 1k3-9aju-p9r3
Comments Due: June 18, 2019
Submission Type: E-mail

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0224
Adoption and Foster Care Analysis and Reporting System

Document: ACF-2018-0003-0320
Confederated Salish and Kootenai Tribes

Submitter Information

Name: Ronald Trahan
Address:
Pablo, MT,
Organization: Confederated Salish and Kootenai Tribes
Government Agency Type: Tribal
Government Agency: Confederated Salish and Kootenai Tribes

General Comment

See attached

Attachments

Confederated Salish and Kootenai Tribes

THE CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE FLATHEAD NATION
P.O. BOX 278
Pablo, Montana 59855
(406) 275-2700
FAX (406) 275-2806
www.cskt.org

A Confederation of the Salish,
Pend d' Oreille
and Kootenai Tribes

A People of Vision

June 18, 2019

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: Email: CBComments@acf.hhs.gov.

Re: RIN number 0970-AC72. Notice of Proposed Rulemaking (NPRM) on the Adoption and Foster Care Analysis and Reporting System (AFCARS), published in the Federal Register on April 19, 2019 (85 FR 16572)

Dear Ms. McHugh:

The Confederated Salish and Kootenai Tribes (Tribes) submit these comments regarding the Administration for Children and Families (ACF), U.S. Department of Health and Human Services Notice of Proposed Rulemaking (NPRM) on the Adoption and Foster Care Analysis and Reporting System (AFCARS), proposed revisions to eliminate the AFCARS data elements that were finalized in the AFCARS final rule published on December 14, 2016 (81 FR 90524), under the Notice of Proposed Rulemaking published and proposed Rule by the Children and Families Administration published in the Federal Register on April 19, 2019 (85 FR 16572).

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. We oppose any streamlining, modification, or elimination of these critical AFCARS data elements for AI/AN children.

It has been almost 40 years since the enactment of ICWA. In enacting the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§1901 et. seq., Congress found that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children. ..." Congress also determined that states "...often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families. The intent of Congress under ICWA was to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families" (25 U.S.C. § 1902). The constitutionality of the ICWA was strongly upheld by the U.S. Supreme Court in Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989).

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.

The AFCARS data elements for AI/AN children in the 2016 Final Rule have incredible potential to improve outcomes for tribes continued existence and ensure ICWA compliance, but only if the data elements are not heavily modified or eliminated. The experience of having little to no data collected for AI/AN children through AFCARS over the last two decades has been a clear barrier to meaningful improvements in the safety and well-being for AI/AN children and could be argued as having contributed to worsening conditions for this population.

Quality data is helpful and only serves to help governments along with their workers effectively perform their roles and duties effectively and it falls within the statutory mission of the ACF's data collection responsibilities under Section 479(3). Collection of this information by states should not be looked at as a burden but it should be looked at as an asset of how to do the job better since 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.

We must move forward with this critically important data collection for AI/AN children and families and end the delays for not collecting all data instead of moving backwards and eliminate data elements that were found to be necessary to support and promote healing for our population in the 2016 Final Rule. We respectfully submit these comments and only look to preserve and protect our future generations and our continued existence.

Sincerely,

THE CONFEDERATED SALISH AND KOOTENAI TRIBES

Ronald Trahan, Chairman
Tribal Council

As of: September 14, 2020
Received: June 18, 2019
Status: Posted
Posted: June 18, 2019
Tracking No. 1k3-9aju-fa0m
Comments Due: June 18, 2019
Submission Type: E-mail

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0224
Adoption and Foster Care Analysis and Reporting System

Document: ACF-2018-0003-0321
Fond du Lac Band of Lake Superior Chippewa

Submitter Information

Name: Kevin Dupuis
Address:
Cloquet, MN,
Organization: Fond du Lac Band of Lake Superior Chippewa
Government Agency Type: Tribal
Government Agency: Fond du Lac Band of Lake Superior Chippewa

General Comment

See attached

Attachments

Fond du Lac Band of Lake Superior Chippewa

Fond du Lac Band of Lake Superior Chippewa

Reservation Business Committee

1720 Big Lake Rd.
Cloquet, MN 55720
Phone (218) 879-4593
Fax (218) 879-4146

June 18, 2019

VIA E-MAIL SUBMISSION
CBComments@acf.hhs.gov

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

Re: Children's Bureau; Administration on Children, Youth and Families; Administration for Children and Families; Notice of Proposed Rulemaking; Adoption and Foster Care Automated Reporting System 2016 Final Rule; RIN 0970-AC72.

Dear Ms. McHugh:

The Fond du Lac Band of Lake Superior ("Band") appreciates this opportunity to comment on the proposed rule changes regarding the final Adoption and Foster Care Automated Reporting System ("AFCARS") rule promulgated on December 14, 2016. 81 Fed. Reg. 90,524 (Dec. 14, 2016) ("Final Rule"). Most of the Final Rule became effective on January 17, 2017, but agencies were given two fiscal years to comply. *Id.* at 90,524 & 90,529. However, since April 2016 the Administration for Children and Families ("ACF") has sought not only to delay implementation of the Final Rule, but twice engaged (2017 and 2018) in the collection of public comments with the apparent goal of limiting the Final Rule's collection of certain data. Indeed, ACF now proposes to limit the collection of data that agencies must collect relating to compliance with the Indian Child Welfare Act ("ICWA), 25 U.S.C. §§ 1901-1963. 84 Fed. Reg. 16572 (Apr. 19, 2019). As discussed below, the Band opposes the proposed changes to the ICWA-related data that were originally included in the Final Rule.

The Band is pleased that ACF is proposing to retain the 2016 AFCARS Final Rule data elements that ask whether the state inquired as to whether the child is Indian, the child and parent's tribal affiliation, and whether the state notified the tribe of court proceedings. However, ACF is proposing to eliminate most of the other data elements for Indian children from the 2016 Final Rule. Elimination of many of the ICWA data elements goes beyond streamlining and undermines tribes, states, and federal policymakers' ability to understand whether

> and how ICWA is being implemented nationwide and in individual states. This is because the only data elements being retained primarily go to whether ICWA applied in a case and if the tribe was notified. All the data elements that allow policymakers to determine whether ICWA was followed throughout a case when it did apply are being proposed for deletion. This will not aid in any quantitative understanding of how states are serving Indian children and families in a manner consistent with ICWA. As such, ACF will continue to be guessing at whether states are implementing ICWA properly.

It appears that ACF determined that the estimated increase in time and costs that it would take to report on ICWA outweighed retaining most of the ICWA related data elements. *See id.* (200-25,000 hours to accomplish ICWA tasks due to an asserted need to modify policy, rules, case management systems and search, obtain and enter the information into records systems). ACF itself acknowledged that while states desired streamlining the AFCARS data, "they also expressed that the 2016 final rule was a considerable improvement to the current AFCARS, will improve data reporting, and provide national information on a number of new topics, including ICWA, health needs, and permanency. States recognized that more comprehensive data allows them to better understand the children and families they serve." 84 Fed. Reg. at 16573. The wholesale removal of most of the ICWA data elements contained in the Final Rule is not streamlining (or as ACF suggests even removing duplications), nor can it be reasonably justified as such.

Removing ICWA data elements merely because they may require additional time, training and reporting is not only arbitrary and capricious, but particularly concerning given that ICWA is a federal statute that all states must follow and implement. Thus, irrespective of whether states currently have rules, policies or systems to record ICWA related information, ICWA must be followed and adhered to in all cases involving an Indian child. It is also important to keep in mind that compliance with ICWA, which provides for minimum standards that are different than state law standards, will likely require additional time to investigate and/or meet. This is not a product of having AFCARS ICWA data elements, but meeting the statutory requirements of federal law. It is therefore difficult to understand how reporting on the substantive requirements of ICWA that apply throughout a case with an Indian child significantly adds to the burden posed on states. To the extent that states will have to modify or expand their electronic reporting systems, it also seems to be cost-effective to have states make these adjustments now when those systems must be adjusted or expanded anyway to account for the new data elements that the proposed rule seeks to retain.

Retaining more of the ICWA data elements in AFCARS can aid states in ensuring that steps are taken consistent with federal law where there may not otherwise be existing guidance. This includes the requirement under Title IV-B that requires states to consult with tribes on the implementation of ICWA, which ACF is responsible for providing oversight on. 42 U.S.C. § 622(b)(9). Moreover, at least 15 states have enacted their own statutes, regulations and rules governing state court proceedings incorporating the requirements of ICWA. *See* Brief of *Amici*

States, *Brackeen v. Zinke*, Case No. 18-11479, at 3-4 (5th Cir. filed Jan. 14, 2019).[1] So reporting in these states should be relatively easily. The proposed rule also fails to recognize that in other states, the increase in time and resources necessary to report on additional ICWA data elements will subside over time for at least two reasons. First, once systems are updated to reflect the new data elements and states become more familiar with the requirements, reporting time will be reduced. Second, in states where there is a low population of Indian children, those states will not have to spend much time answering the ICWA data elements beyond initially determining whether a child is an Indian child. For example, ACF mentioned that "four states reported that their out-of-home care populations were well under one percent (1%)." 84 Fed. Reg. at 16574. In those states the more detailed ICWA data elements will not be applicable. At the same time, however, it is important that ICWA is being applied in the limited instances where an Indian child is in out-of-home care in those states. To that end, more detailed AFCARS data regarding ICWA implementation will allow for a better understanding of when and how ICWA is being applied in states with low Indian children populations in out-of-home care (as well as states with high Indian children populations).

Indeed, ICWA was enacted because Congress found that "an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted of their children . . . and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions." 25 U.S.C. § 1901(4). Since ICWA's enactment over 40 years ago, our children have continued to be represented disproportionally in state foster and adoptive proceedings across the country. And our families still experience biased treatment in state child welfare systems. Without consistent and reliable data relating to ICWA's implementation it will be nearly impossible to address these serious problems.

In addition to the data elements proposed to be retained, we strongly suggest that, at a minimum, you add back the following streamlined ICWA data elements (rather than eliminating them in their entirety):

- Require reporting of the date the court determined ICWA applied.

- If the case involves an Indian child, ask whether a request for transfer the case to the tribal court made (yes or no); and if so, was the request granted (yes or no). If the request was not granted, include a drop-down box with the following choices: (1) either parent objected (2) tribal court declined transfer (3) state court found good cause not to transfer; or (4) other choices not applicable.

- Add to the new foster care questions already being proposed, a question that applies to Indian children in foster care and whether ICWA's placement preferences were met (yes or no). If no, provide a follow-up question that provides the following choices (1) the court found good cause to deviate from the placement preferences; (2)

[1] Found at: https://turtletalk.files.wordpress.com/2019/01/stateamicusbrief.pdf.

followed tribe's placement preferences;[2] or (3) placement consistent with parent or Indian child preference.[3] If yes, provide a drop-down box that specifies which placement preference was applied.[4]

- Add to the new elements already being proposed that require reporting of whether termination of parental rights was voluntary or involuntary, a question that applies to Indian children, which asks whether there was a court finding that active efforts were made prior to the involuntary termination of parental rights (yes or no).

- Add to the new adoptive placement questions already bring proposed, a question that applies to Indian children, which asks whether ICWA's adoptive placement preferences were met (yes and no). If no, provide a follow-up question that provides the following choices (1) the court found good cause to deviate from the placement preferences; (2) followed tribe's placement preferences;[5] or (3) placement consistent with parent or Indian child preference.[6] If yes, provide a drop-down box that specifies which preference was applied.[7]

- Ask whether, in involuntary proceedings, the required ICWA notices to the Indian tribe(s), parent(s) and/or Indian custodian was sent within statutory timeline (yes or no).

The above-mentioned data elements are core minimum standards mandated by Congress to be applied in cases where ICWA applies. These are all quantitative data elements and should appear in any well-maintained case file. In fact, when ICWA applies, states regularly report on each of these issues to the court and court determinations are readily available and easy to include in a case file. These additional data elements shouldn't overly burden state child welfare systems. This is particularly true in the vast majority of states where Indian children do not make up a large percentage of children in out-of-home care. Because, as noted above, once it is established that a child is not an Indian child under ICWA, which is only one data element, no other data elements have to be completed.

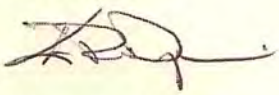
---

[2] *See* 25 U.S.C. § 1915(c).
[3] *Id.*
[4] ICWA's foster care placement preferences are as follows: (1) member of the Indian child's extended family; (2) a foster home licensed, approved or specified by the Indian child's tribe; (3) an Indian foster home licensed or approved by an authorized non-Indian authority; or (4) 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. 25 U.S.C. § 1915(b).
[5] *See* 25 U.S.C. § 1915(c).
[6] *Id.*
[7] ICWA's adoptive care placement preferences are as follows: (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

In sum, the proposed rule should include additional ICWA data elements in order to close the gap on much needed data relating to national implementation and compliance with ICWA. Stronger information will lead to better practice, and ultimately greater compliance with this critical law. With this data federal, state and tribal governments can better understand not only the number of Indian children in out-of-home care, but whether these children are receiving ICWA's 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.

Thank you.

Sincerely,



Kevin R. Dupuis
Chairman

As of: September 14, 2020
Received: June 18, 2019
Status: Posted
Posted: June 18, 2019
Tracking No. 1k3-9ajv-zwag
Comments Due: June 18, 2019
Submission Type: E-mail

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0224
Adoption and Foster Care Analysis and Reporting System

Document: ACF-2018-0003-0322
Leech Lake Band of OJibwe

Submitter Information

Name: Sarah Stahelin
Address:
Lake, MN,
Organization: Leech Lake Band of OJibwe
Government Agency Type: Tribal
Government Agency: Leech Lake Band of OJibwe

General Comment

See Attached

Attachments

Leech Lake Band of OJibwe

LEECH LAKE BAND OF OJIBWE
Legal Department

Grace Elliott, Legal Director
Shea Fleming, Paralegal
Gloria Wilson, Legal Secretary

Sarah Stahelin, Tribal Attorney
Ralph Overholt, Tribal Attorney
Tom Dahl, Paralegal
Nahtanha White Wing, Administrator

June 18, 2019

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

Agency: Children's Bureau; Administration on Children, Youth and Families; Administration for Children and Families; Department of Health and Human Services

Action: **Adoption and Foster Care Analysis and Reporting System;** Notice of Proposed Rulemaking (4/19/19)

Dear Sir or Madam,

The Leech Lake Band of Ojibwe submits these comments on the 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.

By way of background, tribes, tribal organizations, and tribal advocates have long sought the inclusion of ICWA-related data points in the AFCARS because there is no other national method to track ICWA compliance, and there are few if any state systems. The initial rules were changed due to comments made by these entities and others after reviewing the Administration of Children and Families' (ACF) February 9, 2015 proposed rule. On April 2, 2015 the Agency issued a Supplemental Notice of Proposed Rulemaking (SNPRM) changing

certain data elements. 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, and included the ICWA data elements. The current NPRM seeks to modify or eliminate a significant number of the ICWA data points found in the 2016 Final Rule.

General Comments:

The Goals of the Families First Prevention Services Act and ICWA are Parallel and Support One Another.

As the current NPRM reminds us, there is a new Title IV-E prevention services program, the Families First Prevention Services Act. The 2019 Title IV-B Program Instructions state, "[c]reating a system that sees the prevention of child abuse and neglect as the goal of child welfare changes the current system toward working with families sooner through upfront prevention efforts." (ACYF-CB-PI-19-4 (2019).) Those same Program Instructions "recognize that tribes have long embraced a vision for child welfare that focuses on strengthening families and native communities and that seeks to avoid the unnecessary removal of children from home." (ACYF-CB-PI-19-4 (2019).) Indeed, for over 40 years, the Indian Child Welfare Act has required active efforts be made to prevent the breakup of the Indian family, making it the "gold standard" of child welfare practice. (81 Fed Reg. 90527.) Additionally, placement under Families First aligns with the placement preferences of ICWA. The placement goal of Families First is to place children in family foster care, only utilizing congregate care as a last resort. ICWA's placement preferences have long taken this approach, again making it the "gold standard" of child welfare practice.

The ICWA data points in AFCARS were to be a significant step in the direction of improving child welfare practices for not only AI/AN children, but for all children. As noted in the NPRM, "states with higher numbers of tribal children in their care reported that they supported including limited information related to ICWA in AFCARS because they believe child welfare programs will be enhanced by having this information to inform policy decisions and program management." (84 Fed Reg. 16574.) In its comments to the April 2018 Advanced Notice of Proposed Rulemaking, the California Department of Social Services (the state with the largest Native American population) "unequivocally supported 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."

Having data on ICWA would provide States with a valuable tool that would help to shift the system in the direction Families First intends, toward prevention, toward placement in a family setting and toward collaboration between all parties in the system.

Importantly, the 2016 Final Rule was intended to identify more effective ways for tribes, States and the federal government to work together to advance the well-being of Indian children and families. This again is directly in line with Families First, where it includes as a goal, "a strong, healthy child welfare workforce to achieve better outcomes."

To that end, all of ICWA data points included in the 2016 Final Rule should be retained. Moreover, we strongly encourage a review of the data points being revised, in order to ensure they do not inadvertently encourage non-compliance with ICWA, whereby the well-being of Indian children would be harmed.

The NPRM's One-Sided Focus on Compliance Costs is Arbitrary and Capricious

This NPRM relies on information obtained through the April 2019 ANPRM which sought information only on burdens, making a reasoned cost-benefit analysis.

As required by law, the 2016 Final Rule conducted a careful analysis of the benefits and burdens, and appropriately amended the proposed rule streamline compliance costs. 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. Executive Order 13,777 is not a sufficient basis for the Agency to reverse course. Further, Families First legislation does not amend ICWA, and so does not operate as a sufficient rationale to modify ICWA data points.

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 (HHS) to 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.

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 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.

States are already in the process of implementing these changes.

Since these regulations have been effective for over two years, 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 largest population of American Indian/Alaska Native residents, is already well under way with its implementation efforts, having relied on the Final Rule. At this stage, the proposed modification of the data collection requirements would be a waste of finite state child welfare resources, which itself is an additional burden.

The primary challenge faced by States in their implementation of ICWA data elements is the failure of ACF to provide the required data map. Through this failure, the current administration effectively blocked their implementation, seemingly pending the current streamlining action.

The NPRM "commend[s] the willingness of states to collect a more comprehensive array of information." (84 Fed Reg. 16575.) However, in the absence of a national data reporting requirement, it is guaranteed there will be variability with data elements, frustrating Section 479's mandate to create a "national," "comprehensive," and "uniform" data collection system. 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.

Further, modification to the existing data points requires states to start over on collaborations with their tribal partners and further delays 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.

These regulations are important to us, to our families, and also to 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 that data collection is necessary to protect Indian children, 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 expected data elements. Tribes which 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) will see more of their limited resources wasted.

Specific Comments Regarding Data Elements.

While we strongly encourage retaining **all** of ICWA-related data elements of the 2016 Final Rule, we provide these specific comments to identify concerns regarding the suggested data elements and to offer methods of increasing the utility of streamlined data points.

Notice: We suggest adding the following additional data elements:

The NRPM includes a data element that would capture whether notice has been sent to a child's tribe. We recommend also including a data element that would capture the date of the notice (as found on the return receipt), as well as the date the petition was filed. These dates are easily located and are not qualitative or too detailed in nature, but do provide important additional information regarding whether notice was timely.

Placement: We suggest adding the following additional data elements:

Data points exist regarding whether a child is placed with a relative. The NPRM proposes to also collect data on whether a child is placed with a tribal member. We suggest adding these two additional data elements:

1. If the child is not placed with either a relative or a tribal member, was a good cause finding made to deviate from ICWA's placement preferences? (yes or no)
2. If yes, what was the basis of the good cause finding? (drop down list from the 2016 ICWA regulations)

This information will provide a more complete picture of what is occurring regarding placement and is consistent with the goal of Families First to place children in a family-like setting.

Transfer to Tribal Court: We suggest modifying this data element as proposed.

As written, this data element is confusing. We suggest the following set of questions:

1. Was a transfer to tribal court requested? (yes or no)
2. If so, was it granted? (yes or no)
3. If it was denied, what was the reason? (drop down menu based on 2016 ICWA regulations).

This data will enhance understanding regarding transfers to tribal court. There is no other mandatory mechanism for this data to be collected. The Court Improvement Program data would be voluntary, not mandatory.

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 far outweigh the burden.

In closing, the ICWA 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 will significantly impact tribal children and families, as well as county agencies trying to better follow the law. In the interest of increasing compliance with the ICWA, and ultimately in protecting our children and families, we respectfully submit these comments.

Sincerely,

Sarah Stahelin, Tribal Attorney
Leech Lake Band of Ojibwe

As of: September 14, 2020
Received: June 18, 2019
Status: Posted
Posted: June 18, 2019
Tracking No. 1k3-9ajv-pyku
Comments Due: June 18, 2019
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0224
Adoption and Foster Care Analysis and Reporting System

Document: ACF-2018-0003-0323
Nebraska Appleseed Center for Law in the Public Interest

Submitter Information

Name: Becca Brune
Address:
Lincoln, NE,
Organization: Nebraska Appleseed Center for Law in the Public Interest

General Comment

See attached file(s)

Attachments

Nebraska Appleseed Center for Law in the Public Interest

NEBRASKA APPLESEED
STAND UP FOR JUSTICE

June 18, 2019

Kathleen McHugh
U.S. Department of Health and Human Services
Administration for Children and Families
Director, Policy Division
330 C Street S.W.
Washington, D.C. 20024
cbcomments@acf.hhs.gov

Re: Proposed Rulemaking amending the Adoption and Foster Care Analysis and Reporting System (AFCARS) to remove questions and data collection relating to sexual orientation, the Indian Child Welfare Act and Transition Planning

Dear Ms. McHugh,

Nebraska Appleseed Center for Law in the Public Interest is a non-profit, non-partisan law and policy organization that works for equal justice and full opportunity for all. We work closely with our state child welfare agency as well as youth, families, and native partners to support Nebraska families and strengthen the child welfare system. We are writing in support of strong data collection through the Adoption and Foster Care Analysis and Reporting System and in opposition to the proposed elimination of questions related to sexual orientation, the Indian Child Welfare Act and transition planning

Data collection is an essential part of a functioning child welfare system. The important data collected through the Adoption and Foster Care Analysis and Reporting System allows state and tribal title IV-E agencies to ensure services meet the needs of diverse children and families who come into contact with the child welfare system. AFCARS also provides the opportunity for needed oversight and analysis of trends in state and tribal foster care systems. Data is an important tool in determining state and federal law and policy change. For these reasons, we are writing to oppose the elimination of data elements related to Lesbian, Gay, Bisexual, Transgender and Queer (LGBTQ) youth, Indian Child Welfare Act cases, and data related to transition planning.

LGBTQ Youth: Youth who identify as LGBTQ are overrepresented in the foster care system. They also face unique challenges and discrimination within the system. Because of this disproportionality and discrimation, the collection of LGBTQ data from foster youth and adoptive families is critical to help assess trends in the involvement and experiences of youth and families involved in the foster care system. The addition of gender identify question within AFCARS would help the system in responding to the needs of all youth involved in foster care. We urge AFCARS to collect both data on both gender identity and sexual orientation so more can be known about the expericnes of LGBTQ youth in the foster care system and steps taken to reduce disparities.

Indian Child Welfare Act Cases: The proposed changes to the collection of AFCARS data relating to Native children in state child welfare systems and the Indian Child Welfare Act will hinder the progress made in the last decades to address the disparities and disproportionality that exist in the system for Native youth. Nebraska has continued to rank very high for the overrepresentation of native youth in the state foster care system. Local data is needed so states and tribes can identify discrepancies in state ICWA caseloads or to identify practices issues that need improvement. Important data elements that are proposed to be eliminated including dates of court determination of ICWA application, transfer of jurisdiction, foster care and adoptive placement preferences, and notice of placement and termination of parental rights to tribes and parents are all necessary to inform case planning and to improve outcomes. We are also concerned for the burden that would be placed on the state IV-E agencies to become the collectors and managers of important ICWA data.

Transition Planning: Since the passage of the Foster Connections Act of 2008, transition planning has provided older foster youth with the support and services they need as they leave or age out of the system. Starting at age 14 young people in foster care are required to receive these transition services to work towards success in the areas where foster youth often struggle, such as school, employment and learning adult life skills. Still too often, transition planning requirements are left unaddressed. For these reasons, continued oversight through data collection is necessary to ensure transition age youth are receiving these required supportive services to prepare them for a successful adulthood.

For these reasons, we urge for the continued collection of important AFCARS data so states can continue meeting the needs of the diverse youth and families in foster care.

Sincerely,

NEBRASKA APPLESEED

Becca Brune
Program Associate, Child Welfare Program

As of: September 14, 2020
Received: June 18, 2019
Status: Posted
Posted: June 18, 2019
Tracking No. 1k3-9aju-hbu0
Comments Due: June 18, 2019
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0224
Adoption and Foster Care Analysis and Reporting System

Document: ACF-2018-0003-0324
Children's Rights

Submitter Information

Name: Sandy Santana
Address: 10005
Email: ssantana@childrensrights.org
Organization: Children's Rights

General Comment

See attached file(s)

June 18, 2019

Kathleen McHugh
U.S. Department of Health and Human Services, ACS
Director, Policy Division
330 C Street, S.W.
Washington, D.C. 20024
cbcomments@acf.hhs.gov

Dear Ms. McHugh:

This letter is in response to the Proposed Rulemaking amending the Adoption and Foster Care Analysis and Reporting System (AFCARS) to remove questions relating to sexual orientation (Apr. 19, 2019) [RIN 0970-AC72].

We are alarmed that the U.S. Department of Health and Human Services (HHS) has proposed eliminating the collection of data concerning LGBTQ youth in foster care and foster and adoptive parents and guardians. In doing so, HHS would fail in its duty to protect all children in state care. Many of these children have already been rejected by their families of origin; HHS must do everything in its power to provide them with safe and loving homes, including the recruitment of diverse and affirming foster families.

Since 1995, Childrens Rights has been advocating for children in broken child welfare, juvenile justice,

education, and healthcare systems. We have won landmark legal victories across the United States that hold governments accountable for keeping kids safe and healthy. We look to the federal government to provide comprehensive and accurate data on children in out-of-home systems to help address their needs.

As LGBTQ youth are overrepresented in the child welfare system, the collection of such data is critical in developing evidence-based policies and appropriate supportive services. Data collection will also raise awareness of any issues that uniquely affect LGBTQ youth.

We strongly urge you to retain the questions on sexual orientation for foster youth, parents, and guardians.

We are also concerned that discrimination against LGBTQ individuals and families in state law, policy, or regulations across the country could harm children. To ensure that collecting vital information be done safely, we request that the administration follow through on existing federal guidelines, which require states not to discriminate based on LGBTQ status if they accept federal IV-E dollars. In addition, we urge that the administration proactively require states to implement LGBTQ-affirming policies. Foster children, among the most vulnerable members of our communities, deserve nothing less.

Sincerely,

Sandy Santana
Executive Director, Childrens Rights

Attachments

Childrens Rights

CHILDREN'S RIGHTS
PROTECTING KIDS. PROVIDING HOPE.

June 18, 2019

Kathleen McHugh
U.S. Department of Health and Human Services, ACS
Director, Policy Division
330 C Street, S.W.
Washington, D.C. 20024
cbcomments@acf.hhs.gov

Dear Ms. McHugh:

This letter is in response to the Proposed Rulemaking amending the Adoption and Foster Care Analysis and Reporting System (AFCARS) to remove questions relating to sexual orientation (Apr. 19, 2019) [RIN 0970-AC72].

We are alarmed that the U.S. Department of Health and Human Services (HHS) has proposed eliminating the collection of data concerning LGBTQ youth in foster care and foster and adoptive parents and guardians. In doing so, HHS would fail in its duty to protect all children in state care. Many of these children have already been rejected by their families of origin; HHS must do everything in its power to provide them with safe and loving homes, including the recruitment of diverse and affirming foster families.

Since 1995, Children's Rights has been advocating for children in broken child welfare, juvenile justice, education, and healthcare systems. We have won landmark legal victories across the United States that hold governments accountable for keeping kids safe and healthy. We look to the federal government to provide comprehensive and accurate data on children in out-of-home systems to help address their needs.

As LGBTQ youth are overrepresented in the child welfare system, the collection of such data is critical in developing evidence-based policies and ~~comprehensive/critical/necessary/~~appropriate~~/adequate/~~supportive services ~~arrays that reflect the actual needs of children in state care~~. Data collection will also raise awareness of any issues that uniquely affect LGBTQ youth.

We strongly urge you to retain the questions on sexual orientation for foster youth, parents, and guardians.

We are also concerned that discrimination against LGBTQ individuals and families in state law, policy, or regulations across the country could harm children. To ensure that collecting vital ~~and critical~~ information be done safely, we request that the administration follow through on existing federal guidelines, which require states not to discriminate based on LGBTQ status if they accept federal IV-E dollars. In addition, we urge that the administration proactively require states to implement LGBTQ-affirming policies. Foster children, among the most vulnerable members of our communities, deserve nothing less.

Sincerely,

Sandy Santana

Executive Director, Children's Rights

As of: September 14, 2020
Received: June 18, 2019
Status: Posted
Posted: June 18, 2019
Tracking No. 1k3-9aju-rncj
Comments Due: June 18, 2019
Submission Type: API

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0224
Adoption and Foster Care Analysis and Reporting System

Document: ACF-2018-0003-0325
United Auburn Indian Community

Submitter Information

Name: Brian Guth
Address:
Auburn, CA, 95603
Email: bguth@auburnrancheria.com
Organization: United Auburn Indian Community
Government Agency Type: Tribal
Government Agency: United Auburn Indian Community

General Comment

Attached are the United Auburn Indian Communitys comments on the proposed rule to amend regulations regarding the Adoption and Foster Care Analysis and Reporting System for Title IV-B and Title IV-E as they relate to the Indian Child Welfare Act of 1978. UAIC respectfully requests that its comments be considered in the rulemaking process.

Attachments

United Auburn Indian Community

MIWOK
MAIDU

United Auburn Indian Community
of the Auburn Rancheria

Gene Whitehouse, Chairman
John L. Williams, Vice Chairman
Danny Rey, Secretary
Brenda Adams, Treasurer
Calvin Moman, Council Member

June 18, 2019

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

Agency: Children's Bureau; Administration on Children, Youth and Families; Administration for Children and Families; Department of Health and Human Services

Action: **Adoption and Foster Care Analysis and Reporting System;** Notice of Proposed Rulemaking (4/19/19)

Dear Ms. McHugh,

The United Auburn Indian Community, a federally recognized Indian tribe located in Auburn, California, submits these comments on the 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.

By way of background, tribes, tribal organizations, and tribal advocates have long sought the inclusion of ICWA-related data points in the AFCARS because **there is no other national method to track ICWA compliance, and there are few if any state systems that do so**. The initial rules were changed due to comments made by these entities and others after reviewing the Administration of Children and Families' (ACF) February 9, 2015 proposed rule. On April 2, 2015 the Agency issued a Supplemental Notice of Proposed Rulemaking (SNPRM) changing certain data elements. Another SNPRM was issued on April 7, 2016, seeking 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. It included the ICWA data elements. The current NPRM seeks to modify or eliminate a significant number of the ICWA data points found in the 2016 Final Rule. The United Auburn Indian

Community is opposed to these changes and requests that the comments below be considered before a final decision is made.

General Comments:

1. ***The Goals of the Families First Prevention Services Act and ICWA are Parallel and Support One Another.***

As the current NPRM reminds us, there is a new Title IV-E prevention services program, the Families First Prevention Services Act. The 2019 Title IV-B Program Instructions state, "[c]reating a system that sees the prevention of child abuse and neglect as the goal of child welfare changes the current system toward working with families sooner through upfront prevention efforts." (ACYF-CB-PI-19-4 (2019).) Those same Program Instructions "recognize that tribes have long embraced a vision for child welfare that focuses on strengthening families and native communities and that seeks to avoid the unnecessary removal of children from home." (ACYF-CB-PI-19-4 (2019).) Indeed, for over 40 years, the Indian Child Welfare Act has required that active efforts be made to prevent the breakup of the Indian family, making it the "gold standard" of child welfare practice. (81 Fed Reg. 90527.) Placement under the Families First Act aligns with ICWA's placement preferences. The Families First Act's placement goal is to place children in family foster care, only utilizing congregate care as a last resort. ICWA's placement preferences have long taken this approach, again making it the "gold standard" of child welfare practice.

The ICWA data points in AFCARS were to be a significant step in the direction of improving child welfare practices for not only American Indian/Alaska Native children, but for all children. As noted in the NPRM, "states with higher numbers of tribal children in their care reported that they supported including limited information related to ICWA in AFCARS because they believe child welfare programs will be enhanced by having this information to inform policy decisions and program management." (84 Fed Reg. 16574.) In its comments to the April 2018 Advanced Notice of Proposed Rulemaking, the California Department of Social Services (the state with the largest Native American population) "unequivocally supported 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."

Having data on ICWA would provide States with a valuable tool to shift the system in the direction the Families First Act intends, toward prevention, toward placement in a family setting, and toward increased collaboration between all parties in the system.

Importantly, the 2016 Final Rule was intended to identify more effective ways for tribes, States, and the federal government to work together to advance the well-being of Indian children and families. This again is directly in line with the Families First Act, which includes the goal of "a strong, healthy child welfare workforce to achieve better outcomes."

To that end, **all the ICWA data points included in the 2016 Final Rule should be retained**. Moreover, we strongly encourage a review of the data points being revised, in order to ensure they do not inadvertently encourage non-compliance with ICWA, thereby inadvertently harming Indian children.

2. *The NPRM's one-sided focus on compliance costs is arbitrary and capricious*

This NPRM relies on information obtained through the April 2019 ANPRM, which sought information only on burdens. The NPRM's changes are based only on compliance costs and not a reasoned cost-benefit analysis, which makes the decision to adopt the changes arbitrary and capricious.

As required by law, the 2016 Final Rule conducted a careful analysis of the benefits and burdens, and appropriately amended the proposed rule streamline compliance costs. 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. Executive Order 13,777 is not a sufficient basis for the Agency to reverse course. Further, the Families First Act does not amend ICWA, and so does not operate as a sufficient rationale to modify ICWA data points.

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

Section 479 of the Social Security Act requires the Department of Health and Human Services (HHS) to collect national, uniform, and reliable information on children in state care. The Final Rule's data collection requirements are consistent with this statutory mission.

Similarly, Section 474(f) of the Social Security Act requires HHS to impose penalties for non-compliant AFCARS data. Section 1102 of the Social Security Act instructs the Secretary to promulgate regulations necessary for the effective administration of the functions for which HHS is responsible under the Act. 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 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.

4. ***States are already in the process of implementing these changes.***

Since these regulations have been in effect for over two years, states should already be in the process of implementing them. We know that California, a state with 109 federally recognized tribes and the largest population of American Indian/Alaska Native residents, is already well under way with its implementation efforts, having relied on the Final Rule. For California, at least, the proposed modification of the data collection requirements would result in wasted state child welfare resources, which are finite. This burden is an additional basis not to adopt the proposed modifications.

The primary challenge faced by States in their implementation of ICWA data elements has been the ACF's failure to provide the required data map. Through this failure, the current administration effectively blocked implementation of the data elements, seemingly pending the current streamlining action.

The NPRM "commend[s] the willingness of states to collect a more comprehensive array of information." (84 Fed Reg. 16575.) However, in the absence of a national data reporting requirement, it is guaranteed there will be variability with data elements, frustrating Section 479's mandate to create a "national," "comprehensive," and "uniform" data collection system. 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.

Finally, modification to the existing data points requires states to start over on collaborations with their tribal partners and further delays 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.

5. ***These regulations are important to us, to our families, and also to 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 that data collection is necessary to protect Indian children, 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.

6. 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 expected data elements. Tribes that 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) will see more of their limited resources wasted.

Specific Comments Regarding Data Elements:

While we strongly encourage retaining **all** of the ICWA-related data elements from the 2016 Final Rule, we provide these specific comments to identify concerns regarding the suggested data elements and to offer methods of increasing the utility of streamlined data points.

Notice: We suggest adding the following additional data elements:

The NRPM includes a data element that would capture whether notice has been sent to a child's tribe. We recommend also including a data element that would capture the date of the notice (as found on the return receipt), as well as the date the petition was filed. These dates are easily located and are not qualitative or too detailed in nature, but do provide important additional information regarding whether notice was timely.

Placement: We suggest adding the following additional data elements:

Data points exist regarding whether a child is placed with a relative. The NPRM proposes to also collect data on whether a child is placed with a tribal member. We suggest adding these two additional data elements:

1. If the child is not placed with either a relative or a tribal member, was a good cause finding made to deviate from ICWA's placement preferences? (yes or no)

2. If yes, what was the basis of the good cause finding? (drop down list from the 2016 ICWA regulations)

This information will provide a more complete picture of what is occurring regarding placement and is consistent with the goal of the Families First Act to place children in a family-like setting.

Transfer to Tribal Court: We suggest modifying this data element as proposed.

As written, this data element is confusing. We suggest the following set of questions:

1. Was a transfer to tribal court requested? (yes or no)
2. If so, was it granted? (yes or no)
3. If it was denied, what was the reason? (drop down menu based on 2016 ICWA regulations).

This data will enhance understanding regarding transfers to tribal court. There is no other mandatory mechanism for this data to be collected. The Court Improvement Program data would be voluntary, not mandatory.

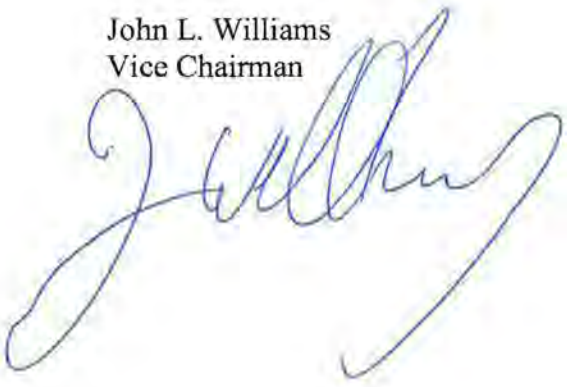
Conclusion:

For all of the reasons discussed above, 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 far outweigh the burden. The ICWA-related data points should be retained. We oppose any changes or modifications that would undo the progress made when the Final Rule was published by limiting or removing the obligation for states to collect ICWA-related data.

ICWA is widely considered the "gold standard" of child welfare, and a refinement of family reunification objectives mandated by nearly every state. Stopping ICWA data point collection will significantly impact tribal children and families, as well as county agencies trying to better follow the law. In the interest of increasing compliance with the ICWA, and ultimately in protecting our children and families, we respectfully submit these comments.

Sincerely,

John L. Williams
Vice Chairman



As of: September 14, 2020
Received: June 18, 2019
Status: Posted
Posted: June 18, 2019
Tracking No. 1k3-9ajv-lhjx
Comments Due: June 18, 2019
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0224
Adoption and Foster Care Analysis and Reporting System

Document: ACF-2018-0003-0326
South Dakota Division of Child Protection Services

Submitter Information

Name: Tonia Bogue
Address:
Pierre, SD,
Organization: South Dakota Division of Child Protection Services
Government Agency Type: State
Government Agency: South Dakota Division of Child Protection Services

General Comment

The South Dakota Division of Child Protection Services respectfully submits the attached comments regarding the revisions to the AFCARS elements.

Attachments

South Dakota Division of Child Protection Services

DEPARTMENT OF SOCIAL SERVICES
OFFICE OF THE SECRETARY
700 GOVERNORS DRIVE
PIERRE, SD 57501-2291
PHONE: 605-773-3165
FAX: 605-773-4855
WEB: dss.sd.gov

DSS
Strong Families - South Dakota's Foundation and Our Future

June 18, 2019

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

The State of South Dakota respectfully submits comments in response to the ANPRM published April 19, 2019 regarding the additions and changes to AFCARS data elements included in the Final Rule dated December 14, 2016 (NPRM RIN 0970-AC72). The South Dakota Division of Child Protection Services (SD-CPS) believes these changes would still require a significant investment of not only staff resources, but also funding associated with staff to implement the proposed changes.

SD-CPS supports the reduction to 183 distinct elements. Specifically, SD-CPS agrees with the simplification of these data elements: "related to health assessments, child financial and medical assistance, child's relationship to foster/adoptive parents and legal guardians, and inter-jurisdictional adoptive/guardianship placements to keep only essential information as identified by ANPRM commenters on children in out-of-home care and who exit to adoption or legal guardianship."

SD-CPS agrees with removing the elements related to sexual orientation for children or youth in foster care as well as foster and adoptive parent for many of the same reasons stated in the ANPRM. Specifically, the reasons "responses about sexual orientation, especially with adolescents, are private, anonymous, and confidential, it is clear that AFCARS is not the appropriate vehicle to collect this information" and "impossible to ensure that a child's response to a question on sexual orientation would be kept private, anonymous, or confidential considering a caseworker would be gathering this information to enter into a child's case electronic record."

SD-CPS can add family conflict related to the child's sexual orientation, gender identity, or gender expression to the list of *Child and family circumstances at removal* and report this data element.

SD-CPS supports the simplification of many of the ICWA elements. Specifically, SD-CPS appreciates the simplification of the elements related to reporting whether inquiries were made as to whether the child is an Indian child and removing the list of specific people/entities. There still needs to be a more focused approach regarding who should report the data, as outcomes in child welfare are the responsibility of many systems, not

just child welfare agencies. The ICWA-related data elements are based on the Department of Interior regulations, not the Department of Health and Human Services, and many are the responsibility of the courts. For example, data elements related to court findings such as if ICWA applies to the case and whether the Indian child's parent or Indian custodian and the child's tribe were sent legal notice 10 days prior to the first child custody proceeding. However, the burden of capturing this data is placed on state child welfare agencies to serve as agents of the courts by reporting on court activities. In addition to the burden of collection and entering these data elements; if the courts do not accurately apply ICWA to these cases, the penalties for non-compliant data will fall on the state child welfare agency, not the courts. States will be penalized funding from the Department of Health and Human Services for failing to report or accurately report Department of Interior data.

While SD-CPS appreciates the review and the simplification and/or reduction of the number of elements, this still represents a burden for states both in technology costs to develop fields and staff time to document the additional data elements. The data entry required for the elements would divert time away from direct casework and potentially cause delays in timely permanency for children and affect other critical services for children to ensure their safety and well-being. The ability of staff, who are already finding it difficult to meet the demands of their job, to collect and enter the new AFCARS data elements, will impact the reliability and consistency of the reporting, thereby increasing the likelihood for non-compliant data resulting in potential financial penalties. There needs to be a better balance between the "need to know" versus the "want to know". What research or analysis has been done to support or verify the information being proposed will truly impact outcomes for children and families? Or enhances states' work with children and families?

SD-CPS believes the time estimate related to data entry by staff is low. SD-CPS estimates the time required by staff to compile and enter the required data elements would be closer to 15 hours per year per child: 12 hours for direct staff and an extra 3 hours for supervisors. This would not only require additional time for data entry, but also additional time for ensuring data is current due to such things as placement moves or changes in permanency goals. Supervisors would need to devote additional time to ensuring data entry in the database matches court reports and other items and ensuring timely data entry further limiting their time to provide clinical supervision to front line staff.

SD-CPS averages 1,242 Native American children in foster care each year. Using this average; the number of extra hours devoted to compiling and entering data supervisory oversight would be 1,1923 hours for workers and 2,980 for supervisors, totaling additional work hours of 14,903 per year. The average salary for a Family Services Specialist is $19.73 per hour and the average salary for a Family Services Specialist Supervisor is $25.49 per hour. The estimated cost on an ongoing basis for Family Services Specialist would be $235,240.79 (1,923 x $19.73) and $75,960.20 (2980 x $25.49) for a Family Services Specialist Supervisor at a total cost of $311,200.99.

Based on previous projects, the SD-CPS estimates 2,000 hours of technical staff time devoted to research, workgroup participation, development and testing of revised screens and/or new screens and mapping of new AFCARS elements to the screens. Cost to SD-CPS for technical time is $71.00 per hour for a total estimated cost of $142,000.00 (2,000 X $71.00) for development and implementation of CCWIS and AFCARS changes. Based on previous projects, SD-CPS estimates additional child welfare staff time for workgroups, testing and implementation to be 120 hours for 3 CPS CCWIS program staff and

approximately 60 hours each for 3 CPS staff with responsibilities related to foster care, adoption and monitoring of Title IV-E Agreements with tribes. Estimated hours for CPS staff for development, testing, implementation and training is 540 hours at an average salary for these 6 staff is $26.98 for a total cost of $14,569.20 (540 hours x $26.98). The total initial project costs, including implementation and training, are estimated to be $156,569.20.

The estimated ongoing hours and associated costs for the six CPS staff would be $3,561.36 (132 hours x average salary $26.98) based on previous projects and previous AFCARS data quality oversight. The estimated ongoing hours and associated costs for the technical staff would be $2,130.00 (30 hours times x $71.00).

The SDDSS requests your thoughtful consideration of the significant burden the revised AFCARS data elements places on program and technical staff, as well as financial resources. SDDSS recognizes the value in adding additional information to monitor and analyze outcomes for children in the child welfare system. However, it is a delicate balance between allocating time between direct service and data collection and data entry. The burden of balancing all of this falls on the shoulders of field staff and their supervisors who are already struggling to maintain balance. The addition of these data elements will only result in further turnover and issues with data reliability, consistency and the potential of penalties with non-compliant data.

If you have questions regarding South Dakota's comments, please contact Virgena Wieseler, Division Director of SD Child Protection Services at (605) 773-3227 or Tonia Bogue, CCWIS Project Director at (605) 367-5444 extension 1000274.

Sincerely,

Amy Iversen-Pollreisz
Interim Cabinet Secretary

CC: Virgena Wieseler, Division Director of Child Protection Services
Tonia Bogue, CCWIS Project Director

As of: September 14, 2020
Received: June 18, 2019
Status: Posted
Posted: June 18, 2019
Tracking No. 1k3-9ajv-idai
Comments Due: June 18, 2019
Submission Type: API

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0224
Adoption and Foster Care Analysis and Reporting System

Document: ACF-2018-0003-0327
APHSA/NAPCWA

Submitter Information

Name: Jamie Sorenson
Address:
Washington, DC, 22209
Email: mdygert@aphsa.org
Organization: National Association of Public Child Welfare Administrators/APHSA

General Comment

See attached.

Attachments

NAPCWA APHSA

National Association of Public Child Welfare Administrators

June 11, 2019

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

Re: ACF-2018-0003-0224

Dear Ms. McHugh,

The American Public Human Services Association (APHSA) and its affinity group, the National Association of Public Child Welfare Administrators (NAPCWA), on behalf of the state child welfare administrators, respectfully submit these comments in response to the notice regarding the Adoption and Foster Care Analysis and Reporting System by the Children's Bureau within the Administration for Children and Families (ACF) on April 19, 2019. The comments submitted reflect the perspective of state administrators, representing all ACF regions, charged with administering child welfare programs. The following comments were gathered through written and verbal feedback and compiled by NAPCWA's Executive Committee and APHSA staff.

NAPCWA strongly supports maintaining 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 resources, and reduce disparities experienced by lesbian, gay, bisexual, transgender, and questioning ("LGBTQ") foster children. 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 stated that "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] LGBTQ youth are immensely overrepresented in foster care and suffer worse safety, permanency, and well-being outcomes than their non-LGBTQ peers. We urgently need to collect data on these youth in care to improve outcomes, reduce costs, and curtail disparities. If we do not collect this data then we cannot properly advise federal law, policy and funding determinations, to identify best practices for replication and, critically, to enhance ACF's efforts to prevent removal and allow for children to remain safely at home with their families. 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

A 2013 study conducted in connection with the R.I.S.E. Project – a five-year, $13.3 million demonstration grant funded by the Administration on Children, Youth & Families to create a model program to support LGBTQ youth in the foster care system – confirmed the disproportionate representation of LGBTQ youth in care and the poor outcomes they experience.[3] 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% of foster youth ages 12-21 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% of participants identified as lesbian, gay, bisexual or questioning; 11% of the participants identified as gender-nonconforming, and 5.6% identified as transgender.

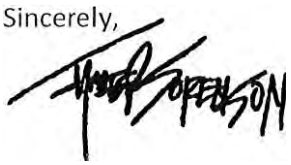
LGBTQ youth are more likely to become homeless and end up in involved in the juvenile justice system, a population that through the Family First Prevention Services Act (FFPSA) the federal government asked states to monitor and reduce.[4] States and tribes will continue to be stymied in their ability to improve outcomes and reduce costs for LGBTQ foster youth until sexual orientation and gender identity data is available.

Lastly, NAPCWA also opposes 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.

We thank you for the opportunity to comment on this important rule and will continue to work with you as the final rules are being developed and released.

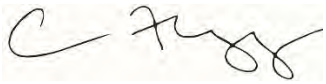
For further information, please contact APHSA's staff liaison to NAPCWA, Ann Flagg, at aflagg@aphsa.org or 443-386-8759.

Sincerely,



Jaime Sorenson
Chair
National Association of Public Child Welfare Administrators

Ann Flagg



Director, Collaborative Centers for Policy and Practice
American Public Human Services Association

[3] 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

As of: September 14, 2020
Received: June 18, 2019
Status: Posted
Posted: June 18, 2019
Tracking No. 1k3-9ajv-iu6e
Comments Due: June 18, 2019
Submission Type: Web

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0224
Adoption and Foster Care Analysis and Reporting System

Document: ACF-2018-0003-0328
California Dept of Social Services

Submitter Information

Name: Megan Lape
Address:
Sacramento, CA,
Organization: California Dept of Social Services
Government Agency Type: State
Government Agency: California Dept of Social Services

General Comment

California Department of Social Services submits comments in the attached file.

Attachments

California Dept of Social Services

CDSS
PAT LEARY
ACTING DIRECTOR

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

GAVIN NEWSOM
GOVERNOR

June 18, 2019

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

SUBJECT: COMMENTS ON FEDERAL REGISTER HHS DOCKET NUMBER ACF-2018-0003 NOTICE OF PROPOSED RULEMAKING, ADOPTION AND FOSTER CARE ANALYSIS AND REPORTING SYSTEM (AFCARS) – RIN 0970-AC72

The California Department of Social Services (CDSS) respectfully submits comments in response to the U.S. Department of Health and Human Services' Administration for Children and Families' (ACF) Notice of Proposed Rulemaking (NPRM) (HHS Docket Number ACF-2018-0003) published on April 19, 2019. The NPRM proposes to amend the AFCARS regulations that require title IV–E agencies to collect and report data to ACF on children in out-of-home care, who exit out-of-home care to adoption or legal guardianship, and children who are covered by a title IV–E adoption or guardianship assistance agreement. Specifically, the NPRM proposes the removal from the final 2016 AFCARS regulations the collection of critical data regarding children protected under the Indian Child Welfare Act (ICWA) of 1978 and regarding the sexual orientation of foster children, foster parents, and adoptive parents. CDSS opposes the removal of this important and valuable data from the AFCARS.

CDSS has the state oversight responsibility for child welfare services; and specifically, over the development and implementation of policies, guidance, training and technical assistance to counties and to tribes with whom the state has a IV-E Agreement regarding the administration of Title IV-B and Title IV-E programs in California. On behalf of CDSS, CFSD submits comments below addressing areas identified as responsive to this AFCARS NPRM request for comment.

I. Comment on data elements that ACF is proposing to remove or revise from the 2016 final rule

The December 2016 final rule includes new data collection requirements, including numerous data elements relating to our most vulnerable populations, Indian children subject to the ICWA and lesbian, gay, bisexual, transgender, and questioning (LGBTQ) youth. In each response to a request for comment by ACF, CDSS has consistently expressed support for such data collection.

California remains steadfast and unequivocal in our support for the data collection set forth in the 2016 final rule, including the collection of ICWA and LGBTQ information. This data collection is necessary for the proper performance of the functions of the agency. Data-informed policy and program decisions positively impact the ability to ensure the safety, well-being and permanency outcomes of the child welfare system.

California is committed to implementing Continuous Quality Improvement (CQI) as promoted by ACF. CQI is the complete process of identifying, describing, and analyzing strengths and problems and then testing, implementing, learning from, and revising solutions. Collecting quality data is the foundation of ensuring accountability, necessary/appropriate service delivery, and appropriate resource allocation fundamental to CQI systems. For data to be considered quality it must be accurate, complete, timely, and consistent in definition and usage. The 2016 AFCARS data elements establish a baseline for collection of national data not otherwise achievable and in sufficient detail to inform the CQI process. As discussed more fully below, we believe that national data is necessary and that this data is directly relevant to ACF statutory, program monitoring and Congressional reporting.

II. Comment on the streamlined data elements and how they will impact work and budgets

Any reasonable assessment of the impact of ICWA AFCARS data elements on work and budgets, as set forth in the 2016 final rule or as remaining as a result of this NPRM, must occur in the context of related and unchanging regulatory developments that preceded publication of the 2016 AFCARS final rule and that continue irrespective of changes that may result from this NPRM. Both child welfare data collection and ICWA were the focus of major federal regulatory changes prior to issuance of the AFCARS final rule on December 14, 2016.

On June 2, 2016, ACF published the Comprehensive Child Welfare Information System (CCWIS) Final Rule. CCWIS imposes data quality and completeness standards that require uniformity that does not currently exist. It also makes the state's data system the system of record for all mandated child welfare federal reporting, and mandates

reporting on specific measures taken to comply with the requirements in section 422(b)(9) of the Act regarding the state's compliance with the ICWA. Relative to the burden and cost of the development of data collection systems, it should be noted that CCWIS requires modular design that is capable of being shared, leveraged and reused as a separate component within and among states and tribes. (45 CFR 1355.53). This holds the potential for significant savings on what a state might identify as an anticipated burden for the design and development of these systems.

On June 14, 2016 the U.S. Department of the Interior (DOI), Bureau of Indian Affairs published amendments to the federal ICWA regulations for the stated purpose of driving consistent ICWA implementation nationwide. AFCARS data on the wellbeing of Indian children will support the work of multiple relevant federal agencies, including in identifying needs and gaps, expanding best practices, and shaping new policy and technical assistance. As a part of improving implementation and interagency coordination and collaboration around ICWA, ACF, HHS, Department of Justice, and DOI participated in an inter-agency ICWA working group. (81 FR 20286). The workgroup informed development of the 2016 ICWA regulations. The 2016 ICWA AFCARS data set corresponds to the ICWA regulations to further the same end as those regulations – consistency.

Irrespective of any changes to AFCARS data elements, states must modify their data systems and their policies and procedures; they must also undertake development work, training, and other, related tasks. For this reason, California deems it inappropriate to assess this activity as an AFCARS burden and is not doing so. To the contrary, improved data as identified in the AFCARS data elements holds the promise of maximizing resources and alleviating the burdens associated with implementation of child welfare programs.

In short, CDSS believes that the burdens described in the NPRM are overstated. Reliance on widely varied burden estimates reflected in the NPRM to strip away most of the critical data elements contained in the AFCARS final rule of 2016 appears arbitrary and capricious. This is especially true given that states had not ascribed a heavy burden to these data elements until after multiple solicitations for comments on this specific question.

a. Coordination between title IV-E agencies and stakeholders in collecting and reporting data for AFCARS and how nationally aggregated data will assist child welfare work

To implement state and federal law, including by preparing for the implementation of the AFCARS, CDSS is in the process of updating many policies, practices and curricula to incorporate both ICWA standards and a framework that reflects sexual orientation, gender identity and gender expression. For example, in a collaborated effort with

stakeholders, effective January 2019, a comprehensive amendment of California law conformed state law to the 2016 federal ICWA regulations. Amendment of state regulations to align them with the federal ICWA regulations and the conforming changes to state law has begun and includes a vigorous tribal consultation process. California seated a Tribal Advisory Committee consisting of California tribes, state and federal agency representatives and three Indian Organizations, as defined by the ICWA at 25 USC §1903(7), to support the effort to enhance ICWA implementation, including data collection efforts. 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, including courts. These developments directly support collection and reporting of data for AFCARS. It should also be noted, that due to the federal regulatory changes discussed above, the updates are all required irrespective of the 2016 AFCARS final rule or changes to it. Removing the data elements suggested in the NPRM will do little more than eliminate the collection of national aggregate data on the states' implementation of the final ICWA regulations.

CDSS has also engaged with stakeholders regarding the needs of our LGBTQ minor and non-minor dependents (NMDs) through the SOGIE (Sexual Orientation, Gender Identity and Expression) Advisory Workgroup. The Workgroup is comprised of former foster youth, CDSS representatives from multiple program areas, county representatives, attorneys and advocates for foster youth, the National Center for Lesbian Rights (NCLR), get REAL CA project, Office of the Foster Care Ombudsperson, and private providers. Implementing and improving data collection regarding SOGIE has been a key focus area for this workgroup, as consistent state and national level data is critical to understanding the unique needs of and strengthening services for children and youth in foster care who may be marginalized because of their SOGIE.

b. How reporting the data elements will enhance work with children and families

The need for a comprehensive national ICWA data base is particularly clear in California. California has 109 federally recognized tribes located within the state and is home to the largest Indian population of any state. Moreover, the vast majority of California's Indian population is affiliated with tribes located outside California. Indian children in California experience a chronically and disproportionally high degree of involvement with the child welfare system; this gives rise to the nation's highest rate of appeals raising ICWA issues. Addressing this situation, which frequently involves issues that cross state and tribal borders, would be greatly facilitated by standardized, high-quality data collected on a national basis.

National standards for data elements are essential. The NPRM confirms that title IV–E agencies may collect all of the data elements contained in the 2016 final rule regardless of what is ultimately required to be reported to ACF by title IV–E agencies in a rule that finalizes this NPRM. CFSD has confirmed to California tribes that California intends to do so. The necessary data is not confined to state boundaries because the majority of California child welfare cases involve tribes from outside California; such cases often involve preferential placement of Indian children outside the state. The absence of consistent national standards and collection of data imposes a serious impediment to ICWA compliance and CQI efforts.

Similarly, collecting demographic data regarding sexual orientation will significantly improve the ability of child welfare workers to enhance services to youth. There are an increasing number of LGBTQ youth being brought into the foster care system. Many of these youth have experienced abuse or neglect within their families because of their sexual orientation, gender identity, or gender expression. Moreover, recent reports suggest that over half of LGBTQ youth experience additional harassment or abuse in foster care because of their SOGIE. Collection of this information will help Title IV-E agencies to better tailor case plan needs and services and match youth with appropriate and affirming families and service providers when foster care is necessary to improve their well-being. Collection of this information through the AFCARS will also provide valuable data to assess at a macro level how LGBTQ children and youth interact with and are served by child welfare systems, provide important demographic data on LGBTQ foster and adoptive parents, and assist in identifying and improving any systemic disparities.

c. Comment on data elements proposed in the NPRM

As discussed above, the 2016 ICWA AFCARS data set corresponds to the ICWA regulations to further the same end as those regulations – consistency within and among states.

The proposed removal of ICWA data elements eliminates collection of data critical to monitoring implementation of federal law that directly impacts the well-being of Indian children. ICWA establishes national policy and statutory requirements governing foster care and adoptive placement – the very subjects ACF is required to gather data on. Further, failure to establish national ICWA data standards (consistent in definition and usage) frustrates quality reporting on ICWA compliance measures developed in consultation with Indian tribes as required by IV-B and the CCWIS regulations.

The simplified elements proposed in the NPRM will seriously frustrate the ability to achieve consistent ICWA implementation and the collection of quality data. As one example, the simplified "Reason to know" data element requires a yes/no answer as to whether inquiries were made by the IV-E agency whether the child is an Indian child. Thus, one documented question to one parent at the beginning of a child abuse

investigation could result in a "yes" answer to the data element question whether an ICWA inquiry occurred. Nevertheless, the ICWA inquiry requirements would not be satisfied unless further due diligence occurred with questions to the other parent, other relatives and/or community members, and the child. Thus, the "yes" answer would be misleading regarding satisfactory ICWA compliance. While the 2016 inquiry element does not incorporate all factors set out in the ICWA regulations, it does strike a reasonable balance by requiring inquiry of the parent, Indian custodian and extended family, as well as consideration of residence or domicile on an Indian reservation. This assures collection of meaningful data.

The NPRM sets out an ACF "commitment to obtain alternative methods that will inform aspects of ICWA." (84 FR 16577) Unfortunately, the methods are not adequate. As an example, data elements on ICWA requirements relating to termination of parental rights are eliminated in favor of a single element that applies to all children and collects whether a termination/modification of parental rights is voluntary or involuntary. The proposed element specifies "Voluntary means the parent voluntarily relinquished their parental rights to the title IV-E agency, with or without court involvement." (84 FR 16594.) The ICWA, however, requires court involvement even when a child is voluntarily relinquished for adoption by requiring the voluntary consent to be executed in writing and recorded before a judge after the judge confirms that the parent was fully informed of the consequences of the relinquishment and fully understood the explanation. (25 U.S.C. § 1913(a).) A regulatory definition of voluntary termination of parental rights that is inconsistent with a federal statute governing this very subject renders the proposed approach an inadequate substitute for the eliminated ICWA data elements. As such, the proposed data element is incomplete and misleading.

III. AFCARS is the most effective vehicle for collecting data and no other current method is feasible to collect the information

Collection of ICWA data is not only necessary and appropriate, but an ACF responsibility. As stated by ACF in its discussion of *Use of AFCARS Data* in the Adoption and Foster Care Analysis and Reporting System, Supplemental notice of proposed rulemaking, published on April 7, 2016 (81 FR 20283):

> 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.)

Collection of ICWA data elements directly relates to specific ACF purposes:

- Section 479 of the Social Security Act mandates the U.S. Department of Health and Human Services to collect national, uniform, and reliable information on children in state care. Collecting data on Indian children, including ICWA-related data, is in line with the statutory goal of assessing the status of children in foster care.

- Title IV-B mandates that state plans include measures to comply with ICWA developed in consultation with Indian tribes. ACF's CCWIS regulations mandate data collection on this.

- ACF reports to Congress on child well-being and permanency. The well-being of Indian children is promoted by compliance with ICWA standards. ICWA expressly sets out as a declaration of national policy that for Indian children, the child's best interest does not rest upon subjective notions but upon compliance with the ICWA minimum federal standards for states, and placement in accordance with placement preference standards established in ICWA. The ICWA begins with Congressional declaration of policy that informs all governmental agencies:

> The Congress hereby declares that it is the policy of this Nation to protect the best interest of Indian children and to promote the stability and security of Indian tribes and 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.)

These are significant ACF obligations, yet ACF collects no data to monitor these federal requirements or report on the well-being of Indian children. It is particularly alarming that the NPRM proposes to eliminate data collection on ICWA foster care and adoption placement preferences in complete disregard of Congressionally declared national policy.

In discussing the streamlining of ICWA data elements, ACF suggests "alternative methods that will inform aspects of ICWA". The problem with this is identified by ACF itself in its discussion of retained adoption data elements:

> Currently, the information is reported via a narrative in the Child and Family Service Plan and annual updates. This proposed method is preferred because currently the information must be compiled from the narratives and the reporting is not consistent across title IV–E agencies. Having this information in AFCARS will improve the accuracy, reliability, and consistency of the data because it will become an automated reporting through AFCARS. (84 FR 16581)

The NPRM discusses at length the challenge ICWA data collection may present to states that have small populations of Indian children known to be in their care. The suggestion that these states would prioritize other suggested methods to inform ICWA compliance rings hollow. Both the 2016 federal ICWA regulation and the 2016 AFCARS final rule were developed in direct response to the inconsistency in ICWA implementation across title IV-E agencies, with scant effort made to employ any "alternative methods" during the 40 years ICWA has been law. Having ICWA data in AFCARS will improve the accuracy, reliability, and consistency of the data because it will become an automated reporting through AFCARS.

With respect to data on LGBTQ foster youth, the collection of data is also critically important and woefully lacking. In 2011, the ACF issued an Information Memorandum (ACYF-CB-IM-11-03) specifically designed to improve the protection and support of LGBTQ youth in foster care. The Commissioner wrote in the IM that "I, therefore, urge every title IV-E agency to develop procedures that ascertain that young people in foster care who are LGBTQ are physically safe from harm and bullying whether they are placed in a foster home or a congregate care setting with other children" and 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." When data is unavailable regarding sexual orientation, gender identity and gender expression, however, many of the efforts described in the IM become exceedingly challenging.

Finally, any concern that there may be "regional differences in interviewers' and respondents' comfort with questions about [youth] sexual orientation" (84 FR 16576) is misplaced. Child welfare professionals are already required to ask some of the most difficult questions about physical and sexual abuse, as well as deeply personal information about a child and family's lives. They should have no greater difficulty asking specific questions about sexual orientation or gender identity/expression. Furthermore, child welfare professionals are responsible for providing appropriate case management, planning and services, and must engage youth and families in conversations regarding SOGIE to ensure a child's safety and needs are appropriately met.

CDSS continues to support the 2016 AFCARS final rule as a necessary step to improvement the implementation of ICWA. We believe the elimination of data elements proposed by this NPRM are arbitrary and capricious, based on unfounded concerns about burden on states and the discomfort of child welfare specialists who would be required to ask the questions that will supply the data. Further, the elimination of ICWA data elements, combined with the inadequacy of the proposed simplified data elements and the announcement that ACF will restrict the release of data relating to tribal membership and ICWA applicability (84 FR 16578), amounts not only to a breach of the federal trust responsibility to Indians and tribes, but is also calculated to foster inconsistency and an absence of accountability—in direct contradiction to "the policy of this Nation to protect the best interest of Indian children and to promote the stability and security of Indian tribes and families." (25 U.S.C.§ 1902.)

We look forward to continuing to work with ACF to implement the very important data requirements. We urge retention of the data elements as contained in the 2016 AFCARS final rule as necessary to achieve the consistency needed to promote the well-being and permanency of Indian children and the LGBTQ youth who are overrepresented in foster care.

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

Sincerely,

Sara Rogers For Greg Rose

GREGORY E. ROSE
Deputy Director
Children and Family Services Division

As of: September 14, 2020
Received: June 18, 2019
Status: Posted
Posted: June 18, 2019
Tracking No. 1k3-9ajv-9cnn
Comments Due: June 18, 2019
Submission Type: API

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0224
Adoption and Foster Care Analysis and Reporting System

Document: ACF-2018-0003-0329
Rhode Island KIDS COUNT

Submitter Information

Name: Elizabeth Burke Bryant
Address: 02903
Email: ebb@rikidscount.org
Organization: Rhode Island KIDS COUNT

General Comment

See attached file(s)

Attachments

Rhode Island KIDS COUNT

June 18, 2019

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

Re: Response to Request for Public Comments on Data Elements of the Adoption and Foster Care Analysis and Reporting System (AFCARS) 2016 Final Rule

Dear Ms. McHugh:

Thank you for the opportunity to share comments regarding the Adoption and Foster Care Analysis Reporting System (AFCARS). Pursuant to the notice published in the Federal Register on April 19, 2019 (84 Fed. Reg 16572), Rhode Island KIDS COUNT submits these comments expressing **strong opposition to the elimination of data elements that track implementation of the Indian Child Welfare Act (ICWA), sexual orientation and gender identity and expression, date and timeliness of health assessments, educational stability, juvenile justice involvement, and transition planning.**

As a policy and advocacy organization working to improve the lives of children, youth, and their families in Rhode Island, we are writing to ask that you retain critical data elements tracking children and their families in the child welfare system, and refrain from further streamlining of the original proposed rule. These data have been used to inform state and federal policy resulting in improvements for some of our most vulnerable children in the child welfare system.

LGBTQ and Native American Youth

The AFCARS 2016 Final Rule helped the child welfare system make made significant strides in understanding the challenges facing LGBTQ youth in foster care and helping to understand the experiences of American Indian and Alaska Native children in state child welfare systems and gave a more complete picture of the implementation of the ICWA and overall well-being of tribal children. Removing data that tracks implementation of the Indian Child Welfare Act (ICWA), sexual orientation and gender identity and expression, date and timeliness of health assessments, educational stability, juvenile justice involvement, and transition planning and date would negatively impact the safety, permanency, and well-being of children involved in the child welfare system.

Health Assessment

The inclusion of the date of a child's health assessment is essential for assessing access to care for children in the child welfare system at both the state and national level and provides a baseline understanding of a child's health, trauma history, and developmental milestones upon entering the child welfare system.

Educational Stability

Data elements relating to educational stability are used as a critical for assessing compliance with federal child welfare and educational laws, including the *Fostering Connections to Success and Increasing Adoptions Act* of 2008 and the *Every Student Succeeds Act (ESSA).* These pieces of federal legislation work together to ensure child welfare agencies proactively place students close to their school of origin to maintain school stability and connections to their community. Since the passage of *ESSA*, state departments of education are required to report on the educational performance of students in foster care. The combination of AFCARS data and State Report Cards will allow for states to collect longitudinal data about the educational needs of students in foster care. Tracking involvement in the juvenile justice system through AFCARS will be critical for reviewing the educational outcomes of students involved in the juvenile justice system.

Transition Planning

Tracking transition planning data elements in AFCARS is essential to ensuring that our systems appropriately track and respond to the needs of transition-age youth and serves as a key catalyst for improving the provision of services to youth in accordance with legal requirements.

AFCARS data continues to help advocates better understand the experiences and outcomes of children in the child welfare system, how those experiences vary state to state, and impact policy and practice in the child welfare field. For these reasons, we urge the retention of all data elements in the 2016 AFCARS Final Rule.

Thank you for your consideration.

Sincerely,

Elizabeth Burke Bryant
Executive Director
Rhode Island KIDS COUNT

As of: September 14, 2020
Received: June 18, 2019
Status: Posted
Posted: June 18, 2019
Tracking No. 1k3-9ajv-32zt
Comments Due: June 18, 2019
Submission Type: API

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0224
Adoption and Foster Care Analysis and Reporting System

Document: ACF-2018-0003-0330
Kentucky's Department for Community Based Services

Submitter Information

Organization: Kentucky's Department for Community Based Services
Government Agency Type: State
Government Agency: Kentucky's Department for Community Based Services

General Comment

Kentucky respectfully submits the attached comments.

Attachments

Kentucky's Department for Community Based Services

Kentucky's Department for Community Based Services

Docket #: ACF-2018-0003

RIN: 0970-AC72

Kentucky's comments for this NPRM are very similar to the comments submitted previously, as the general concerns in regards to the time and resources required for the collection of these data is rather intensive for the state.

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.

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.

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. 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.

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 CCWIS. 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 CCWIS 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 CCWIS 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.

Kentucky's CCWIS currently does not capture children who are considered Indian children as defined by ICWA, only those identified by field staff as Native American.

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*			

As of: September 14, 2020
Received: June 18, 2019
Status: Posted
Posted: June 18, 2019
Tracking No. 1k3-9ajw-pm6h
Comments Due: June 18, 2019
Submission Type: E-mail

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0224
Adoption and Foster Care Analysis and Reporting System

Document: ACF-2018-0003-0331
Kootenai Tribe of Idaho

Submitter Information

Name: Gary Aitken
Address:
Bonners Ferry, ID,
Organization: Kootenai Tribe of Idaho
Government Agency Type: Tribal
Government Agency: Kootenai Tribe of Idaho

General Comment

See attached

Attachments

Kootenai Tribe of Idaho

Kootenai Tribe of Idaho

P.O. Box 1269
100 Circle Drive
Bonners Ferry, ID 83805
Ph# (208) 267-3519
Fax (208) 267-2960

June 18, 2019

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

Agency: Children's Bureau; Administration on Children, Youth and Families; Administration for Children and Families; Department of Health and Human Services

Action: Adoption and Foster Care Analysis and Reporting System; Notice of Proposed Rulemaking (4/19/19)

Dear Ms. McHugh:

The Kootenai Tribe of Idaho submits these comments on the 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.

By way of background, tribes, tribal organizations, and tribal advocates have long sought the inclusion of ICWA-related data points in the AFCARS because there is no other national method to track ICWA compliance, and there are few if any state systems. The initial rules were changed due to comments made by these entities and others after reviewing the Administration of Children and Families' (ACF) February 9, 2015 proposed rule. On April 2, 2015 the Agency issued a Supplemental Notice of Proposed Rulemaking (SNPRM) changing certain data elements. 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, and included the ICWA data elements. The current NPRM seeks to modify or eliminate a significant number of the ICWA data points found in the 2016 Final Rule.

General Comments:

The Goals of the Families First Prevention Services Act and ICWA are Parallel and Support One Another.

As the current NPRM reminds us, there is a new Title IV-E prevention services program, the Families First Prevention Services Act. The 2019 Title IV-B Program Instructions state, "[c]reating a system that sees the prevention of child abuse and neglect as the goal of child welfare changes the current system toward working with families sooner through upfront prevention efforts." (ACYF-CB-PI-19-4 (2019).) Those same Program Instructions "recognize that tribes have long embraced a vision for child welfare that focuses on strengthening families and native communities and that seeks to avoid the unnecessary removal of children from home." (ACYF-CB-PI-19-4 (2019).) Indeed, for over 40 years, the Indian Child Welfare Act has required active efforts be made to prevent the breakup of the Indian family, making it the "gold standard" of child welfare practice. (81 Fed Reg. 90527.) Additionally, placement under Families First aligns with the placement preferences of ICWA. The placement goal of Families First is to place children in family foster care, only utilizing congregate care as a last resort. ICWA's placement preferences have long taken this approach, again making it the "gold standard" of child welfare practice.

The ICWA data points in AFCARS were to be a significant step in the direction of improving child welfare practices for not only AI/AN children, but for all children. As noted in the NPRM, "states with higher numbers of tribal children in their care reported that they supported including limited information related to ICWA in AFCARS because they believe child welfare programs will be enhanced by having this information to inform policy decisions and program management." (84 Fed Reg. 16574.) In its comments to the April 2018 Advanced Notice of Proposed Rulemaking, the California Department of Social Services (the state with the largest Native American population) "unequivocally supported 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."

Having data on ICWA would provide States with a valuable tool that would help to shift the system in the direction Families First intends, toward prevention, toward placement in a family setting and toward collaboration between all parties in the system.

Importantly, the 2016 Final Rule was intended to identify more effective ways for tribes, States and the federal government to work together to advance the well-being of Indian children and families. This again is directly in line with Families First, where it includes as a goal, "a strong, healthy child welfare workforce to achieve better outcomes."

To that end, all of ICWA data points included in the 2016 Final Rule should be retained. Moreover, we strongly encourage a review of the data points being revised, in order to ensure

they do not inadvertently encourage non-compliance with ICWA, whereby the well-being of Indian children would be harmed.

The NPRM's One-Sided Focus on Compliance Costs is Arbitrary and Capricious

This NPRM relies on information obtained through the April 2019 ANPRM which sought information only on burdens, making a reasoned cost-benefit analysis impossible.

As required by law, the 2016 Final Rule conducted a careful analysis of the benefits and burdens, and appropriately amended the proposed rule streamline compliance costs. 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. Executive Order 13,777 is not a sufficient basis for the Agency to reverse course. Further, Families First legislation does not amend ICWA, and so does not operate as a sufficient rationale to modify ICWA data points.

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 (HHS) to 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.

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 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.

States are already in the process of implementing these changes.

Since these regulations have been effective for over two years, 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 largest population of American Indian/Alaska Native residents, is already well under way with its implementation efforts, having relied on the Final Rule. At this stage, the proposed modification of the data collection requirements would be a waste of finite state child welfare resources, which itself is an additional burden.

The primary challenge faced by States in their implementation of ICWA data elements is the failure of ACF to provide the required data map. Through this failure, the current administration effectively blocked their implementation, seemingly pending the current streamlining action.

The NPRM "commend[s] the willingness of states to collect a more comprehensive array of information." (84 Fed Reg. 16575.) However, in the absence of a national data reporting requirement, it is guaranteed there will be variability with data elements, frustrating Section 479's mandate to create a "national," "comprehensive," and "uniform" data collection system. 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.

Further, modification to the existing data points requires states to start over on collaborations with their tribal partners and further delays 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.

These regulations are important to us, to our families, and also to 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 organizati a`ons, 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 that data collection is necessary to protect Indian children, 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 expected data elements. Tribes which 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) will see more of their limited resources wasted.

Specific Comments Regarding Data Elements.

While we strongly encourage retaining all of ICWA-related data elements of the 2016 Final Rule, we provide these specific comments to identify concerns regarding the suggested data elements and to offer methods of increasing the utility of streamlined data points.

Notice: We suggest adding the following additional data elements:

The NRPM includes a data element that would capture whether notice has been sent to a child's tribe. We recommend also including a data element that would capture the date of the notice (as found on the return receipt), as well as the date the petition was filed. These dates are easily located and are not qualitative or too detailed in nature, but do provide important additional information regarding whether notice was timely.

Placement: We suggest adding the following additional data elements:

Data points exist regarding whether a child is placed with a relative. The NPRM proposes to also collect data on whether a child is placed with a tribal member. We suggest adding these two additional data elements:

1. If the child is not placed with either a relative or a tribal member, was a good cause finding made to deviate from ICWA's placement preferences? (yes or no)
2. If yes, what was the basis of the good cause finding? (drop down list from the 2016 ICWA regulations)

This information will provide a more complete picture of what is occurring regarding placement and is consistent with the goal of Families First to place children in a family-like setting.

Transfer to Tribal Court: We suggest modifying this data element as proposed.

As written, this data element is confusing. We suggest the following set of questions:

1. Was a transfer to tribal court requested? (yes or no)
2. If so, was it granted? (yes or no)
3. If it was denied, what was the reason? (drop down menu based on 2016 ICWA regulations).

This data will enhance understanding regarding transfers to tribal court. There is no other mandatory mechanism for this data to be collected. The Court Improvement Program data would be voluntary, not mandatory.

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 far outweigh the burden.

In closing, the ICWA 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 will significantly impact tribal children and families, as well as county agencies trying to better follow the law. In the interest of increasing compliance with the ICWA, and ultimately in protecting our children and families, we respectfully submit these comments.

Failure to Consult with Tribal Governments.

On June 8 representatives for the Tribe attempted to participate in a tribal consultation via Internet connection. They report that the audio did not function, they were unable to participate, and after an hour, they gave up. This is not meaningful consultation and we encourage the agency to postpone any modifications to the Final Rule until such time as meaningful consultation takes place.

Sincerely,

Gary Aitken, Jr, Chairman
Kootenai Tribe of Idaho

As of: September 14, 2020
Received: June 18, 2019
Status: Posted
Posted: June 18, 2019
Tracking No. 1k3-9ajw-bzta
Comments Due: June 18, 2019
Submission Type: E-mail

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0224
Adoption and Foster Care Analysis and Reporting System

Document: ACF-2018-0003-0332
Suquamish Tribe

Submitter Information

Name: Leonard Forsman
Address:
Suquamish, WA,
Organization: Suquamish Tribe
Government Agency Type: Tribal
Government Agency: Suquamish Tribe

General Comment

See attached

Attachments

Suquamish Tribe

THE SUQUAMISH TRIBE
OFFICE OF TRIBAL COUNCIL
LEONARD FORSMAN, CHAIRMAN
Post Office Box 498
Suquamish, WA 98392-0498
Phone (360) 598-3311
Fax (360) 598-4293

June 17, 2019

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

Agency: Children's Bureau; Administration on Children, Youth and Families; Administration for Children and Families; Department of Health and Human Services

Action: **Adoption and Foster Care Analysis and Reporting System;** Notice of Proposed Rulemaking (4/19/19)

Dear Sir or Madam,

The Suquamish Tribe submits these comments on the 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.

By way of background, tribes, tribal organizations, and tribal advocates have long sought the inclusion of ICWA-related data points in the AFCARS because there is no other national method to track ICWA compliance, and there are few if any state systems. The initial rules were changed due to comments made by these entities and others after reviewing the Administration of Children and Families' (ACF) February 9, 2015 proposed rule. On April 2, 2015 the Agency issued a Supplemental Notice of Proposed Rulemaking (SNPRM) changing certain data elements. 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, and included the ICWA data elements. The current NPRM seeks to modify or eliminate a significant number of

the ICWA data points found in the 2016 Final Rule.

General Comments:

Appropriate Consultation with Tribal Nations HAS NOT occurred regarding the current NPRM.

Tribal consultation, pursuant to ACF principles and to ensure effective government-to-government relationships, has not been conducted regarding the issue of removing the ICWA data points. Although ACF has listed previous meetings with Tribal Nations as consultations in the NPRM, the reality is that those meetings were not identified as consultations to tribal leaders, and many did not specifically address issues of concern to tribal leaders. Under the current circumstances, tribal consultations are of paramount importance, because the 2018 advanced notice of proposed rulemaking (ANPRM), which is the basis for the 2019 NPRM, focused almost entirely on the perceived burden for states, with little consideration given to the benefits of the ICWA data collection for native children and families, and the benefits to the whole child welfare system.

The Goals of the Families First Prevention Services Act and ICWA are Parallel and Support One Another.

As the current NPRM reminds us, there is a new Title IV-E prevention services program, the Families First Prevention Services Act. The 2019 Title IV-B Program Instructions state, "[c]reating a system that sees the prevention of child abuse and neglect as the goal of child welfare changes the current system toward working with families sooner through upfront prevention efforts." (ACYF-CB-PI-19-4 (2019).) Those same Program Instructions "recognize that tribes have long embraced a vision for child welfare that focuses on strengthening families and native communities and that seeks to avoid the unnecessary removal of children from home." (ACYF-CB-PI-19-4 (2019).) Indeed, for over 40 years, the Indian Child Welfare Act has required active efforts be made to prevent the breakup of the Indian family, making it the "gold standard" of child welfare practice. (81 Fed Reg. 90527.) Additionally, placement under Families First aligns with the placement preferences of ICWA. The placement goal of Families First is to place children in family foster care, only utilizing congregate care as a last resort. ICWA's placement preferences have long taken this approach, again making it the "gold standard" of child welfare practice.

The ICWA data points in AFCARS were to be a significant step in the direction of improving child welfare practices for not only AI/AN children, but for all children. As noted in the NPRM, "states with higher numbers of tribal children in their care reported that they supported including limited information related to ICWA in AFCARS because they believe child welfare programs will be enhanced by having this information to inform policy decisions and program management." (84 Fed Reg. 16574.) In its comments to the April 2018 Advanced Notice of Proposed Rulemaking, the California Department of Social Services (the state with the largest Native American population) "unequivocally supported 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."

Having data on ICWA would provide States with a valuable tool that would help to shift the system in the direction Families First intends, toward prevention, toward placement in a family setting and toward collaboration between all parties in the system.

Importantly, the 2016 Final Rule was intended to identify more effective ways for tribes, States and the federal government to work together to advance the well-being of Indian children and families. This again is directly in line with Families First, where it includes as a goal, "a strong, healthy child welfare workforce to achieve better outcomes."

To that end, all of ICWA data points included in the 2016 Final Rule should be retained. Moreover, we strongly encourage a review of the data points being revised, in order to ensure they do not inadvertently encourage non-compliance with ICWA, whereby the well-being of Indian children would be harmed.

The NPRM's One-Sided Focus on Compliance Costs is Arbitrary and Capricious

This NPRM relies on information obtained through the April 2019 ANPRM which sought information only on burdens, **and not on** benefits, thereby failing to allow for a reasoned cost-benefit analysis regarding the ICWA data points.

As required by law, the 2016 Final Rule conducted a careful analysis of the benefits and burdens, and appropriately amended the proposed rule to streamline compliance costs. 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. Executive Order 13,777 is not a sufficient basis for the Agency to reverse course. Further, Families First legislation does not amend ICWA, and so does not operate as a sufficient rationale to modify ICWA data points.

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 (HHS)

to 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.

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 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.

States are already in the process of implementing these changes.

Since these regulations have been in effect for over two years, 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 largest population of American Indian/Alaska Native residents, is already well under way with its implementation efforts, having relied on the Final Rule. At this stage, the proposed modification of the data collection requirements would be a waste of finite state child welfare resources, which in itself is an additional burden.

The primary challenge faced by States in their implementation of ICWA data elements is the failure of ACF to provide the required data map. Through this failure, the current administration effectively blocked their implementation, seemingly pending the current streamlining action.

The NPRM "commend[s] the willingness of states to collect a more comprehensive array of information." (84 Fed Reg. 16575.) However, in the absence of a national data reporting requirement, it is guaranteed there will be variability with data elements, frustrating Section 479's mandate to create a "national," "comprehensive," and "uniform" data collection system. 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.

Further, modification to the existing data points requires states to start over on collaborations with their tribal partners and further delays 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.

These regulations are important to us, to our families, and also to 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 that data collection is necessary to protect Indian children, 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 expected data elements. Tribes which 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) will see more of their limited resources wasted.

Specific Comments Regarding Data Elements.

While we strongly encourage retaining **all** of ICWA-related data elements of the 2016 Final Rule, we provide these specific comments to identify concerns regarding the suggested data elements and to offer methods of increasing the utility of streamlined data points.

Notice: We suggest adding the following additional data elements:

The NRPM includes a data element that would capture whether notice has been sent to a child's tribe. We recommend also including a data element that would capture the date of the notice (as found on the return receipt), as well as the date the petition was filed. These dates are easily located and are not qualitative or too detailed in nature, but do provide important additional information regarding whether notice was timely.

Placement: We suggest adding the following additional data elements:

Data points exist regarding whether a child is placed with a relative. The NPRM proposes to also collect data on whether a child is placed with a tribal member. We suggest adding these two additional data elements:

1. If the child is not placed with either a relative or a tribal member, was a good cause finding made to deviate from ICWA's placement preferences? (yes or no)
2. If yes, what was the basis of the good cause finding? (drop down list from the 2016 ICWA regulations)

This information will provide a more comprehensive picture of what is occurring regarding placement and is consistent with the goal of Families First to place children in a family-like setting.

Transfer to Tribal Court: We suggest modifying this data element as proposed.

As written, this data element is confusing. We suggest the following set of questions:

1. Was a transfer to tribal court requested? (yes or no)
2. If so, was it granted? (yes or no)
3. If it was denied, what was the reason? (drop down menu based on 2016 ICWA regulations).

This data will enhance understanding regarding transfers to tribal court. There is no other mandatory mechanism for this data to be collected. The Court Improvement Program data would be voluntary, not mandatory.

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 far outweigh the burden.

In closing, the ICWA 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 will significantly impact tribal children and families, as well as state and county agencies trying to better follow the law. In the interest of increasing compliance with the ICWA, and ultimately in protecting our children and families, we respectfully submit these comments.

Sincerely,

Leonard Forsman, Chairman
The Suquamish Tribe

As of: September 14, 2020
Received: June 18, 2019
Status: Posted
Posted: June 18, 2019
Tracking No. 1k3-9ajw-6mq4
Comments Due: June 18, 2019
Submission Type: E-mail

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0224
Adoption and Foster Care Analysis and Reporting System

Document: ACF-2018-0003-0333
Brandelle Whitworth

Submitter Information

Name: Brandelle Whitworth

General Comment

See attached

Attachments

Brandelle Whitworth

June 18, 2019

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

Agency: Children's Bureau; Administration on Children, Youth and Families; Administration for Children and Families; Department of Health and Human Services

Action: **Adoption and Foster Care Analysis and Reporting System;** Notice of Proposed Rulemaking (4/19/19)

Dear Madam,

I submit these comments on the Notice of Proposed Rulemaking ("NPRM") 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.

First and foremost, I want to thank the Administration of Children and Families (ACF) for its efforts to incorporate ICWA data points in the AFCARS.

For several years, Indian tribes, tribal organizations, and tribal advocates have advocated for a nationwide mechanism to track ICWA data and compliance throughout the United States, including the inclusion of ICWA-related data points in the AFCARS because there is no other national method to track ICWA compliance. The initial AFCARS rules were changed due to comments made by these entities and others after reviewing the ACF's February 9, 2015 proposed rule. Then on April 2, 2015, a Supplemental Notice of Proposed Rulemaking ("SNPRM") changing certain data elements was issued. Another SNPRM was issued on April 7, 2016. Specifically, 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 current NPRM seeks to modify or eliminate approximately 90% of the ICWA-related data points found in the 2016 Final Rule.

General Comments:

1. ***The Proposed "Alternative Methods" To Inform On Aspects of ICWA Are Not Mandated.***

Proposed "alternative methods" to inform on aspects of ICWA compliance/ICWA-related data elements are merely recommendations and are encouraged or supported instead of mandated. ICWA-related data collection will still not be mandated, allowing states the option to continue to ignore ICWA's applicability and its requirements, *over 40 years after its passage*.

2. ***The NPRM's One-Sided Focus on Compliance Costs is Arbitrary and Capricious***

This NPRM relies on information obtained through the April 2019 ANPRM that sought information only on burdens, making a reasoned cost-benefit analysis impossible. There have been no material changes in circumstances justifying the Agency's new approach. Executive Order 13,777 is not a sufficient basis for the Agency to reverse course. Further, Families First legislation does not amend ICWA, and so does not operate as a sufficient rationale to modify ICWA data points.

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

Section 479 of the Social Security Act ("Act") mandates Health and Human Services ("HHS") to 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. Section 422(b)(9) of the 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 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.

4. ***The Goals of the Families First Prevention Services Act and ICWA are Parallel and Support One Another.***

As the current NPRM reminds us, there is a new Title IV-E prevention services program, the Families First Prevention Services Act ("Families First"). For over 40 years, the ICWA has required active efforts be made to prevent the breakup of the Indian family, making it the "gold standard" of child welfare practice (81 Fed Reg. 90527). Additionally, placement under Families First aligns with the placement preferences of ICWA. The placement goal of Families First is to place children in family foster care, only utilizing congregate care as a last resort. ICWA's placement preferences have long taken this approach, again making it the "gold standard" of child welfare practice. Having data on ICWA would provide States with a valuable tool that would help to shift the system in the direction Families First intends, toward prevention, toward placement in a family setting and toward collaboration between all parties in the system. To that end, all of ICWA data points included in the 2016 Final Rule should be retained.

5. ***States are already in the process of implementing these changes.***

Since these regulations have been effective for over two years, all states should be in the process of implementing them. At this stage, the proposed modification of the data collection requirements would be a waste of finite state child welfare resources, which itself is an additional

burden. Further, modification to the existing data points requires states to start over on collaborations with their tribal partners and further delays 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.

6. ***These regulations are important to Indian tribes, their children, their families, and to state child welfare systems.***

The regulations themselves—in response to the comments from stakeholders across the country—describe the importance of these changes. Nothing has changed since ACF made clear that data collection is necessary to protect Indian children, 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. Further, there have been no changes that would alter the burdens or benefits of the Final Rule's data collection requirements.

7. ***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 expected data elements. Tribes that 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) will see more of their limited resources wasted.

Specific Comments Relating to Data Elements:

While strongly encouraging retention *all* of ICWA-related data elements approved in the 2016 Final Rule, I provide these specific comments to identify concerns regarding the suggested elimination or modification of data elements in the NPRM.

1. ***Indian Custodian (removal from).***

While the April 19, 2019 Federal Register indicates, on page 16577 (middle column, last bullet), "tribal membership of mother, father, foster parents, adoptive parents, and legal guardians" will be kept and revised, such collection fails to capture information imperative to determining if the person the Indian child is removed from is the child's Indian custodian, as identified in the ICWA. In ICWA, an Indian custodian is more than just an Indian child's legal custodian and is defined as "any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child." 25 U.S.C. 1903 (6). Under ICWA, the Indian custodian is afforded many rights. Without collecting data on whether the person the Indian child has been removed from is an Indian custodian, as defined in ICWA, the rights specifically outlined above may not be afforded that Indian custodian.

2. ***Notice.***

I suggest adding a data element that would capture whether notice has been sent to a child's tribe, including a data element that would capture the date of the notice (as found on the return receipt), as well as the date the petition was filed. These dates are easily located and are not

qualitative or too detailed in nature, but do provide important additional information regarding whether notice was timely.

3. Placement.

I suggest adding data points regarding whether a child is placed with a relative. The NPRM proposes to also collect data on whether a child is placed with a tribal member. I suggest adding these two additional data elements:

1. If the child is not placed with either a relative or a tribal member, was a good cause finding made to deviate from ICWA's placement preferences? (yes/no)
2. If yes, what was the basis of the good cause finding? (drop-down list from the 2016 ICWA regulations)

This information will provide a more complete picture of what is occurring regarding placement and is consistent with the goal of Families First to place children in a family-like setting.

4. Transfer to Tribal Court.

As written, this data element is confusing. Therefore, I suggest modifying this data element as follows:

1. Was a transfer to tribal court requested? (yes/no)
2. If so, was it granted? (yes/no)
3. If it was denied, what was the reason cited? (drop-down menu based on 2016 ICWA regulations).

This data will enhance understanding regarding transfers to tribal court. There is no other mandatory mechanism for this data to be collected. As mentioned, the Court Improvement Program data would be voluntary, not mandatory.

Conclusion:

For the foregoing reasons, I strongly support retention of each of the ICWA-related data points and believe, as your Agency did in the Final Rule, the benefits of this data collection far outweigh any burdens. ICWA is widely considered the "gold standard" of child welfare. Any administrative hurdle decreasing ICWA data point collection will significantly impact tribes, their children, and their families, as well as state and county agencies trying to follow the law.

In the interest of increasing compliance with the ICWA, and ultimately, in protecting Indian children and families, I respectfully submit these comments.

Sincerely,

Brandelle Whitworth
Shoshone-Bannock Tribal Member

As of: September 14, 2020
Received: June 18, 2019
Status: Posted
Posted: June 18, 2019
Tracking No. 1k3-9ajw-v0cs
Comments Due: June 18, 2019
Submission Type: E-mail

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0224
Adoption and Foster Care Analysis and Reporting System

Document: ACF-2018-0003-0334
Tino Batt

Submitter Information

Name: Tino Batt

General Comment

See attached

Attachments

Tino Batt

June 18, 2019

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

Dear Madam,

I wanted to provide personal comments on the Notice of Proposed Rulemaking ("NPRM") 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.

For several years, Tribes have advocated for a nationwide mechanism to track ICWA data and compliance throughout the United States, including the inclusion of ICWA-related data points in the AFCARS because there is no other national method to track ICWA compliance. The Final Rule was published on December 14, 2016, and included the ICWA data elements. The current NPRM seeks to modify or eliminate approximately 90% of the ICWA-related data points found in the 2016 Final Rule.

Having personal experience with states placements and states placing our Native Children in non-native homes is a huge concern. My family had to stop the State of Arizona from termination my family members parental rights. The state system muddled the case and failed to comply with ICWA. In the end, if the state was complying and reporting accurate information then they would have saved a lot of money in litigation for failing to comply with ICWA. The state failed to report to the Tribe and the Family members that the children were native.

Proposed "alternative methods" to inform on aspects of ICWA compliance/ICWA-related data elements are merely recommendations and are encouraged or supported instead of mandated. ICWA-related data collection will still not be mandated, allowing states the option to continue to ignore ICWA's applicability and its requirements, *over 40 years after its passage.*

Section 479 of the Social Security Act ("Act") mandates Health and Human Services ("HHS") to 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. Section 422(b)(9) of the 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 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.

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 expected data elements. Tribes that 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) will see more of their limited resources wasted.

Specific Comments Relating to Data Elements:

While strongly encouraging retention *all* of ICWA-related data elements approved in the 2016 Final Rule, I provide these specific comments to identify concerns regarding the suggested elimination or modification of data elements in the NPRM.

1. ***Indian Custodian (removal from).***

While the April 19, 2019 Federal Register indicates, on page 16577 (middle column, last bullet), "tribal membership of mother, father, foster parents, adoptive parents, and legal guardians" will be kept and revised, such collection fails to capture information imperative to determining if the person the Indian child is removed from is the child's Indian custodian, as identified in the ICWA. In ICWA, an Indian custodian is more than just an Indian child's legal custodian and is defined as "any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child." 25 U.S.C. 1903 (6). Under ICWA, the Indian custodian is afforded many rights. Without collecting data on whether the person the Indian child has been removed from is an Indian custodian, as defined in ICWA, the rights specifically outlined above may not be afforded that Indian custodian.

2. ***Notice.***

I suggest adding a data element that would capture whether notice has been sent to a child's tribe, including a data element that would capture the date of the notice (as found on the return receipt), as well as the date the petition was filed. These dates are easily located and are not qualitative or too detailed in nature, but do provide important additional information regarding whether notice was timely.

3. ***Placement.***

I suggest adding data points regarding whether a child is placed with a relative. The NPRM proposes to also collect data on whether a child is placed with a tribal member. I suggest adding these two additional data elements:

1. If the child is not placed with either a relative or a tribal member, was a good cause finding made to deviate from ICWA's placement preferences? (yes/no)
2. If yes, what was the basis of the good cause finding? (drop-down list from the 2016 ICWA regulations)

This information will provide a more complete picture of what is occurring regarding placement and is consistent with the goal of Families First to place children in a family-like setting.

4. Transfer to Tribal Court.

As written, this data element is confusing. Therefore, I suggest modifying this data element as follows:

1. Was a transfer to tribal court requested? (yes/no)
2. If so, was it granted? (yes/no)
3. If it was denied, what was the reason cited? (drop-down menu based on 2016 ICWA regulations).

This data will enhance understanding regarding transfers to tribal court. There is no other mandatory mechanism for this data to be collected. As mentioned, the Court Improvement Program data would be voluntary, not mandatory.

Conclusion:

For the foregoing reasons, I strongly support retention of each of the ICWA-related data points and believe, as your Agency did in the Final Rule, the benefits of this data collection far outweigh any burdens. ICWA is widely considered the "gold standard" of child welfare. Any administrative hurdle decreasing ICWA data point collection will significantly impact tribes, their children, and their families, as well as state and county agencies trying to follow the law.

In the interest of increasing compliance with the ICWA, and ultimately, in protecting Indian children and families, I respectfully submit these comments.

Sincerely,

Tino Batt

As of: September 14, 2020
Received: June 18, 2019
Status: Posted
Posted: June 18, 2019
Tracking No. 1k3-9ajw-sbqw
Comments Due: June 18, 2019
Submission Type: E-mail

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0224
Adoption and Foster Care Analysis and Reporting System

Document: ACF-2018-0003-0335
Group of law professors

Submitter Information

Organization: Group of law professors

General Comment

See attached

Attachments

Group of law professors

June 18, 2019

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

Re: RIN 0970–AC72, Adoption and Foster Care Analysis and Reporting System; Notice of Proposed Rulemaking, 84 Fed. Reg. 16,572 (April 19, 2019)

Dear Director McHugh,

Thank you for the opportunity to submit comments on the Notice of Proposed Rulemaking (NPRM) 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).

We are a group of law professors with longstanding academic expertise in federal Indian law, family law, and administrative law.[1] Our experience includes litigating ICWA cases in state and Tribal court; researching the nationwide application of ICWA, and the data collection, or lack thereof, about American Indian and Alaska Native (AI/AN) children in state child welfare systems; and researching and litigating administrative law cases.

The AFCARS data collection system is crucial to fulfilling the Executive Branch's statutory obligations and to protecting AI/AN children. We support the Administration for Children and Families' (ACF) decision to retain a number of key ICWA-related data elements from the 2016 Final Rule. *See* Adoption and Foster Care Analysis and Reporting System, 81 Fed. Reg. 90,524 (Dec. 14, 2016) [hereinafter, "Final Rule"]. We write, however, to urge the Administration to reconsider its decision to remove other ICWA-related data elements from AFCARS. The proposal to remove these data elements rests upon a one-sided analysis of costs and benefits that fails adequately to consider the benefits and arbitrarily and unlawfully discounts the interests of AI/AN children.

As ACF concluded in 2016, the lack of consistent data about AI/AN children in the child welfare system has been one of the biggest threats to ICWA implementation. ACF therefore promulgated a final rule revising the AFCARS regulations. *See* Final Rule, 81 Fed. Reg. at 90,524. In promulgating the Final Rule, ACF recognized that "some states, tribes, national organizations, and federal agencies [had] stated that ICWA is the 'gold standard' of child welfare practice and its implementation and associated data collection will likely help inform efforts to improve outcomes for all children and

[1] The Appendix identifies the signatories to this comment. We submit this comment in our individual capacities, not on behalf of our institutions.

families in state child welfare systems." *Id.* at 90,527. ACF concluded that the "benefits outweigh the burden associated with collecting and reporting the additional data." *Id.* at 90,528.

To reverse course now by eliminating crucially important ICWA data elements would be arbitrary and unlawful. The NPRM justifies eliminating ICWA data elements by referring to the costs of compliance for Title IV-E agencies. But the existence of compliance costs does not by itself justify eliminating existing regulatory requirements.

Under well-established principles of administrative law, ACF must show that the benefits of eliminating data elements from the Final Rule outweigh the costs of doing so. There have not, however, been any material changes since 2016 in the facts or circumstances that supported ACF's conclusion that the benefits of the data elements outweigh their costs. There is no reasonable and lawful basis, therefore, for ACF's proposal to eliminate the majority of the ICWA-related data elements from the 2016 Final Rule.

I. Summary of Suggestions

Our principal suggestions are as follows:

1. **ACF should retain ICWA-related data elements that are crucial to assessing implementation of core aspects of ICWA, such as the "active efforts" and "good cause" requirements**. The NPRM offers an analysis of costs and benefits that focuses upon the widely varying estimates of compliance costs offered by some states. But "only considering one side of the equation" in cost-benefit analysis is arbitrary and capricious. *California v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106, 1123 (N.D. Cal. 2017). To the extent that it addresses benefits, the NPRM does so unlawfully: In particular, the NPRM asserts, ICWA-related data elements should be eliminated because they would not apply "to a majority of [the] children" in the states. 84 Fed. Reg. at 16,575. This biased discounting of the rights of AI/AN children, families, and Tribes is not only inconsistent with the federal government's trust responsibility to Native Nations, it is also inconsistent with Section 479 of the Social Security Act and ICWA itself.

2. **ACF should retain quantitative data elements that are readily measured and are important to assessing implementation of ICWA**. The NPRM asserts that "many new data elements are qualitative" and therefore are not appropriate for AFCARS. *See* 84 Fed. Reg. at 16,575. But many of the ICWA-related data elements that ACF has proposed to eliminate are not qualitative and therefore should be retained. For example, the NPRM proposes to eliminate data elements concerning whether there have been requests to transfer proceedings to Tribal courts and whether those requests were denied. *See id.* at 16,577. These data are quantitative, readily available, and important for assessing ICWA implementation.

3. **ACF should reconsider some of the revisions it has proposed to the data elements it proposes to retain**. The NPRM fails adequately to explain some of the revisions it proposes to data elements that ACF plans to retain. In particular, some of the proposed revisions would eliminate the requirement to report quantitative and easily-accessible data that are crucial to monitoring ICWA implementation. These data elements should be retained without revision.

While ACF has rightly retained some elements from the 2016 Final Rule, the NPRM's proposal to streamline data collection has gone too far in eliminating or revising crucial ICWA-related data elements.

II. ACF Should Retain ICWA-Related Data Elements That Are Crucial to Assessing Implementation of Core Aspects of ICWA, Such as the "Active Efforts" and "Good Cause" Requirements

We urge ACF to reconsider its decision to eliminate crucial ICWA-related data elements, including elements designed to assess implementation of the "active efforts" and "good cause" requirements of ICWA. Meaningful data concerning implementation of these requirements may be recorded and reported by title IV-E agencies without imposing unwarranted compliance costs. ACF's decision to eliminate these crucial data elements is a reversal of course that rests upon an arbitrary and unlawful analysis of the costs and benefits of collecting these data.

A. Crucial ICWA-Related Data Elements Should Not Be Eliminated Based Upon a One-Sided Analysis of Costs and Benefits

Even if ACF were writing on a blank slate, the APA would require it to give a reasoned assessment of both the costs and benefits of adopting the ICWA-related data elements. But it is not writing on a blank slate. In eliminating the majority of the ICWA-related data elements from the 2016 Final Rule, ACF must offer a reasoned explanation that considers the facts, circumstances, and conclusions that underlaid its prior policy. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009).

When adopting the 2016 Final Rule, ACF recognized the need for ICWA-related data elements to implement federal statutory law. *See, e.g.*, Final Rule, 81 Fed. Reg. at 90,536 (concluding that "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") (emphases added). ACF reached this conclusion after a comprehensive notice and comment process, one in which Indian Tribes, child welfare organizations, and several states supported the ICWA-related data elements. *Id.*

When promulgating the 2016 Final Rule, ACF did not consider the benefits of ICWA-related data elements in a vacuum. Far from it. Instead, the agency comprehensively considered the benefits *and* the burdens of including ICWA-related data elements in AFCARS. It concluded that the benefits outweighed the burdens, finding, among other things, that (i) there "may be confusion" among the states in how and when ICWA applies, which ICWA-related data elements would help resolve; (ii) it was "unclear" whether states are implementing ICWA because of lack of ICWA-related data elements, which, of course, ICWA-related data elements would help address; and (iii) the majority of states that commented supported "improving data on Indian children." Final Rule, 81 Fed. Reg. at 90,528. In other words, ACF found that ICWA-related data elements were necessary to implement federal statutory law and the United States' trust responsibility towards Indians.

ACF did not, however, ignore concerns about regulatory burdens in revising AFCARS in 2016. Indeed, the agency modified its proposed ICWA-related data elements in several respects. Final Rule, 81 Fed. Reg. at 90,528. And in response to comments from states and Indian Tribes, ACF coordinated its AFCARS revisions with the Bureau of Indian Affairs' 2016 rulemaking implementing ICWA. *See id.* These changes, the agency concluded, would "allow the state title IV-E agency more flexibility,

alleviate some of the burden and other concerns identified by states, help target technical assistance . . . , and improve practice and national data on all children who are in foster care." *Id.* ACF's "streamlined" approach addressed concerns about regulatory burdens while still achieving benefits for AI/AN children. *Id.* at 90,566 (explaining how agency addressed concerns of states about regulatory burdens).

In 2016, ACF thus carefully considered the benefits and burdens and adopted a tailored set of ICWA-related data elements in order to fulfill its statutory responsibilities. Its reasonable and well-reasoned revisions to AFCARS were based upon up-to-date data and a comprehensive rulemaking process in which all interested parties, including states, fully aired their concerns.

The NPRM proposes to eliminate a host of the ICWA-related data elements from the 2016 Final Rule, including elements designed to collect meaningful data on implementation of the "active efforts" and "good cause" requirements. *See* 84 Fed. Reg. at 16,577. In support of this reversal of course, the NPRM offers a one-sided analysis of compliance costs. Under fundamental principles of administrative law, this one-sided analysis is arbitrary and unlawful.

The Administrative Procedure Act (APA) directs reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The agency must consider all relevant aspects of a problem, including both the benefits and costs of regulation, when altering its policy. An agency, in other words, "is correct to look at the costs as well as the benefits" of its regulations. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 54 (1983). But an agency's assessment of costs and benefits must not be arbitrary. *See id.* at 55. While political elections have consequences, it is not enough for an agency changing course to cite the policy preferences of a new presidential administration. *See id.* at 55-56 (concluding agency had acted arbitrarily in adopting policy change following presidential election without reasoned explanation for its change).

The Supreme Court has made clear its concern with agencies that make an about-face from their prior policies. *See Fox TV*, 556 U.S. at 515-16; *id.* at 537 (Kennedy, J., concurring); *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015); *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016). In particular, an agency may not change course without (i) "'show[ing] that there are good reasons for the new policy,'" (ii) explaining why it is "'disregarding facts and circumstances that underlay or were engendered by the prior policy,'" and (iii) addressing "'serious reliance interests'" that have come to rest on its prior policy. *Encino Motorcars*, 136 S. Ct. at 2126 (quoting *Fox TV*, 556 U.S. at 515-16).

When, as here, an agency makes regulatory policy based upon cost-benefit analysis, these principles of administrative law require the agency adequately to assess both costs *and benefits*. That is the very definition of cost-benefit analysis: "an emphasis on costs is only part of the equation. Benefits matter too." Cary Coglianese, *It's Time to Think Strategically About Retrospective Benefit-Cost Analysis*, The Regulatory Review (Apr. 30, 2018), *at* https://www.theregreview.org/2018/04/30/coglianese-think-strategically-retrospective-benefit-cost-analysis. Consideration of both sides of the equation is necessary not only when an agency adopts a new regulatory policy, but also when it "eliminate[s] or relax[es] earlier regulations." Jonathan S. Masur & Eric A. Posner, *Cost-Benefit Analysis and the Judicial Role*, 85 U. Chi. L. Rev. 935, 942 (2018). When an agency eliminates or relaxes existing regulations based upon analysis of costs and benefits, it must "show that the benefits from deregulation exceed the costs." *Id.* In short, "[d]rawing meaningful conclusions from a comparison of costs and benefits

is difficult — and sometimes may be impossible — unless you can quantify *both* sides in a common metric." Amy Sinden, *The Problem of Unquantified Benefits*, 49 Envtl. L. 73, 75 (2019) (emphasis added).

Federal courts have scrutinized agency cost-benefit analyses under the arbitrary-and-capricious standard of review. A reviewing court may reverse an agency's adoption of a regulation if the agency failed adequately to assess the regulation's costs. *See, e.g.*, *Business Roundtable, Inc. v. SEC*, 647 F.3d 1144, 1150 (D.C. Cir. 2011); *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1217 (5th Cir. 1991). But failure to give adequate consideration to the *benefits* of regulation is also reversible error when an agency decides to deregulate. When an agency eliminates a regulatory requirement, the benefits provided by the prior regulation become costs of deregulation that the agency must consider. In *California v. U.S. Bureau of Land Management*, for example, the reviewing court held that the agency's inadequate consideration of the benefits of regulating violated the "fundamental principle of the APA that an agency's decision is arbitrary when it 'entirely failed to consider an important aspect of the problem.'" 277 F. Supp. 3d at 1122. In that case, the agency justified its one-sided cost-benefit analysis based upon a looming compliance deadline and the President's issuance of an executive order directing the agency to reevaluate regulatory burdens. *See id.* at 1123. Applying fundamental administrative law principles, the reviewing court held that the agency had failed to give a "'reasoned explanation'" for its reversal of course. *Id.* at 1123 (quoting *Fox TV*, 556 U.S. at 515-16).

From its inception, the present rulemaking has focused solely upon the costs of compliance with the 2016 Final Rule. In its advance notice of proposed rulemaking, ACF requested comment on "the [AFCARS] data elements and their associated burden." Adoption and Foster Care Reporting System; Advance Notice of Proposed Rulemaking, 83 Fed. Reg. 11,449, 11,450 (Mar. 15, 2018). This request for comment, ACF explained, was based upon Executive Order 13,777, which directed agencies to review regulatory burdens and to modify or eliminate existing regulations. The NPRM repeatedly emphasizes the widely varying estimates of compliance costs offered by states, explaining that ACF has "analyzed all of the ANPRM comments, costs, and burden estimates and considered them as it related to meeting the requirements of E.O. 13777." 84 Fed. Reg. at 16,575. Based upon this analysis of compliance costs, the NPRM concludes that "proposing revisions to the AFCARS regulation through a NPRM is warranted and within the spirit of E.O. 13777 to streamline and reduce burden on title IV-E agencies." *Id.*

This is precisely the sort of one-sided cost-benefit analysis that violates the APA's requirement of reasoned decisionmaking. Nothing in Executive Order 13,777 authorizes ACF to make an about-face from its prior policy without a reasonable basis. *See California*, 277 F. Supp. 3d at 1123 (concluding that an executive order was not by itself a changed circumstance justifying a reversal of agency policy). The NPRM, which makes no attempt to quantify the benefits of the ICWA-related data elements, fails to show that the benefits of eliminating many of those elements exceeds the costs of doing so. That is arbitrary and capricious. *See id.*

B. To the Extent That it Addresses Benefits, the NPRM Does So Arbitrarily and Unlawfully

The NPRM justifies the elimination of many ICWA-related data elements by pointing to Section 479(c)(1) of the Social Security Act (SSA). Section 479(c)(1) directs HHS to "avoid unnecessary diversion of resources from agencies responsible for adoption and foster care." 42 U.S.C. § 679(c)(1). Citing this statute, the NPRM concludes: "Requiring every state to modify its systems to be able to report on a large number of data elements when the foster care population does not reflect that the

data elements will be applicable to a majority of their children does not meet this mandate." 84 Fed. Reg. at 16,575. But Section 479 does not mandate ACF to discount the rights of American Indian and Alaska Native children simply because American Indians and Alaska Natives are not a numerical majority in the United States.

To the contrary, the 2016 Final Rule's ICWA-related data elements are critical to carrying out Congress's mandate in Section 479 and therefore are not "unnecessary" obligations. That statutory provision does not focus one-sidedly on compliance costs. Section 479(c)(2) and (c)(3) require a data collection system that "is reliable and consistent" and "provide[]s comprehensive national information" regarding "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." 42 U.S.C. § 679(2), (c)(3)(D). Congress thus mandated the creation of a national, comprehensive data collection system that ensures that the best interests of all children, including AI/AN children, are protected by adoption and foster care systems. The statute makes no distinction between AI/AN children and other children. Nor does it direct ACF to focus solely upon the costs of compliance when designing AFCARS.

To single out AI/AN children and families for special disfavor in the AFCARS scheme is also inconsistent with the federal government's trust responsibility to Native Nations. The trust responsibility, which arises from treaties and the government-to-government relationships between Indian Tribes and the United States, requires the United States to treat Indians with the care and faithfulness of a fiduciary. *See, e.g.*, *Seminole Nation v. United States*, 316 U.S. 296, 297 (1942) (explaining that the federal government "has charged itself with moral obligations of the highest responsibility and trust [towards Indian Tribes, and its] conduct . . . should therefore be judged by the most exacting fiduciary standards"). This responsibility is enforceable against federal administrative agencies. *See Cohen's Handbook of Federal Indian Law*, § 5.04[3][a] (Nell Jessup Newton ed., 2012). Under elementary trust law, a fiduciary cannot single out the beneficiaries of a trust for special disfavor, but rather must loyally and carefully pursue their interests. *See, e.g.*, *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928); Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 Cornell L. Rev. 621, 657-58 (2004) (discussing trustee's duty of impartiality). Given ACF's 2016 conclusion that the ICWA-related data elements are necessary to ensure protection of the best interests of AI/AN children, it would now be an arbitrary and capricious violation of the United States' trust responsibility to single out AI/AN children for special disfavor by eliminating those elements.

Congress enacted ICWA in 1978 to address the practice of state entities removing a large number of AI/AN children from their homes without an understanding of traditional American Indian child-rearing practices. In adopting ICWA, Congress created a "'gold standard' of child welfare practices," one that is a model for improving outcomes for all children and families in state welfare systems. *See* Final Rule, 81 Fed. Reg. at 90,527.

ACF's Final Rule adopted ICWA-related data elements that are crucial to implementing this "gold standard" for child welfare systems. Collecting this data, as ACF concluded in 2016, will allow an assessment of ICWA implementation, which continues to be a problem among the states. *See* Alicia Summers & Kathy Deserly, *The Importance of Measuring Case Outcomes in Indian Child Welfare Cases*, 36 No. 1 Child L. Prac. 22, 23-23 (2017). In 2016, then-Commissioner Rafael López of the Administration on Children, Youth and Families succinctly summarized the point: "Given the history we've had with the removal of Indian children from Indian country . . . not being able to articulate

very clearly what's happening to all children, let alone American Indian and Alaska Native children, is unacceptable." *Id.* at 22 (internal quotation marks omitted).

As Congress has found, "the States, [in] exercising their recognized jurisdiction over Indian child custody proceedings . . . , have often failed to recognize the essential tribal relations of Indian people and cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(5). Based upon this finding, Congress has made it "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." *Id.* § 1902. ICWA represents Congress's effort to fulfill the "[f]ederal responsibility to Indian people," also known as the federal trust responsibility, by creating procedures and practices to keep Indian families together when possible. *Id.* § 1901. In implementing ICWA, the Executive Branch must similarly fulfill this trust responsibility. *See Cohen's Handbook*, *supra*, § 5.04[3][a] (explaining that "courts have applied the trust responsibility to limit federal administrative action").

To be sure, AI/AN children are not a numerical majority in the United States. But this bare fact is not a lawful basis for ACF to reverse course by removing crucial ICWA-related data elements from the 2016 Final Rule. Indeed, the only material changes in circumstances since 2016 require ACF to stay the course.

Since 2016, states have relied upon the 2016 AFCARS regulations by beginning to implement them. California, for example, has already proceeded far down the path of implementing ACF's data collection requirements. In addition, Indian Tribes have relied upon the 2016 regulations by working with local and state governments to implement the data elements. For example, some Tribes have developed and updated intergovernmental agreements based upon the ICWA-related data elements and the 2016 BIA regulations.

ACF should not, therefore, reconsider costs without a full assessment of the benefits of the ICWA-related data elements it proposes to eliminate. A one-sided consideration of costs is not a "good reason[]" for reversing course, particularly where parties have relied upon the existing regulatory regime. *See Encino Motorcars*, 136 S. Ct. at 2126 (internal quotation marks omitted).

C. ACF Should Not Eliminate Data Elements Concerning the "Active Efforts" and "Good Cause" Requirements of ICWA

While the NPRM asserts that there are other methods for collecting some ICWA-related data, such as information on transfers, it proposes to eliminate data collection concerning the "active efforts" and "good cause" requirements of ICWA. *See* 84 Fed. Reg. at 16,577-78. We urge ACF to reconsider this decision.

The active efforts requirement is a core aspect of ICWA's protections for AI/AN children and families. ICWA prohibits a placement or termination of parental rights unless "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family." 25 U.S.C. § 1912(d). This requirement is crucial to ICWA's basic purpose of "protect[ing] the integrity of Indian families." *Cohen's Handbook*, *supra*, § 11.05.

ICWA's good cause requirement is also crucial to achieving the statute's purpose. ICWA creates an order of preference for adoption and foster care placements for Indian children. *See* 25 U.S.C. § 1915. The Supreme Court has explained that these placement preferences are "[t]he most important

substantive requirement imposed on state courts." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989). Indeed, "[m]ore than any other substantive requirement, these preferences reflect the underlying assumption of ICWA that Indian children have a strong interest in preserving their tribal ties." *Cohen's Handbook*, *supra*, § 11.05. These preferences may be overcome only upon a showing of "good cause to the contrary." 25 U.S.C. § 1915(a).

The NPRM suggests that data related to these two requirements are necessarily "qualitative" and therefore not a proper element of AFCARS. *See* 84 Fed. Reg. at 16,575, 16,577. Not so. For example, it is not difficult to imagine a data element that requires states to report whether an active-efforts finding was made prior to a placement or termination of parental rights. Nor is it difficult to imagine a data element consisting of a series of easily completed drop-down boxes tracking the actions that are relevant to the active-efforts determination. *See* 45 C.F.R. § 1355.44(f)(10) (listing types of "active efforts"); *Cohen's Handbook*, *supra*, § 11.05 (listing relevant factors). After all, the active efforts requirement has been implemented by a Bureau of Indian Affairs' regulation listing examples of the primary types of active efforts most frequently provided to prevent the removal of an Indian child *See* 25 C.F.R. § 23.2. And the 2016 Final Rule requires collection of data on those types of efforts. *See* 45 C.F.R. § 1355.44(f)(10).[2] Similarly, it is not difficult to envision a data element that requires quantitative reporting on whether a good cause finding was made. *See* 45 C.F.R. § 1355.44(e)(10)–(11) (describing just such a data element).

ACF should not eliminate the active efforts and good cause data elements entirely from the AFCARS system. Reporting meaningful data about implementation of these core requirements of ICWA is feasible and warranted to protect AI/AN children.

III. ACF Should Retain Quantitative Data Elements That Are Readily Measured and Are Important to Assessing Implementation of ICWA

Relatedly, ACF should retain quantitative data elements that may be tracked and reported with minimal burden. The NPRM's concern about qualitative data collection simply does not apply to some of the data elements that the NPRM proposes to eliminate.

For example, the NPRM proposes to eliminate entirely data elements concerning whether there was a request to transfer to a Tribal court and whether that request was denied. Such data, it asserts, are qualitative. 84 Fed. Reg. at 16,577. But it is possible to collect and report meaningful quantitative data on whether a request was made and whether it was granted. And such data would be important to assessing implementation of ICWA's "provisions concerning jurisdiction over Indian child custody proceedings," which are "[at] the heart of the [Act]." *Mississippi Band of Choctaw Indians*, 490 U.S. at 36.

IV. ACF Should Reconsider Some of the Revisions It Has Proposed to the Data Elements it Proposes to Retain

We support ACF's proposal to retain several ICWA-related data elements from the 2016 Final Rule. *See* NPRM, 84 Fed. Reg. at 16,577. Each of these elements will, as ACF has concluded, assist in implementation of ICWA.

[2] The 2016 Final Rule, moreover, already streamlined the active efforts data element in response to public comment. Final Rule, 81 Fed. Reg. at 90,524.

We recommend, however, that ACF reconsider some of the revisions it has proposed to the data elements it plans to retain. One of these data elements, contained in 45 C.F.R. § 1355.44(b)(6), concerns ICWA's requirement that a "party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe." 25 U.S.C. § 1912(a). Section 1355.44(b)(6) requires the title IV-E agency to report not only whether the Indian child's Tribe received notification, but also whether the Indian child's parent or custodian received notification. The regulation also requires the title IV-E agency to provide information regarding the timeliness of the notification. ACF has now proposed to revise Section 1355.44(b)(6) to eliminate the reporting requirement concerning the Indian child's parent or custodian. Its proposed revision also omits information about the timeliness of notification. The NPRM fails to provide any explanation of these changes other than the bare statement that information regarding notification to the child's Indian Tribe is a "key aspect of ICWA's requirements." *See* 84 Fed. Reg. at 16,580. But notice to the Indian child's parents or custodian, as well as the timeliness of notice, are also key aspects of ICWA's requirements. We recommend that ACF leave Section 1355.44(b)(6) unaltered, as it requires reporting of quantitative data that are available and crucial to tracking ICWA implementation.

* * *

ACF's 2016 Final Rule was the first federal data elements requirement designed to provide detailed information on ICWA implementation. Comprehensive collection of these data elements tied to ICWA's requirements 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. Establishing these data elements will provide AI/AN children the same opportunities to benefit from the data that other children currently have and will better inform responses addressing the unique issues facing Tribal children in both policy and practice.

Thank you for the opportunity to comment on ACF's proposed revisions of the 2016 Final Rule. We hope that our comments are helpful to ensure that ACF fully examines the benefits as well as the costs of the ICWA-related data elements in that carefully tailored regulatory scheme.

Appendix*

Robert T. Anderson, University of Washington School of Law

Alejandro E. Camacho, University of California, Irvine School of Law

Seth Davis, University of California, Berkeley School of Law

Daniel Deacon, University of California, Irvine School of Law

Matthew L.M. Fletcher, Michigan State University College of Law

Kathryn E. Fort, Michigan State University College of Law

B.J. Jones, University of North Dakota School of Law

Monte Mills, Alexander Blewett III School of Law, University of Montana

Addie C. Rolnick, William S. Boyd School of Law, University of Nevada, Las Vegas

Joseph William Singer, Harvard Law School

Michalyn Steele, J. Reuben Clark Law School, Brigham Young University

Marcia A. Yablon-Zug, University of South Carolina School of Law

* We submit this comment in our individual capacities, not on behalf of our institutions. Institutional affiliations are listed for identification purposes only.

As of: September 14, 2020
Received: June 18, 2019
Status: Posted
Posted: June 18, 2019
Tracking No. 1k3-9ajv-ieul
Comments Due: June 18, 2019
Submission Type: API

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0224
Adoption and Foster Care Analysis and Reporting System

Document: ACF-2018-0003-0336
City of Philadelphia Department of Human Services

Submitter Information

Name: Cynthia Figueroa
Address:
Philadelphia, PA, 19102
Email: cynthia.figueroa@phila.gov
Organization: City of Philadelphia Department of Human Services
Government Agency Type: Local
Government Agency: City of Philadelphia Department of Human Services

General Comment

The attached comments are provided on behalf of the Philadelphia Department of Human Services.

Attachments

City of Philadelphia Department of Human Services

CITY OF PHILADELPHIA

Cynthia F. Figueroa
Commissioner
Philadelphia Department of
Human Services

June 18, 2019

Kathleen McHugh, Director
United States Department of Health and Human Services
Administration for Children and Families
Children's Bureau
Policy Division
330 C Street, SW,
Washington, DC 20201

Re: Federal Register Number 2019-07827

Dear Director Hughes:

The City of Philadelphia Department of Human Services (DHS) respectfully submits the comments below in response to the Administration for Children and Families' ("the Administration") 2019 proposal to amend AFCARS and its regulations.

A. The City of Philadelphia Department of Human Services is the largest child welfare agency in the Commonwealth of Pennsylvania.

Pennsylvania's child welfare and juvenile justice systems are county-administered and state supervised. DHS is Philadelphia County's title IV-E, child welfare and juvenile justice agency, serving thousands of children each year. The mission of DHS is to provide and promote safety, permanency, and well-being for children and youth at risk of abuse, neglect, and delinquency. DHS has three primary operating divisions:

Community Based Prevention Services: In conjunction with community based providers, DHS provides services designed to divert children and families from the formal child welfare system. These services include Out of School Time, in home case management, domestic violence support services, truancy intervention services, housing support and mentoring.

Child Welfare Operations: DHS operates at child abuse hotline 24 hours a day, 365 days-per-year to respond to allegations of child abuse or neglect. In addition, social work staff

conducts investigations and assess families to determine their need for services. While the primary focus is to keep children at home with their families, DHS manages the placement of children based on the existence of safety threats in a family. DHS works with six providers called Community Umbrella Agencies to provide ongoing services (in home and placement) to children and families in 10 geographic regions in the City.

Juvenile Justice: DHS operates the Philadelphia Juvenile Justice Services Center, the City's secure detention facility for juveniles. In addition, the JJS division supports and funds a full array of diversion programs to prevent youth from entering the juvenile justice system.

B. The proposed changes should not be implemented because they are overly broad, too burdensome and do not address the need to better understand trends in the system

The proposed regulations as outlined in the Federal Register Vol. 84, No. 76/Friday, April 19, 2019 should not be implemented because they are overly broad and burdensome. Despite the reduction from the original rule, DHS estimates that the proposed regulations add approximately 100 new data collection fields. The new requirements create additional work responsibilities and costs, requiring significant additional training for over 1000 child welfare professionals in the Philadelphia system. Additionally, the proposed changes would require additional enhancements to our data collection system which is already constantly changing due to other state and federal requirements. Finally, if the proposed changes go through, due to the extensive training and system changes that would be required, DHS respectfully requests that then new rules not be implemented until October of 2021.

Moreover, AFCARS data is point in time, which is not the optimal way to understand trends in the system. Longitudinal data collection would better allow systems to track progress on specific issues over time. Finally, it is imperative that we have a comprehensive system wide approach to gathering both placement and prevention data to satisfy the upcoming needs of the Family Services Prevention Act.

C. Removing the data elements should not relieve jurisdictions from moving forward on best practice.

While DHS is appreciative in the reduction of fields from the original proposed rule, DHS wants to reiterate that the selected fields designated to be removed represent critical information. State and local jurisdictions should be encouraged to track and monitor these items, separate from AFCARS reporting, to ensure best practice. Specifically, ensuring data collection around sexual orientation and gender identity (SOGI) and educational stability is critical to ensure the well-being of children and youth in the system.

D. Conclusion

The Philadelphia Department of Human Services respectfully submits that the proposed changes to AFCARS should not be implemented because they are overly broad and burdensome. The changes would require significant changes to work responsibilities and extensive training for

over 1000 child welfare professionals in Pennsylvania. The federal government should instead consider longitudinal data collection to more accurately assess for trends in child welfare and to monitor progress over time. Thank you for the opportunity to provide comments.

Sincerely,

Cynthia F. Figueroa
Commissioner

As of: September 14, 2020
Received: June 18, 2019
Status: Posted
Posted: June 18, 2019
Tracking No. 1k3-9ajw-g9a6
Comments Due: June 18, 2019
Submission Type: API

PUBLIC SUBMISSION

Docket: ACF-2018-0003
AFCARS 2018-2020

Comment On: ACF-2018-0003-0224
Adoption and Foster Care Analysis and Reporting System

Document: ACF-2018-0003-0337
DC Child and Families

Submitter Information

Name: Jennifer Gillyard
Address:
Washington, DC, 20003
Email: jennifer.gillyard@dc.gov
Organization: DC CHILD AND FAMILY SERVICES
Government Agency Type: State
Government Agency: DC Child and Families

General Comment

See file attached

Attachments

DC Child and Families

Dear Ms. McHugh,

Thank you for the opportunity to comment formally on the Final Rule on AFCARS. We in the District of Columbia's Child and Family Services Agency (CFSA) are appreciative that ACYF has recognized the need to gather and analyze data on emerging trends, practices and populations along the continuum of care. We look forward to providing you with rich data for ongoing analysis to promote system reform and improvement. We are pleased to offer the following responses, which we've aligned with HHS' specifically requested comments.

(a) Is the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility.

CFSA Response: We believe that the overall AFCARS reporting system is integral to the national child welfare arena. Many of the newly introduced data elements are important and necessary for CFSA's proper performance and functioning. For instance, new requirements around health assessments and mental health reporting dovetail into our recent efforts to become a trauma-informed system, and will inform our progress toward that end.

There are new AFCARS elements, however, that will have little to no practical utility in the District. While we appreciate HHS' focus on improving data collection nationally with respect to ICWA and removing a few previously proposed elements, it is *extremely rare* that a child to whom ICWA applies is placed into the District's foster care system. Creating an AFCARS reporting infrastructure around the ICWA population is locally burdensome and impractical in DC.

Additionally, we would like to note that other agencies within the District of Columbia government, such as the Department of Motor Vehicles, have moved away from binary gender classifications with respect to consumer identification. It would be our preference to enact policies and procedures to move in that direction as well. To that extent, we would appreciate the reflection in AFCARS reporting of non-binary gender classifications (or values) in any and all gender-related data elements, including and especially Child's Gender.

(b) the accuracy of the agency's estimate of the burden of the proposed collection of information

CFSA Response: The District has not derived a cost estimate of the burden of proposed collection of information. However, proposed elements such as ICWA would require a 1) SACWIS system build out to accommodate and capture data on multiple children and caregivers per case, 2) practice change, 3) training on new requirements and 4) the development of policy.

(c) the quality, utility, and clarity of the information to be collected

CFSA Response: CFSA is hopeful that ACYF, through technical assistance, will help clarify some of the requirements that could be subject to interpretation, especially those pertaining

to: living arrangement and child's relationship to foster parent, child sexual orientation, child gender, pregnant and parenting youth, and group home categorizations.

Although modified down to three categories, the pick list for child's relationship to foster parent is confusing- *nonrelative, kin and relatives*. Based on ACYF's definitions of all three response options, CFSA would suggest that the data elements be modified to prevent any confusion. When discussing kin as a living arrangement most jurisdictions are referring to a relative. Based on your definitions, the term *kin* is being used in reference to non-kin who have a close relationship with the child or family, which in some states is referred to as "fictive kin". Moreover, the Children's Bureau has already used the term *kin* in reference to relatives in the kinship guardianship assistance program. This new distinction confuses things. This is the same concern for living arrangement and provider information response options.

CFSA disagrees that the removal of the child sexual orientation data element from AFCARS is in the best interest of children and youth in foster care as well as child welfare practice. Sexual orientation has been a causal factor for home removals and replacements in the District. Moreover, sexual orientation feeds into clinical decisions concerning permanency. Local child welfare agencies need to capture this information discretely to get a better understanding of the LGBTQ population of youth entering care and to better address their needs. ACYF should be using the states' data to get the national picture for this population of youth in care.

Moreover, Child's Gender is now only requiring a response of male or female- but what if the youth is transgender; do we indicate assigned gender or identified gender in this element? (As a corollary, in the event that we are to indicate the latter, will the AFCARS reporting system accommodate instances in which the child's gender may change over time?).

CFSA needs an answer to a question on one element concerning pregnant and parenting youth- what is the timeframe being considered when reporting on whether the youth in care has "ever fathered or bore a child"?

Lastly, interpretations of the group home elements may vary from state to state, providing examples of such categorizations would be helpful.

(d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

CFSA Response: It is the District's plan to use automated collection as the process to reduce the burden of data collection. We will work with program staff to make every effort to develop ways to make data collection easier for staff and respondents.

In conclusion, we urge HHS to follow through on their implementation of the new AFCARS data requirements, but we also encourage HHS to provide the necessary support and technical assistance to the states to help enhance the data collection and AFCARS systems.