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AFCARS 2018-2020

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

Document: ACF-2018-0003-0338
Oneida Nation

Submitter Information

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Government Agency Type: Tribal
Government Agency: Oneida Nation

General Comment

See attached file(s)

Attachments

Oneida Nation

Oneida Nation
Oneida Business Committee
PO Box 365 • Oneida, WI 54155-0365
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ONEIDA

June 18, 2019

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

Submitted electronical via https://www.federalregister.gov/

RE: RIN 0970-AC72, Adoption and Foster Care Analysis and Reporting System Proposed Rule

Dear Ms. McHugh,

On behalf of the Oneida Nation ("the Nation") I submit the following comments on the Notice of Proposed Rulemaking (NPRM) to amend the Adoption and Foster Care Analysis and Reporting System (AFCARS) regulations issued by the U.S. Department of Health and Human Services (HHS) Administration for Children and Families (ACF). The Nation supports the inclusion of the ICWA related data elements in AFCAR information collection, as finalized in the 2016 rule.[1] The Nation is opposed to any streamlining, modification, or elimination of critical AFCARS data elements pertaining to the welfare of American Indian and Alaska Native Children.

Background

The Nation is a Title V Self-Governance tribe and has had a compact and funding agreement with the HHS since 1997. The Nation is also a Title IV Self-Governance tribe and has had a compact and funding agreement with the US Department of Interior. In accordance with our funding agreement with the US Department of Interior, we have taken over the responsibility of, among other things, the Indian Child Welfare program. Our Indian Child Welfare Department became a Title IV-E agency under the Social Security Act in 2016. Our Indian Child Welfare Department has approximately 1500 clients and provides the following services:

- Participate in and/or monitors child abuse and neglect assessments
- Arrange and supervise out-of-home placements
- Crisis intervention
- Attend court hearings and represent the decision of the Oneida Nation in child protection hearings
- Coordinate services with county agencies
- Problem assessment

[1] Adoption and Foster Care Analysis and Reporting System, RIN: 0970-AC47, 45 CFR 1355 (Dec. 14, 2016), https://www.federalregister.gov/documents/2016/12/14/2016-29366/adoption-and-foster-care-analysis-and-reporting-system

- Assist with family interaction such as visits between parent and child when appropriate
- Provide assistance and support to families
- Home visits
- Provide protection services
- Link individuals to other services as needed
- Assist in adoption services and guardianship cases
- Network with county and private sector agencies

The Nation also provides the Foster Care Program which is a state licensed, tribal run Child Placing Agency developed to facilitate out-of-home care for Oneida children who have been victims of abuse and/or neglect. The Foster Care Program's mission is to recruit, license, train, and support the American Indian foster homes and the Oneida children they care for. Our Foster Care Program provides the following services:

- Assist with the application and licensing process
- Foster Care training/ongoing training
- Foster Care Coordinator visits
- On-going support team
- Provide support services
- Respite care
- Resource library

The Foster Care Program is the only tribal run foster care program in the State of Wisconsin that can license level 2 homes off the Reservation. This is because we follow Wisconsin's foster care standards. The Foster Care Program has licensed approximately 15 homes and serves approximately 492 clients. The Nation has two Child Placement Coordinators that operate the Foster Care Program.

The United States (U.S.) has a unique legal and political relationship with American Indian and Alaska Native Tribal governments. This relationship was established through treaties and affirmed by the United States Constitution, Supreme Court decisions, federal laws and regulations, and presidential executive orders. Central to this relationship is the federal government's trust responsibility to protect the interests of Indian Tribes and their children,[2] including through the provision of health care and public health related policies.

Despite the federal trust responsibility to protect American Indian and Alaska Native families, decades of official federal policy aimed at assimilating Tribes, and particularly American Indian and Alaska Native children, into mainstream society resulted in the removal of these children from their homes by state child welfare agencies at rates far higher than those of non-Indian families. In response to the national crisis of separation of American Indian and Alaska Native children from their families, Congress enacted the Indian Child Welfare Act (ICWA or the Act) of 1978.[3] ICWA establishes minimum federal standards for the removal of Indian children from their

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[2] The 25 U.S.C. § 1901(2)–(3) (Supp. IV 2016) ("Congress, through statutes, treaties, and the general course of dealing with Indian Tribes, has assumed the responsibility for the protection and preservation of Indian Tribes and their resources . . . there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian Tribe . . . .").

[3] 25 U.S.C. § 1901 et seq.

families and the placement of such children in foster care or adoptive placements that reflect the unique values of American Indian and Alaska Native culture.

The intent of Congress in passing the ICWA legislation was to promote the best interests of American Indian and Alaska Native children and to protect the rights of parents. At the same time, Congress sought to balance the jurisdiction and political interests of Tribes and the states. The AFCARS rule, finalized in 2016, for the first time incorporated and outlined ACF's responsibilities to American Indian and Alaska Native children under ICWA. Regulations required AFCARS data to include a review of state recordkeeping procedures, state court requirements under ICWA, and a review of whether states made "active efforts" prior to removal of American Indian and Alaska Native children and prior to the termination of parental rights, among other protections.[4] The Indian Child Welfare Act is just as essential today as in the year of its passage to achieve the best interests of American Indian children, and to preserve the unity between American Indian and Alaska Native children and their Tribes. The Agency should not, through this NPRM, undermine the congressionally sanctioned special protections in place for American Indian and Alaska Native children by removing valuable ICWA related reporting requirements that make a difference to the lives of children, and that help to strengthen the advocacy on their behalf.

Proposed Rule

In this NPRM, the Agency requests commenters to focus on the data elements that the Agency is proposing to remove or revise from the 2016 Final Rule. The 2016 Final Rule contained updated statutory requirements since the first issuance of the rule in 1993, implemented statutory penalties for non-compliant data submissions, and enhanced the type of information reported to better measure outcomes of children and families including information related to ICWA.

The Nation appreciates that ACF is proposing to retain the 2016 AFCARS Final Rule data elements that ask 1) whether the state inquired as to whether a child is American Indian and Alaska Native, 2) whether the child and parent are Tribally-affiliated, and 3) whether the state notified the Tribe of court proceedings. Yet the Nation is concerned with ACF's proposal to eliminate over 90% of the other data elements for American Indian and Alaska Native children from the 2016 Final Rule. The Agency notes "In particular, we propose to streamline data elements related to child information, placements, and permanency planning based on public comments to the Advanced Notice of Proposed Rule Making (ANPRM) and the work of federal experts with an interest in AFCARS data." The Nation believes that this hinders the ability of Tribes, states, and federal policymakers to understand how ICWA is being implemented nationwide and within individual states. This includes the requirement under Title IV-B for states to consult with Tribes on the implementation of ICWA, which ACF plays a role in providing oversight on.

Under Section 479(c)(3) of the Social Security Act,[5] information collected through AFCARS must provide "comprehensive national information." Exempting some states from reporting the proposed ICWA related data elements is not consistent with this statutory mandate, and would

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[4] Department of the Interior (June 14, 2016), https://www.federalregister.gov/documents/2016/06/14/2016-13686/indian-child-welfare-act-proceedings. Also see talking points, https://www.acf.hhs.gov/sites/default/files/cb/afcars_talking_points.pdf.

[5] 42 U.S.C. 679.

render it difficult to use this data for development of national policies for Indian children.[6] By not providing fuller data through AFCARS, ACF will not have a clear picture on whether states are implementing ICWA properly and ensuring that Tribal children and families are receiving its protections. American Indian and Alaska Native children are already disproportionately represented in state foster care systems in at least 13 states and nationally, and Tribal families still experience biased treatment in state child welfare systems;[7] removing these data elements will only worsen the problem.

AFCARS is the most effective tool for collecting a consistent set of data elements for states to use to address the well-being of AI/AN children.

There are many benefits of collecting the ICWA data elements identified in the 2016 AFCARS rulemaking. States, Tribes, federal agencies, and policymakers need better data for American Indian and Alaska Native children and families to understand how to effectively address persistent and long-term poor outcomes for Tribes and their children. While ACF is proposing to retain five of the ICWA data elements from the 2016 Final Rule, 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 historically poor outcomes in state child welfare systems.

When local ICWA data is available, Tribes use it to identify discrepancies in state ICWA caseloads or to identify practice issues that need improvement. Unfortunately, many states do not collect this data. The 2016 AFCARS data elements would provide a consistent set of data that Tribes and states could use to address ICWA implementation challenges and other child welfare issues. Moreover, many of the ICWA data elements proposed for elimination in the 2019 NPRM have the potential to help ACF support effective implementation of the Family First Prevention Services Act (2018), which has implications for American Indian and Alaska Native children who are in state custody and eligible for ICWA protections.[8]

The U.S. Department of the Interior (DOI) issued final regulations that address requirements for state courts regarding ICWA [81 FR 38778]. DOI, however, does not have a relationship with states in child welfare and does not have an operational data base, or resources, to collect data on American Indian and Alaska Native children in state foster care systems. Under the binding DOI regulations, ACF is required to oversee that states are consulting with Tribal governments on measures taken by the state to comply with ICWA [42 USC 622(b)(9)]. The 2016 Final Rule ICWA data elements are needed to understand how states are working with Tribes on ICWA implementation and whether their efforts indeed address specific areas of concern.

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[6] Supplemental Notice of Proposed Rulemaking (SNPRM), Adoption and Foster Care Analysis and Reporting System (Apr. 7, 2016), https://www.federalregister.gov/documents/2016/04/07/2016-07920/adoption-and-foster-care-analysis-and-reporting-system

[7] *Id.* ("Representatives from 13 states […] stated that some of their states currently collect information […] related to Indian children, such as Tribal membership, Tribal notification, and Tribal enrollment status. They noted that some of the information with regard to ICWA, such as placement preferences and active efforts, are contained in case files, case notes, or other narratives, and not currently captured within their information systems, and noted issues with extraction of such data for AFCARS reporting.").

[8] See National Indian Child Welfare Association, https://www.nicwa.org/wp-content/uploads/2018/09/Child-and-Family-Policy-Update-September-2018-FINAL.pdf

For this reason, alternative methods for collecting ICWA related data, such as the Child and Family Services Reviews,[9] are not feasible and the structure of these reviews does not support collection of this type of data. ACF notes that research or surveys could fill the ICWA data collection void, but the history of funding this type of research has demonstrated that it cannot be relied upon to provide accurate and regularly reported data for AI/AN children.[10]

Several of the ICWA data elements in the 2016 Final Rule that are now proposed for elimination, provide important information that inform case planning and systems efforts to improve outcomes. Therefore, we strongly suggest that ACF retain many of the data elements in the 2016 Final Rule including the following:

1. **Date of court determination of ICWA application**. This provides information on whether there were significant differences between when the state court and state IV-E Agency confirmed application of ICWA and how this affected implementation.
2. **Transfer of jurisdiction**. This provides information on whether a request for transfer of jurisdiction was requested, whether it was approved or denied, and if denied, what the basis for denial was. ACF's alternative to this data element based on the data element "reason for exit" will not provide the necessary information to understand when transfer was requested in a case, why it did or did not happen, and how this impacted other service provision or case planning.
3. **Foster care placement preferences.** This provides information on whether foster care placement preferences were met, which placement preference was used, and if placement preferences were not met was good cause found and on what basis. 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, and did the Tribe approve of the placement if it involved a congregate care setting (institution or group care setting).
4. **Adoptive placement preferences.** This provides information on whether the adoptive placement preferences were met, which placement preference was used, and if placement preferences were not met was good cause found and on what basis. 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.
5. **ICWA notice on foster care placement and termination of parental rights to Tribes and parents.** While ACF is proposing to retain a modified data element on notice from the 2016 Final Rule, there are concerns with the modified data element. The NPRM data element only tracks whether notice was sent by the state IV-E Agency.

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[9] Children's Bureau, https://www.acf.hhs.gov/cb/monitoring/child-family-services-reviews

[10] Supplemental Notice of Proposed Rulemaking (SNPRM), Adoption and Foster Care Analysis and Reporting System (Apr. 7, 2016), https://www.federalregister.gov/documents/2016/04/07/2016-07920/adoption-and-foster-care-analysis-and-reporting-system ("It is a well-established that, historically, quantitative and qualitative data on AI/AN populations, including children, has been incomplete and unreliable resulting in such populations being among the most under-counted populations groups in the United States.").

> The NPRM data element does not provide information on whether the notice was sent within ICWA's statutory timelines and whether it was sent to both parents and the child's Tribe. This is important information that informs whether the parents and child's Tribe had the ability to participate in case planning, placement decisions, and court proceedings. Analyzing this data from the proposed data element could lead to erroneous conclusions regarding whether ICWA requirements were met or whether the parent's or Tribe had an opportunity to participate in important case planning decisions and court hearings. 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 which occurs in some jurisdictions. This is data that should be easily retrievable from a case file.

These are all quantitative data elements and should appear in any well-maintained case file. We understand the Agency's rationale that highly descriptive data elements are better suited for qualitative analysis, and may be too descriptive for information collection reporting at the national scale. However, data related to American Indian and Alaska Native children would not be "overly burdensome" for state child welfare systems to collect, especially since in the vast majority of states American Indian and Alaska Native families are less than 5% of the state child welfare system and once states establish that a child is not ICWA eligible, which is only one data element, no other data elements have to be completed. ACF is thus in the best position to capture necessary data on American Indian and Alaska Native children and families in state child welfare systems and AFCARS—not an alternative method—is the only federal data system that has the ability to capture placement related data.

It is manageable and not "overly burdensome" for State IV-E Agencies to collect data elements required under ICWA for AI/AN children.

The 2016 supplemental notice of proposed rulemaking and the 2016 Final Rule addressed issues related to burdens on states. Affirming states' concerns, the Agency concluded that information collecting burdens were warranted given the lack of basic data for American Indian and Alaska Native children, and the benefits for policy development, technical assistance and training, and programming.[11] ACF and states 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 to every child in state custody. These are: 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); and 3) does ICWA apply? These questions are necessary to determine if ICWA applies while other data elements in the 2016 Final Rule would only need to be asked if ICWA does apply. Only nine states have foster care placement rates where ICWA might apply for over 4% of the total state foster care population. In 41 states the rates are under 3%, with 37 states under 1 percent.

While some of ICWA's requirements involve court determinations, most of the actions required are based on state IV-E agencies efforts. Good case management practice requires child welfare agencies to document court findings in case files, including those related to ICWA findings.

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[11] Supplemental Notice of Proposed Rulemaking (SNPRM), Adoption and Foster Care Analysis and Reporting System (Apr. 7, 2016), https://www.federalregister.gov/documents/2016/04/07/2016-07920/adoption-and-foster-care-analysis-and-reporting-system

The ICWA related data elements in the proposed rule will enhance the work of organizations working with children and families.

A few states that have cited concerns about expanded AFCARS data collection and reporting related to the 2016 Final Rule have also found ICWA data elements to be helpful. Part of the basis for their concerns centers on the ACF penalty structures for data that is not collected or reported. States have expressed specific concern regarding data that is not under the control of the state IV-E Agency. Interpretations by ACF of why a state may raise concerns about the number of ICWA data elements must be carefully examined and not unduly conflated with more general concerns related to things like penalty structures.

Four states reported that ICWA-applicable children in their out-of-home care populations were well under one percent (1%). However, 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. Several states have begun integrating the 2016 Final Rule ICWA data elements and are finding the data to be very helpful in addressing ICWA implementation challenges, policy development, and program management effectively.[12]

Going forward, states should ask questions that find whether a child is an American Indian child as defined in ICWA, including inquiring about the family's Tribal membership status. Specific data elements on notification of proceedings and transfers to Tribal court are important because the timelines in ICWA are rarely met, and Information on termination of parental rights, removals under ICWA, and placement preferences are important for determining ICWA compliance. As the Agency itself has recognized, "Not including ICWA related data elements in AFCARS, or including too few data elements, may exclude Indian children and families from the additional benefit of improving AFCARS data."[13]

Conclusion

Please accept these comments with our sincere request to work together with HHS and ACF, in the spirit of its partnership and shared interest to protect our most vital resource, our children. We thank you for this opportunity to supply our comments and recommendations and look forward to your responses.

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[12] NICWA.

[13] Supplemental Notice of Proposed Rulemaking (SNPRM), Adoption and Foster Care Analysis and Reporting System (Apr. 7, 2016), https://www.federalregister.gov/documents/2016/04/07/2016-07920/adoption-and-foster-care-analysis-and-reporting-system

Please contact Candice E. Skenandore, Self-Governance Coordinator at (920) 869-4281 or cskena10@oneidanation.org if you have any questions or to discuss the comments.

Respectfully,

Brandon Yellowbird Stevens
Oneida Nation Vice Chairman

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Adoption and Foster Care Analysis and Reporting System

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Human Rights Campaign

Submitter Information

Name: Andrea Levario
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Washington, DC,
Organization: Human Rights Campaign

General Comment

RE: Proposed Rulemaking for Adoption and Foster Care Analysis and Reporting System; RIN 0970-AC72

To Whom It May Concern:

On behalf of the Human Rights Campaigns nearly 3 million members and supporters nationwide, I write in response to the request for public comment regarding proposed changes by the Administration for Children and Families (ACF) to AFCARS data collection procedures published April 19, 2019. As the nations largest organization working to achieve equal rights for the lesbian, gay, bisexual, transgender, and queer (LGBTQ) community, HRC strongly supports comprehensive federal data collection efforts that directly address sexual orientation and gender identity. HRC strongly urges ACF to maintain the current data elements of AFCARS and to collect information on the sexual orientation, gender identity, and gender expression of children both in out-of-home care and of foster parents, adoptive parents, and legal guardians. By retaining sexual orientation, gender identity, and gender expression (SOGI) in the data elements of AFCARS, ACF can ensure that the child welfare system is able to provide a safe, loving, and affirming placement to every child who is unable to live with their parents.

Attachments

Human Rights Campaign

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, D.C. 20024

RE: Proposed Rulemaking for Adoption and Foster Care Analysis and Reporting System; RIN 0970-AC72

To Whom It May Concern:

On behalf of the Human Rights Campaign's nearly 3 million members and supporters nationwide, I write in response to the request for public comment regarding proposed changes by the Administration for Children and Families (ACF) to AFCARS' data collection procedures published April 19, 2019. As the nation's largest organization working to achieve equal rights for the lesbian, gay, bisexual, transgender, and queer (LGBTQ) community, HRC strongly supports comprehensive federal data collection efforts that directly address sexual orientation and gender identity. HRC strongly urges ACF to maintain the current data elements of AFCARS and to collect information on the sexual orientation, gender identity, and gender expression of children both in out-of-home care and of foster parents, adoptive parents, and legal guardians. By retaining sexual orientation, gender identity, and gender expression ("SOGI") in the data elements of AFCARS, ACF can ensure that the child welfare system is able to provide a safe, loving, and affirming placement to every child who is unable to live with their parents.

I. The data elements currently in AFCARS are not overly burdensome and have already been streamlined through numerous comment periods.

The December 14, 2016 AFCARS Final Rule ("Final Rule") established that questions regarding sexual orientation, gender identity, and gender expression should be included in AFCARS data collection process. The Final Rule is the result of streamlining the original proposed rule.[1] Stakeholders and interested parties had ample opportunity to provide feedback and voice concerns on the data elements included in AFCARS. The Final Rule from 2016 reflects this public input and the data elements that it introduces, including questions about SOGI, are not overly burdensome. Any additional burden incurred by collecting these data elements are far outweighed by the benefits of more informed policy; without accurate and comprehensive information about sexual orientation and gender identity, it is impossible to know how the child welfare system can best serve LGBTQ children and youth.

These changes also bring AFCARS into compliance with statutory requirements for data collection as outlined in the *Preventing Sex Trafficking and Strengthening Families Act* (P.L. 110-351) as well as changes to foster care services introduced 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 Final Rule also introduces data elements that ensure implementation of the *Indian Child Welfare Act* (P.L. 95-608), which seeks to improve outcomes for tribal youth. Again, any burdens resulting from these changes are mitigated by the improvements that comprehensive data will make possible in implementing and assessing these policies.

Furthermore, the 2016 Final Rule represents the first time AFCARS has been amended since 1993. The data elements introduced by the Final Rule represent a much-needed updating of AFCARS and reflect advances in child welfare policy and practice. The child welfare profession has acknowledged the importance of collecting SOGI information about children for creating individualized case plans and tracking outcomes in individual cases. 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 professional guidelines addressing managing SOGI information in child welfare systems. The guidelines emphasize that population-based data for LGBTQ youth in foster care is necessary for policymakers to make informed, evidence-based decisions about allocating resources, providing support, and assessing outcomes for LGBTQ

[1] 2015 NPRM: https://www.federalregister.gov/documents/2015/02/09/2015-02354/adoption-and-foster-care-analysis-and-reporting-system; 2016 SNPRM: https://www.federalregister.gov/documents/2016/04/07/2016-07920/adoption-and-foster-care-analysis-and-reporting-system

children.[2] Removing SOGI data elements from AFCARS data collecting procedures would leave ACF out-of-step with the current recommendations of child welfare specialists and professionals.

II. Maintaining the collection of SOGI data is critical to the safety, permanency, and well-being of LGBTQ children in foster care.

Data collection and LGBTQ children

We strongly recommend that ACF maintains the data elements in the Final Rule related to sexual orientation, gender identity, and gender expression. LGBTQ youth are disproportionately overrepresented in the foster care system. A 2013 study conducted with the R.I.S.E Project[3], a five year $13.3 million demonstration grant funded by the ACF to create a model program to support LGBTQ youth in the foster system, found that 19% of youth ages 12-21 in foster care self-identify as LGBTQ. This is 1.5 to 2 times the number of LGBTQ youth estimated to be living outside of foster care.[4] LGBTQ youth are also more likely to be living in congregate care, such as group homes, residential treatment facilities, and psychiatric institutions. They are also more likely to have been homeless, more likely to have been hospitalized for emotional reasons, and more likely to report being mistreated by the foster care system -- at rates 2 times higher than their non-LGBTQ peers.[5] Further data on the experiences of LGBTQ youth in the foster care system is imperative to improving outcomes, reducing costs, and reducing disparities.

These disparities in experiences with the foster care system are consistent with a growing body of research demonstrating that LGBTQ youth suffer from a range of health and mental health disparities associated with family rejection, school bullying, societal stigma, and discrimination. The Human Rights Campaign Foundation and the University of Connecticut recently published a report based on a survey of over 12,000 LGBTQ teens. Among the key findings are 67% of LGBTQ teens hear their family members make negative comments about LGBTQ people, 73% have experience verbal threats based on their sexual orientation or gender identity, and 95% report difficulty sleeping at night due to stress. In order to identify these risks, the child welfare system must affirmatively collect information about the sexual orientation and gender identity, and expression 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.

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[2] Bianca D.M. Wilson, Khush Cooper, Angel Kastanis, Sheila Nezhad, "Sexual and Gender Minority Youth in Foster Care," August 2014. https://williamsinstitute.law.ucla.edu/wp-content/uploads/LAFYS_report_final-aug-2014.pdf

[3] https://lalgbtcenter.org/rise

[4] *See* "Sexual and Gender Minority Youth in Foster Care, *supra* note 2

[5] *Ibid.*

The 2016 Final Rule introduced voluntary questions regarding the sexual orientation of foster youth over the age of 14. HRC strongly urges that these questions be retained. The poor outcomes experienced by LGBTQ youth are extremely costly for state and tribal welfare systems. Identifying LGBTQ youth through a voluntary sexual orientation question enables states and tribes to implement effective interventions, minimize stays in congregate care, and improve the permanency of placements. All of these measures reduce the overall costs of the child welfare system and justify any burden incurred by asking a question about sexual orientation.

HRC urges ACF to retain the data element related to the removal of a child from a family home due to "family conflict related to child's sexual orientation, gender identity, or gender expression." Family preservation, or helping a child remain with their family of origin, is a priority of the current ACF administration. Including information about removal in AFCARS can inform approaches to and funding for family conflict and acceptance work. The high numbers of LGBTQ youth who end up in foster care suggests that improved family preservation could significantly reduce the number of LGBTQ children who are removed from their families. Removing this data element would impair the ability of states and tribes to improve outcomes for LGBTQ youth and to reduce the over-representation of LGBTQ youth in care.

The 2019 Notice of Proposed Rulemaking (NPRM) makes significant changes to the amount of data collected on Native children and their families. "Native children are overrepresented in the foster care system at a rate 2.7 times higher than their rate in the population nationally."[6] ACF's proposed changes to the 2016 Final Rule are not consistent with the recommendations of the tribes directly affected by the changes in data collection proposed by ACF. HRC recommends that ACF work in consultation with tribal leaders to retain data elements that assist in providing programs and resources that meet the specific needs of Native children in state welfare systems.

Data Collection and LGBTQ parents

In addition to LGBTQ youth in the foster care system, it is also critical to collect SOGI-related data on foster and adoptive parents. Like LGBTQ youth, LGBTQ parents are disadvantaged by the foster care system and remain a significantly under-tapped resource in the effort to place children with permanent families. National surveys indicate that nearly 2 million LGBTQ adults are interested in adopting children.[7] Given the chronic shortage of foster homes in the United States, every effort should be made to recruit and retain all qualified prospective resource

[6] Alicia Summers, PHD, Kathy Deserly, Andy Yost, JD, "*The Importance of Measuring Case Outcomes in Indian Child Welfare Cases*," (January 1, 2017), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-36/january-2017/the-importance-of-measuring-case-outcomes-in-indian-child-welfar/.

[7] The Williams Institute and the Urban institute, Foster and Adoptive Parenting by Gay and Lesbian Parents in the United States, (2007). https://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/lgbt-parenting-in-the-united-states/

families. Including the SOGI of foster families in AFCARS will increase disclosure and ensure that all applicants are thoroughly assessed, which will allow for placements that are most likely to be successful and permanent. Data collection will help identify trends in the types and successes of placements, such as the number of foster placements that result in permanent adoptions. Comprehensive data about SOGI in the foster care system is necessary to maximize the pool of permanent placements for children. To that end, ACF should retain the question in AFCARS regarding the sexual orientation of adoptive and foster parents and guardians.

* * * * *

HRC urges the U.S. Department of Health and Human Services and the ACF to retain all of the data elements in the 2016 AFCARS Final Rule, including those related to sexual orientation, gender identity, and gender expression. LGBTQ children are among the most vulnerable populations that ACF serves. By retaining SOGI questions in its data collection efforts, ACF can take important steps to ensure that all LGBTQ youth in foster care feel safe, affirmed, and loved.

Sincerely,

David Stacy

David Stacy
Government Affairs Director
Human Rights Campaign

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Alliance for Strong Families and Communities

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Washington, DC,
Organization: Alliance for Strong Families and Communities

General Comment

See attached

Attachments

Alliance for Strong Families and Communities

June 17, 2019

Attn: NPRM, RIN: 0970-AC72; Document Number: ACF-2018-0003
Kathleen McHugh
Director, Policy Division
U.S. Department of Health and Human Services
Administration for Children and Families
330 C Street S.W.
Washington, D.C. 20024

Re: Comments on NPRM on proposal to amend the Adoption and Foster Care Analysis and Reporting System (AFCARS) regulations.
Docket #: ACF-2018-0003
RIN: 0970-AC72

Dear Ms. McHugh,

These comments are submitted in accordance with the notice of proposed rulemaking published in the Federal Register on April 19, 2019 under the heading of **Adoption and Foster Care Analysis and Reporting System.**

The Alliance for Strong Families and Communities is a nationwide strategic action network of community-based organizations across the country driving to achieve a healthy and equitable society. Our network of thousands of social sector professionals work with millions of people every day to help them build, maintain, and restore their physical, emotional, social, and economic well-being.

Many Alliance member organizations partner with public agencies at all levels of government in implementing high quality programs and services that achieve critical outcomes for children, youth, families and communities. Because of our network's wealth of experience in providing services in the child welfare system, we believe our network is strategically suited to provide comments on this request.

Alliance point of contact: Ilana Levinson, Sr. Dir. Gov. Relations, llevinson@alliance1.org

LEVEL SETTING

Our membership includes some of the nation's leading community-based organizations that provide child welfare services to their communities. A majority of our members engage in service contracts with state and local human services agencies to provide at least one of the following: prevention services, parenting classes, foster care and adoption services, residential treatment, early childhood education programming,

behavioral health services for youth, and services for youth transitioning out of foster care. Given our deep engagement in all aspects of the child welfare system across the country, we are invested in ensuring that data collection around the foster care and adoption system is comprehensive and inclusive of the unique demographics and needs of all youth who are in care.

Looking forward, the transition to the Family First Prevention Services Act will require a major shift in the way our members structure systems and programs, shifting efforts further upstream. As we make this shift, a national tracking of comprehensive longitudinal data in AFCARS is critical. This data helps us to identify the needs of the children and families we serve and assess the effectiveness of the services we provide.

Further, as social sector leaders who provide programming to families across their lifespan, we recognize that thoughtful, sophisticated, and comprehensive data collection provides us with the information we need to innovate, modify, and better align services to the unique needs of individuals. The more sophisticated our demographic data, the more culturally responsive we can be and better able to align services to the unique needs of the children and families in the child welfare system. Over 100 years of experience has taught us that the more we can target the needs of an individual (especially a child) the better we can serve them.

The Alliance for Strong Families and Communities encourages the Department to return to the 2016 AFCARS Final Rule, which provided a strong and accurate set of data requirements that will provide public and non-profit service providers the information they need to best serve children, minimize costs, and promote positive outcomes. We do not believe the removal of numerous data elements, as proposed in this Notice of Proposed Rulemaking, will serve the system well. We strongly encourage you to resort back to the 2016 rule. The benefits of some minor additional data collection will far outweigh the costs when it comes to identifying cost savings, promoting efficiencies, and most importantly, improving outcomes for children.

Data Collection on Sexual Orientation & Gender Identity

The Alliance for Strong Families and Communities strives to create a healthy and equitable society for all. We strongly support comprehensive data collection efforts that directly address sexual orientation and gender identity. We encourage the agency to retain the specific elements related to data collection on LGBTQ young people and foster/adoptive families in the 2016 Final Rule. We believe the 2016 Final Rule's efforts to collect data on sexual orientation and gender identity of children in out-of-home care, as well as of foster parents, adoptive parents, and legal guardians is essential. If AFCARS collects this data, it will help ensure that the system can provide appropriate,

safe, loving placements to children who have had to be temporarily removed from their families.

The Alliance for Strong Families and Communities was very supportive of the *Family First Prevention Services Act (FFPSA),* which encourages the entire system to move further upstream and to ensure children and families are receiving evidence-based services. The success of Family First hinges on good data. In order to best target prevention services to the youth and families, we will need a deeper understanding of the youth at risk of entering the child welfare system. Since LGBTQ youth are already disproportionately represented in the system, further data collection will help HHS, state and local child welfare agencies, and community-based providers best target the appropriate prevention services to this population to keep them out of foster care.

The changes proposed by the 2016 Final Rule provided a needed upgrade to the data collection system. AFCARS had not been amended since 1993. This was a necessary update – especially around data elements. Stakeholders in the system have acknowledged the importance of collecting sexual orientation, gender identity, and expression (SOGIE) information about children. Population-based data for LGBTQ youth in the foster care system helps policymakers to make more informed decisions and determine outcomes for LGBTQ youth.

The 2016 Final Rule reflected a significant public input process. The Alliance for Strong Families and Communities does not believe that that these data collection requirements are overly burdensome, as surmised by the Department. The benefits of a richer data system that is better aligned to help systems serve youth far outweighs any modest efforts needed to measure additional data elements. If we do not know the sexual orientation or gender identity of the young people we serve, we cannot align the child welfare system to best serve the unique needs of LGBTQ children and youth.

It is critical that we track this data, given that LGBTQ youth are currently experiencing negative outcomes in the system. We know that LGBTQ youth are overrepresented in out-of-home care and know that they are disproportionately mistreated in foster care. Unfortunately, these youth often must endure longer stays in care. These young people are also aging out of care at disproportionate rates and are often involved in the criminal justice system. By tracking this data, state agencies and community-based organizations can better respond to support the needs of these young people.

In addition, the identification and data collection of children and youth at risk of trafficking is mandated in federal law (the *Preventing Sex Trafficking and Strengthening Families Act*). The original language in the 2016 Final Rule would help meet this

mandate, because studies have demonstrated that LGBTQ youth who have run away from home or who have aged out of care are at an increased risk for sex trafficking.

The Alliance for Strong Families and Communities believes that unlike the recent NPRM proposal, ACF should keep the data element around the removal of a child from their family due to a family conflict related to the child's sexual orientation, gender identity, or gender expression. This information about removal can help identify patterns, challenges, and solutions to addressing family conflict.

Beyond collecting data on youth, the Alliance believes it is important to collect related data on foster/adoptive parents. According to national surveys, there are nearly 2 million LGBTQ adults that have expressed an interest in adoption. This remains an under-utilized resource at a time when the need for foster and adoptive parents is in great demand, given the significant shortages of foster homes in the U.S. currently.

Having more LGBTQ foster and adoptive parents in the system will help to lower disruptions in placement if youth are placed with someone who they may identify with and understands their needs. We know that LGBTQ youth are at a higher risk for unnecessary congregate care, placement changes, and other challenges because of their sexual orientation, and gender identity. LGBTQ foster parents represent a huge opportunity to help create placements for kids who are otherwise difficult to place. This helps lead to the goals set about in the *Family First Prevention Services Act,* which is pushing the system to move away from residential care. To meet these goals, AFCARS must collect this SOGIE data, which will help identify trends, outcomes, and opportunities.

Data Elements on Indian Child Welfare Act

As mentioned in the previous section, the Alliance for Strong Families and Communities strives to create a healthy and equitable society for all. We strongly support comprehensive data collection efforts related to Native children, to ensure they receive appropriate, targeted, and equitable services and programs. Unfortunately, the NPRM proposed eliminating 90% of AFCARS data elements related to Native children in state child welfare systems, retaining only five of these original data elements. We strongly encourage the Department to reverse this decision and return to the 2016 Final Rule proposal, which contained nearly 60 important data elements related to the *Indian Child Welfare Act* (ICWA).

Native children often experience disproportionately negative outcomes in the child welfare system. The data elements proposed for elimination in the NPRM would help stakeholders understand the unique issues that Native American children experience,

which will help community-based organizations and other providers serve them better. More data will help tribes recognize challenges and identify areas of improvement. The set of data elements proposed by the 2016 Final Rule would provide one common set of data that states, tribes, and others could use to address ICWA challenges and other child welfare issues, as needed. Further, it is critical that this data be captured through AFCARS, as it is the only federal data system that covers placement-related data. The Department of Interior does not have a relationship with state child welfare agencies and doesn't have the resources to collect such information. Additionally, other methods of data collection for ICWA related data elements, including the Child and Family Services review, does not support collection of the type of data elements that AFCARS covers. The Alliance for Strong Families and Communities disagrees with ACF's premise that this data collection void could be addressed through other means. History demonstrates that this type of research requires funding and infrastructure that is not otherwise supported. AFCARS is the system that can be relied upon to provide the most accurate data.

The Alliance for Strong Families and Communities has concerns about the removal of several of the data points that were included in the 2016 Final Rule but proposed for elimination in the NPRM. We believe these items should not be difficult to collect, and most importantly, that they provide systems and stakeholders with critical information that outweighs any minor administrative inconveniences.

- First, we support collecting information on foster care placement preferences. This critical data element tells us whether preferences were met, as well as the basis for situations where placement preferences were not achieved. It is also helpful to understand whether the tribe approved of the placement if it involved a congregate care setting.

- Second, we support collecting information on adoptive placement preferences. Though the NPRM proposes identifying whether placement involves someone that is a member of a tribe, it does not provide information on whether a tribal placement preference was used.

- Third, we support the original data element on ICWA notice on foster care placement and termination of parental rights to tribes and parents. The new version of this data element proposed in the NPRM only tracks whether notice was sent by the state Title IV-E agency yet does not provide information on whether the notice was sent within ICWA's statutory timelines and whether it was sent to parents and the tribe. According to the National Indian Child Welfare Association: "This is important information that informs whether the parents and child's tribe had the ability to participate in case planning, placement

decisions, and court proceedings. Analyzing this data from the proposed data element could lead to erroneous conclusions regarding whether ICWA requirements were met or whether the parent's~~s~~ or tribe had an opportunity to participate in important case planning decisions and court hearings. 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 which occurs in some jurisdictions. This is data that should be easily retrievable from a case file. "

We also remain concerned about the lack of appropriate consultation with tribal nations. ACF had listed past meetings with tribal nations as consultation in the NPRM that may have been misidentified, as these meetings did not always specifically address the concerns of tribal leaders and representatives. In the best interest of Native children, it is critical that consideration be given to the benefits of data for Native children and how this data could address the poor outcomes often experienced by these children.

The Alliance for Strong Families and Communities always strives to recognize regulatory burden and balance the costs and benefits of additional administrative requirements. While we agree that it is critical to remove unnecessary barriers, we do believe that AFCARS data collection efforts around Native children absolutely warrant the minor administrative efforts required. Further, we know that numerous states are already integrating 2016 Final Rule ICWA data elements in their data collection and they are finding the data helpful in addressing ICWA implementation. Specifically, only three questions related to ICWA will be required per child. Remaining data elements would only apply in cases where ICWA applies. For most states, this equates to less than three percent of the total state foster care population.

Data Elements on Education

The Alliance for Strong Families and Communities was disappointed to see the removal of reporting requirements on educational stability. States are already required to collect and document this information under the *Fostering Connections to Success and Increasing Adoptions Act*. In addition, this is reinforced in the *Every Student Succeeds Act* (ESSA), where school stability and interagency data sharing related to students in foster care is prioritized and recognized. State departments of education are now required to report on the educational performance of students that are currently in foster care as part of the State Education Agency Report Card. This connection and reinforcement of data collection across statues reinforces the need to strengthen our ability to serve and produce better outcomes. Capturing this in AFCARS would help to create uniformity between states.

Currently, very little national data about the education of children in foster care exists. AFCARS is the best system to collect data on educational stability for youth in foster care because it allows for straightforward reporting on how often a child changes schools, as well as the reason. There is no other national system set up to measure this.

Data Elements on Juvenile Justice

The Alliance for Strong Families and Communities believes it is essential to track information related to juvenile justice involvement in AFCARS. Recognizing that many youth in foster care are also involved in the juvenile justice system, and that these dual-status youth have unique needs, it is critical that juvenile justice involvement is a required data element. The longitudinal data that this will produce will help inform state policies and better target services to youth.

The Alliance for Strong Families and Communities was pleased that Senators Grassley (R-IA) and Peters (D-MI) recently introduced bipartisan legislation (the CONNECT Act, S. 1465) that encourages data collaboration around these dual-status youth. Both Senators are focused on reducing challenges these youth face, especially when those challenges are due to a lack of coordination between systems. By tracking this data in AFCARS, it will encourage more cross-system coordination.

Data on Health Assessment

The Alliance for Strong Families and Communities is concerned about the proposal to remove the date of health assessment and timely health assessment elements. This data helps stakeholders understand and assess a young person's access to care. It also helps measure states' compliance with their Title IV-B Health Oversight and Coordination Plans. The proposed 2016 Final Rule included health assessment dates, which would allow the system to understand the health of children upon entering the system.

The Alliance for Strong Families and Communities serves families and communities across the country and we recognize the rise in parental substance use disorders, resulting in more children entering the foster care system. The trauma resulting from such adverse childhood experiences can lead to numerous developmental challenges for kids (physical, emotional, educational, etc.). The timeliness of health assessments is critical to ensuring that providers can appropriately identify trauma-related health challenges and provide evidence-based services in response to such assessments. We strongly encourage ACF to restore these data elements.

Closing

Alliance for Strong Families and Communities ®

In conclusion, the Alliance for Strong Families and Communities recognizes there will be some costs associated with the 2016 Final Rule (which was the case in 1993, the last time this was revised). We recommend that HHS request the resources necessary for implementation of new AFCARS data collection in its next budget request to Congress. Our organization would be pleased to advocate for those important resources, recognizing that there is both a precedent and a need for this important upgrade to AFCARS. These potential upgrades in data collection will shape future policies and service delivery strategies in the foster care system.

Once again, the Alliance for Strong Families and Communities strongly urges ACF to return to the 2016 AFCARS Final Rule and abandon the new NPRM proposal. A more robust data collection and modernization effort will yield countless positive outcomes in the child welfare system.

Thank you for your consideration of our comments.

Sincerely,

Ilana Levinson

Ilana Levinson
Senior Director, Government Relations
Alliance for Strong Families and Communities

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AFCARS 2018-2020

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

Document: ACF-2018-0003-0341
Fort Peck Tribes

Submitter Information

Name: Floyd Azure
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Poplar, MT,
Organization: Fort Peck Tribes
Government Agency Type: Tribal
Government Agency: Fort Peck Tribes

General Comment

See attached

Attachments

Fort Peck Tribes

FORT PECK TRIBES
Assiniboine & Sioux

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 Fort Peck Assiniboine and Sioux Tribes submit 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 data points specific to Indian Child Welfare Act of 1978 (ICWA); these data points were incorporated into AFCARS as detailed in the Final Rule published on December 14, 2016.

There is no other national method to track ICWA compliance, and few, if any state systems. 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.

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, placement in a family setting and 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.

To that end, all of ICWA data points included in the 2016 Final Rule should be retained. Moreover, the Fort Peck Tribes strongly encourage a review of the data points being revised to ensure they do not encourage non-compliance with ICWA, whereby specifically harming the well-being of Indian children.

The NPRM's One-Sided Focus on Compliance Costs Fails to Adequately Consider Already Identified Benefits to the Data Points Proposed for Elimination

This NPRM relies on information obtained through the April 2019 ANPRM which sought information only on burdens, and completely ignores any obligation to do a cost-benefit analysis by wholly ignoring the benefits previously identified through the 2016 Final Rule Process.

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 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 meaningful 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. 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 unconsidered 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. 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 modification of the Final Rule would weigh on system-wide resources.

These Regulations are Critical to Protecting Children.

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.

The need for quality national data to assess states' efforts in implementing ICWA has been previously demonstrated. 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.

There remains a pressing need for comprehensive national data on ICWA implementation. 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 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 the Tribes strongly encourage retaining **all** of ICWA-related data elements of the 2016 Final Rule, these specific comments identify concerns regarding the suggested data elements and would increase 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. The Fort Peck Tribes recommend including a data element to capture the date of notice (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.

Placement: The Fort Peck Tribes 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 clearer picture regarding placement and is consistent with the goal of Families First to place children in a family-like setting.

Transfer to Tribal Court: The Tribes 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 of 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, the Fort Peck Tribes strongly support each of the ICWA-related data points and believe, as your Agency did in 2016, the benefits of this data collection far outweigh the burden.

In the interest of increasing compliance with the ICWA, and protecting our children and families, the Fort Peck Tribes respectfully submit these comments.

Sincerely,

Floyd Azure
Fort Peck Tribal Chairman

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AFCARS 2018-2020

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

Document: ACF-2018-0003-0342
Gun Lake Tribe

Submitter Information

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Government Agency Type: Tribal
Government Agency: Gun Lake Tribe

General Comment

See attached

Attachments

Gun Lake Tribe

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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 Match-E-Be-Nash-She-Wish Band Pottawatomi Indians of Michigan 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:

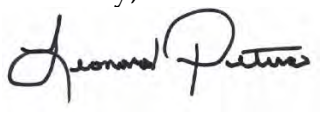
1. Was a transfer to tribal court requested? (yes or no)
2. If so, was it granted? (yes or no)
3. If it was denied, what was the reason? (drop down menu based on 2016 ICWA regulations).

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,



Chairman
Leonard (Bob) Peters

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AFCARS 2018-2020

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

Document: ACF-2018-0003-0343
Nevada Division of Child and Family Services

Submitter Information

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Government Agency Type: State
Government Agency: Nevada Division of Child and Family Services

General Comment

State of Nevada Division of Child and Family Services - See attached file(s)

Attachments

Nevada Division of Child and Family Services

State of Nevada Division of Child and Family Services

June 18, 2019

RE: AFCARS NPRM Open Comment Response Period, RIN: 0970-AC72

Thank you for the opportunity to comment on the AFCARS NRPM published in the Federal Register on April 19, 2019.

The State of Nevada Division of Child and Family Services (DCFS) is pleased with the efforts to streamline the data elements and generally agrees with the changes. The information for the remaining data elements is collected as a part of agency casework for the most part; however, we have remaining concerns related to some of the proposed data elements.

Specific feedback related to the data elements are:

- Regarding elements for *health, behavioral, or mental health conditions*, the option of "exam or assessment conducted but results not received" should be eliminated as a response option as being too burdensome on workers and unnecessary given the other options.

- The expansion of options for *child and family circumstances at removal* increasing from 17 to 34 circumstances is likely going to be confusing and burdensome to workers. While we agree with the importance of adding certain items, we wonder if the list of options can be reduced. We propose combining similar terms wherever possible; for example, perhaps "runaway" and "whereabouts unknown" could be consolidated into one item.

- Including court related information such as *date of termination/modification of parental rights petition* and all *periodic review*, and *permanency hearing* dates for the child are areas with potential concerns due this data being underreported or inconsistently entered into our information system by workers. Efforts to clean-up and consistently enter this data will be considerable, although we agree with the inclusion of the periodic and permanency hearing dates in the AFCARS data extract. Additionally, it is unclear whether the periodic review and permanency hearing dates are to be included for only the most recent out-of-home care episode or whether all historical hearings for all episodes are to be included.

- We propose removing *caseworker visit* information from AFCARS as we believe including this with the biannual submission will put an additional heavy data clean-up burden on caseworkers. We have other methods in place to track and encourage timely data entry and clean-up in this area to ensure the data is accurate and complete by the time the annual caseworker visitation data is due to ACF, but which allows flexibility to take other jurisdictional needs or short-term priorities into consideration, such as holding off certain data clean-up activities to focus on other items such as targeted case reviews.

- As a general note, we believe providing historical data on all *removals*, *living arrangements and providers, permanency plans*, and *general exit data* for each out-of-home care-episode for each child in foster care, will, for a small portion of our youth, cause potentially significant data

quality and consistency issues to become apparent. We believe these issues could likely be caused by jurisdictional differences in documenting certain data in the case management system, particularly when youth move between in-home services to out-of-home-care during their involvement with child welfare agencies. Our state will need to analyze and resolve these potential issues that may arise, but they could consume significant program and technical resources.

- Overall, we would like additional clarification on the new data elements, including how these elements are defined and how they should be captured and reported.

While we want to comment in detail on the hours, costs, and timeframes associated with the work involved to comply with these requirements, this is difficult to accomplish given the lack of detail regarding specific information such as further definitions of these elements, the structure of the extract, and other technical considerations.

The DCFS Information Services unit in coordination with program staff will be responsible for making all changes to the statewide child welfare case management system, UNITY, rewriting the AFCARS data extract to comply with new requirements, and updating or creating various reports used to track data quality and compliance for all areas impacted by AFCARS changes. These activities will place a significant burden on the IS unit. At this time, we estimate that about 50 new data entry fields will need to be added UNITY to meet the proposed regulations, some with complex logic and workflow flagging/alert requirements. These will need to be bundled into projects that will be completed by internal staff and which must go through the software development lifecycle stages of requirements, design, development, testing, implementation, and training, each with their own steps, timeframes, and costs. Very extensive work will need to be done in-house via the software development lifecycle to build the new AFCARS extract as well as modify or build new internal frequency, compliance, and quality reports to measure and track the data reported to AFCARS and to use for clean-up purposes.

Nevada DCFS and our statewide child welfare partners face many significant challenges with capacity and resources. We are a small state with very limited resources and are currently involved in many other large-scale projects which will impact our ability to quickly implement these changes for AFCARS. For example:

- Our state Legislature meets biennially in odd numbered years, and the 2019 session recently ended this month. Many laws and statutes were enacted or modified which will require agency action over the next biennium which will require program and technical resources.

- Nevada is finalizing a Program Improvement Plan based on the Child and Family Services Review – Round 3 which was recently completed. PIP activities will consume significant program and technical resources for the next two to three years.

- Although Nevada delayed implementation of the Family First Act, activities are underway to prepare for implementing this act which will impact program delivery and data collection in UNITY and which will require many program and technical resources.

- Nevada submitted a CCWIS Letter of Intent for the child welfare information system, UNITY, in 2018 and is involved in major work over the next two to three years to make the system CCWIS compliant, develop a comprehensive CCWIS Data Quality Plan, and implement foundational technology to build required bi-directional data exchanges. These projects will also require many program and technical resources.

To comply with the finalized AFCARS regulations, we will need to conduct more formal impact analyses which we believe can only be done after the final regulations are published and more specific guidance is provided. In addition to technical changes outlined above, we anticipate having to modify business practices, training content and delivery, agency documentation, policies and procedures, and statewide QA/CQI processes to adequately accommodate the new regulations and avoid penalties. We believe these activities will still be significant in terms of complexity, cost, and time, even with the reduction in proposed new AFCARS data elements. Additionally, we anticipate needing to request additional technical and program staff positions and funding to assist with meeting these regulations; these requests would need to be reviewed and approved by our state Legislature, no earlier than the 2021 session.

In view of this, Nevada DCFS requests the following:

- Allow five federal fiscal years to comply with the final rule following publication of the finalized data elements.
    - We are requesting five years because we will need time after the publication of the final regulations to do updated impact analyses to determine more realistic resources needed and timeframes as well as request additional positions and funding to complete the work. We also believe it would be more effective and efficient for Nevada to complete foundational CCWIS related work, especially technical components needed for our CCWIS Data Quality plan, prior to beginning work to implement the new AFCARS regulations. In addition, once necessary child welfare information system changes are completed, we would like adequate time to build and test the new AFCARS extract to ensure it is working correctly as well as time to research and resolve new data quality issues that will undoubtedly arise.

- Delay implementation of the financial penalty for at least one federal fiscal year after the first data extract with the new elements is submitted.

- Shortly after the new regulations are published, hold regularly recurring meetings regarding AFCARS with ACF and states to clarify the data elements, technical specifications, etc. to help states prepare for implementation.

- Provide more clarity on how compliance will be measured as well as whether and when new automated data evaluation utilities (currently the FRU, DQU, and DCU) will be available for states to use to test and evaluate the new data files.

Thank you again for the opportunity to comment on these proposed regulations. We appreciate your consideration of our feedback.

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AFCARS 2018-2020

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

Document: ACF-2018-0003-0344
National Indian Health Board (NIHB)

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General Comment

Please find attached the comments of the National Indian Health Board to the Administration for Children and Families (ACF) on the AFCARS Proposed Rule, RIN:
0970-AC72

Attachments

National Indian Health Board (NIHB)

National Indian Health Board

Submitted via https://www.federalregister.gov/

June 18, 2019

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

RE: RIN 0970-AC72, Adoption and Foster Care Analysis and Reporting System Proposed Rule

Dear Ms. McHugh,

On behalf of the National Indian Health Board (NIHB),[1] and the 573 federally recognized American Indian and Alaska Native (AI/AN) Tribes we serve, I write to respond to the Notice of Proposed Rulemaking (NPRM) to amend the Adoption and Foster Care Analysis and Reporting System (AFCARS) regulations issued by the U.S. Department of Health and Human Services (HHS) Administration for Children and Families (ACF). For entities that are not Title IV-E agencies under the Social Security Act, the ACF requests specific reasons as to why AFCARS is the most effective vehicle for collection of the data proposed in this NPRM; why an alternative method is not feasible to collect the information; and whether the data elements in the proposed rule will enhance the work of organizations working with children and families. NIHB supports the inclusion of the ICWA related data elements in AFCAR information collection, as finalized in the 2016 rule.[2] As in previous years, NIHB is opposed to any streamlining, modification, or elimination of critical AFCARS data elements pertaining to the welfare of American Indian and Alaska Native Children.

[1] Established in 1972, the National Indian Health Board (NIHB) is an inter-Tribal organization that advocates on behalf of Tribal governments for the provision of quality health care to all American Indians and Alaska Natives (AI/ANs). The NIHB is governed by a Board of Directors consisting of a representative from each of the twelve Indian Health Service (IHS) Areas. Each Area Health Board elects a representative to sit on the NIHB Board of Directors. In areas where there is no Area Health Board, Tribal governments choose a representative who communicates policy information and concerns of the Tribes in that area with the NIHB. Whether Tribes operate their entire health care program through contracts or compacts with IHS under Public Law 93-638, the Indian Self-Determination and Education Assistance Act (ISDEAA), or continue to also rely on IHS for delivery of some, or even most, of their health care, the NIHB is their advocate.

[2] Adoption and Foster Care Analysis and Reporting System, RIN: 0970-AC47, 45 C.F.R. 1355 (Dec. 14, 2016), https://www.federalregister.gov/documents/2016/12/14/2016-29366/adoption-and-foster-care-analysis-and-reporting-system.

Background

The United States (U.S.) has a unique legal and political relationship with American Indian and Alaska Native Tribal governments. This relationship was established through treaties and affirmed by the U.S. Constitution, Supreme Court decisions, federal laws and regulations, and presidential executive orders. Central to this relationship is the federal government's trust responsibility to protect the interests of Indian Tribes and their children,[3] including through the provision of health care and public health related policies.

Despite the federal trust responsibility to protect AI/AN families, decades of official federal policy aimed at assimilating Tribes, and particularly American Indian and Alaska Native children, into mainstream society resulted in the removal of these children from their homes by state child welfare agencies at rates far higher than those of non-Indian families. In response to the national crisis of separation of AI/AN children from their families, Congress enacted the Indian Child Welfare Act (ICWA or the Act) in 1978.[4] ICWA establishes minimum federal standards for the removal of Indian children from their families and their placement in foster care or adoption care that will reflect the unique values of American Indian and Alaska Native culture.

The intent of Congress in passing the ICWA legislation was to promote the best interests of AI/AN children and to protect the rights of parents. At the same time, Congress sought to balance the jurisdiction and political interests of Tribes and the states. The AFCARS rule, finalized in 2016, for the first time incorporated and outlined ACF's responsibilities to AI/AN children under ICWA. Regulations required AFCARS data to include a review of state recordkeeping procedures, state court requirements under ICWA, and a review of whether states made "active efforts" prior to removal of AI/AN children and prior to the termination of parental rights, among other protections.[5] The Indian Child Welfare Act is as essential today as in the year of its passage to achieve the best interests of American Indian children, and to preserve the unity between AI/AN children and their Tribes. The Agency should not, through this NPRM, undermine the congressionally sanctioned special protections in place for AI/AN children by removing valuable ICWA related reporting requirements that make a difference to the lives of children, and that help to strengthen the advocacy on their behalf.

Proposed Rule

In this NPRM, the Agency requests that commenters focus on the data elements that the Agency is proposing to remove or revise from the 2016 Final Rule. The 2016 Final Rule contained updated statutory requirements since the first issuance of the rule in 1993, implemented statutory penalties for non-compliant data submissions, and enhanced the type of information reported to better measure outcomes of children and families – including information related to ICWA.

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[3] The 25 U.S.C. § 1901(2)–(3) (Supp. IV 2016) ("Congress, through statutes, treaties, and the general course of dealing with Indian Tribes, has assumed the responsibility for the protection and preservation of Indian Tribes and their resources . . . there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian Tribe . . . .").

[4] 25 U.S.C. § 1901 et seq.

[5] Department of the Interior (June 14, 2016), https://www.federalregister.gov/documents/2016/06/14/2016-13686/indian-child-welfare-act-proceedings.

We appreciate that ACF is proposing to retain the 2016 AFCARS Final Rule data elements that require states to inquire as to whether a child is American Indian or Alaska Native, whether the child and parent are Tribally-affiliated, and whether the state notified the Tribe of court proceedings. We note, however, that ACF is proposing to eliminate over 90% of the other data elements for AI/AN children from the 2016 Final Rule. The Agency notes, "In particular, we propose to streamline data elements related to child information, placements, and permanency planning based on public comments to the Advanced Notice of Proposed Rule Making (ANPRM) and the work of federal experts with an interest in AFCARS data." We think this is much more than just "streamlining" and undermines the ability of Tribes, states, and federal policymakers to understand how ICWA is being implemented nationwide and in individual states. This includes the requirement under Title IV-B for states to consult with Tribes on the implementation of ICWA, which ACF plays a role in providing oversight on.

Under Section 479(c)(3) of the Social Security Act,[6] information collected through AFCARS must provide "comprehensive national information." Exempting some states from reporting the proposed ICWA related data elements is not consistent with this statutory mandate, and would render it difficult to use this data for development of national policies for Indian children.[7] By not providing fuller data through AFCARS, ACF will have to resort to guessing if states are implementing ICWA properly and ensuring that Tribal children and families are receiving its protections. American Indian and Alaska Native children are already disproportionately represented in state foster care systems in at least 13 states and nationally, and Tribal families still experience biased treatment in state child welfare systems;[8] removing these data elements will only exacerbate the problem.

AFCARS is the most effective tool for collecting a consistent set of data elements for states to use to address the well-being of AI/AN children.

There are many benefits of collecting the ICWA data elements identified in the 2016 AFCARS rulemaking. While ACF is proposing to retain five of the ICWA data elements from the 2016 Final Rule, the 2019 NPRM eliminates many of the data elements that are needed to understand the unique issues that AI/AN children experience related to historically poor outcomes in state child welfare systems. States, Tribes, federal agencies, and policymakers need better data for AI/AN children and families to understand how to effectively address these persistent and long-term problems.

When local ICWA data is available, Tribes use it to identify discrepancies in state ICWA caseloads or to identify practice issues that need improvement. Unfortunately, many states do not collect this data. The 2016 AFCARS data elements would provide a consistent set of data that Tribes and

[6] 42 U.S.C. 679.

[7] Supplemental Notice of Proposed Rulemaking (SNPRM), Adoption and Foster Care Analysis and Reporting System (Apr. 7, 2016), https://www.federalregister.gov/documents/2016/04/07/2016-07920/adoption-and-foster-care-analysis-and-reporting-system.

[8] *Id*. ("Representatives from 13 states […] stated that some of their states currently collect information […] related to Indian children, such as Tribal membership, Tribal notification, and Tribal enrollment status. They noted that some of the information with regard to ICWA, such as placement preferences and active efforts, are contained in case files, case notes, or other narratives, and not currently captured within their information systems, and noted issues with extraction of such data for AFCARS reporting.").

states could use to address ICWA implementation challenges and other child welfare issues. Moreover, many of the ICWA data elements proposed for elimination in the 2019 NPRM have the potential to help ACF support effective implementation of the Family First Prevention Services Act (2018), which has implications for AI/AN children who are in state custody and eligible for ICWA protections.[9]

The U.S. Department of the Interior (DOI) issued final regulations that address requirements for state courts regarding ICWA [81 FR 38778]. DOI, however, does not have a relationship with states in child welfare and does not have an operational data base, or resources, to collect data on AI/AN children in state foster care systems. Under the binding DOI regulations, ACF is required to oversee that states are consulting with Tribal governments on measures taken by the state to comply with ICWA [42 USC 622(b)(9)]. The 2016 Final Rule ICWA data elements are needed to understand how states are working with Tribes on ICWA implementation and whether their efforts indeed address specific areas of concern.

For this reason, alternative methods for collecting ICWA related data, such as the Child and Family Services Reviews,[10] are not feasible and the structure of these reviews does not support collection of this type of data. ACF notes that research or surveys could fill the ICWA data collection void, but the history of funding this type of research has demonstrated that it can't be relied upon to provide accurate and regularly reported data for AI/AN children.[11]

Several of the ICWA data elements in the 2016 Final Rule that are now proposed for elimination, provide important information and context that inform case planning and systemic efforts to improve outcomes. Therefore, we strongly suggest that ACF retain many of the data elements in the 2016 Final Rule, including the following:

1. **Date of court determination of ICWA application**. This provides information on whether there were significant differences between when the state court and state IV-E agency confirmed application of ICWA and how this affected implementation.
2. **Transfer of jurisdiction**. This provides information on whether a request for transfer of jurisdiction was requested, whether it was approved or denied, and if denied, what the basis for denial was. ACF's alternative to this data element based on the data element "reason for exit" will not provide the necessary information to understand when transfer was requested in a case, why it did or did not happen, and how this impacted other service provision or case planning.
3. **Foster care placement preferences.** This provides information on whether foster care placement preferences were met, which placement preference was used, and if placement preferences were not met was good cause found and on what basis. While the NPRM proposes to identify whether a placement involves a relative or someone

[9] *See* National Indian Child Welfare Association, Child and Family Policy Update (Sept. 2018), https://www.nicwa.org/wp-content/uploads/2018/09/Child-and-Family-Policy-Update-September-2018-FINAL.pdf.
[10] Children's Bureau, https://www.acf.hhs.gov/cb/monitoring/child-family-services-reviews.
[11] Supplemental Notice of Proposed Rulemaking (SNPRM), Adoption and Foster Care Analysis and Reporting System (Apr. 7, 2016), https://www.federalregister.gov/documents/2016/04/07/2016-07920/adoption-and-foster-care-analysis-and-reporting-system ("It is a well-established that, historically, quantitative and qualitative data on AI/AN populations, including children, has been incomplete and unreliable resulting in such populations being among the most under-counted populations groups in the United States.").

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, and did the Tribe approve of the placement if it involved a congregate care setting (institution or group care setting).

4. **Adoptive placement preferences.** This provides information on whether the adoptive placement preferences were met, which placement preference was used, and if placement preferences were not met was good cause found and on what basis. 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.
5. **ICWA notice on foster care placement and termination of parental rights to Tribes and parents.** While ACF is proposing to retain a modified data element on notice from the 2016 Final Rule, in its modified form it contains flaws. The NPRM data element only tracks whether notice was sent by the state IV-E Agency. The NPRM data element does not provide information on whether the notice was sent within ICWA's statutory timelines and whether it was sent to both parents and the child's Tribe. This is important information that informs whether the parents and child's Tribe had the ability to participate in case planning, placement decisions, and court proceedings. Analyzing this data from the proposed data element could lead to erroneous conclusions regarding whether ICWA requirements were met or whether the parents or Tribe had an opportunity to participate in important case planning decisions and court hearings. 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 which occurs in some jurisdictions. This is data that should be easily retrievable from a case file.

These are all quantitative data elements and should appear in any well-maintained case file. We understand the Agency's rationale that highly descriptive data elements are better suited for qualitative analysis, and may even be too descriptive for information collection reporting at the national scale. However, data related to American Indian and Alaska Native children would not be "overly burdensome" for state child welfare systems to collect, especially since in the vast majority of states AI/AN families are less than 5% of the state child welfare system and once states establish that a child is not ICWA eligible, which is only one data element, no other data elements have to be completed. ACF is thus in the best position to capture necessary data on AI/AN children and families in state child welfare systems and AFCARS—not an alternative method—is the only federal data system that has the ability to capture placement related data.

It is manageable and not "overly burdensome" for State IV-E Agencies to collect data elements required under ICWA for AI/AN children.

The 2016 supplemental notice of proposed rulemaking and the 2016 Final Rule addressed issues related to state burdens. Affirming states' concerns, the Agency concluded that information collecting burdens were warranted given the lack of basic data for American Indian and Alaska Native children, and the benefits for policy development, technical assistance and training, and

programming.[12] ACF and states' 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 to every child in state custody. These are: 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); and 3) does ICWA apply? These questions are necessary to determine if ICWA applies while other data elements in the 2016 Final Rule would only need to be asked if ICWA does apply. Only 9 states have foster care placement rates where ICWA might apply for over 4% of the total state foster care population. In 41 states the rates are under 3%, with 37 states under 1 percent.[13]

While some of ICWA's requirements involve court determinations, most of the actions required are based on state IV-E agencies efforts. Good case management practice requires child welfare agencies to document court findings in case files, including those related to ICWA findings.

The ICWA related data elements in the proposed rule will enhance the work of organizations working with children and families.

A number of states that have cited concerns about expanded AFCARS data collection and reporting related to the 2016 Final Rule have also found ICWA data elements to be helpful. Part of the basis for their concerns centers on the ACF penalty structures for data that is not collected or reported. States have expressed specific concern regarding data that is not under the control of the state IV-E Agency.[14] Interpretations by ACF of why a state may raise concerns about the number of ICWA data elements must be carefully examined and not unduly conflated with more general concerns related to penalty structures or other matters.

For a number of states that have begun integrating the 2016 Final Rule ICWA data elements, the information gathered has been an effective means to address ICWA implementation challenges, policy development, and program management. 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 FR 16574].

Going forward, states should ask questions that ascertain whether a child is an American Indian child as defined in ICWA, including inquiring about the family's Tribal membership status. Specific data elements on notification of proceedings and transfers to Tribal court are important because the timelines in ICWA are rarely met, and information on termination of parental rights, removals under ICWA, and placement preferences are important for determining ICWA compliance. As the Agency itself has recognized, "Not including ICWA related data elements in AFCARS, or including too few data elements, may exclude Indian children and families from the

[12] Supplemental Notice of Proposed Rulemaking (SNPRM), Adoption and Foster Care Analysis and Reporting System (Apr. 7, 2016), https://www.federalregister.gov/documents/2016/04/07/2016-07920/adoption-and-foster-care-analysis-and-reporting-system.

[13] Figures provided by the National Indian Child Welfare Association (NICWA), *Example Talking Points for NPRM Comments* (June 2019).

[14] *Id*.

additional benefit of improving AFCARS data."[15] Collection of ICWA data points enhances the integrity of the AFCARS system as a whole.

Conclusion

NIHB and the Tribes remain dedicated to lifting the unified voice of Tribal communities and their families on the very important matter of Indian child welfare. We thank you for this opportunity to provide our comments and recommendations to the Administration of Children and Families as it concerns the notice of proposed changes to AFCARS data collection.

Should you have any questions regarding NIHB's comments, or for more information, please contact NIHB's Director of Policy, Devin Delrow, at ddelrow@nihb.org.

Sincerely,

Victoria Kitcheyan

Victoria Kitcheyan, Chair
National Indian Health Board

Cc: Stacey Ecoffey, Principal Advisor for Tribal Affairs, U.S. Department of Health and Human Services

[15] Supplemental Notice of Proposed Rulemaking (SNPRM), Adoption and Foster Care Analysis and Reporting System (Apr. 7, 2016), https://www.federalregister.gov/documents/2016/04/07/2016-07920/adoption-and-foster-care-analysis-and-reporting-system.

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General Comment

Ms. McHugh--

Attached please find comments from Juvenile Law Center in response to RIN 0970-AC72. We appreciate the opportunity to comment on the data elements in AFCARS and hope ACF will move forward with implementing the 2016 Final Rule in its entirety.

Thank you,

Jennifer Pokempner, Juvenile Center

Attachments

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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 Proposed Regulation for the Adoption and Foster Care Analysis and Reporting System (AFCARS), 84 FR 16572, RIN 0970-AC72

Dear Ms. McHugh,

Pursuant to the notice published in the Federal Register on April 19, 2019 (FR Document 2019-07827), Juvenile Law Center hereby submits these comments on the proposed rule amending the Adoption and Foster Care Analysis and Reporting System (AFCARS). We strongly oppose the proposed changes to the 2016 Final Rule. Collecting the data that was proposed supports compliance with federal law. Collection of this data has even more urgency and importance as states implement the Family First Prevention and Services Act (FFPSA). Understanding and responding to the special needs and characteristics of the child welfare population is vital for states as these enhance their prevention service array and build supports that will keep youth out of group care. The data that the Final Rule proposed to collect will ensure program improvement and accountability and will allow agencies to better serve the children in their care. These data elements reflect learnings from years of research and practice in the child welfare system. Failing to collect this data will stall the good progress that is being made especially with respect to our most vulnerable young people.

Juvenile Law Center (JLC) is the oldest non-profit, public interest law firm for children in the country and works on behalf of children who come into contact with the child welfare and justice systems. Juvenile Law Center works to improve the opportunities and futures of system-involved youth and strives to ensure that laws, policies, and practices affecting youth advance racial and economic equity and are rooted in research, and consistent with children's unique developmental characteristics. Juvenile Law Center is also a partner in the Legal Center for Foster Care and Education. Through the Legal Center, we advocate for better educational opportunities for youth in care in Pennsylvania and nationwide.

Juvenile Law Center would like to highlight seven areas of data elements that are critical to retain: sibling connections, transition planning, juvenile justice, health assessments, education stability, LGBTQ youth and caregivers, and Indian Child Welfare Act (ICWA) data collection requirements. These updates are overdue. While we believe that complaints related to cost are overstated, the investment we must make to ensure that AFCARS reflects the law and that the child welfare system is able to benefit from the great power of data to strengthen and improve our capacity to support families is a necessary one.

1. Inclusion of Data Elements Related to Sibling Connections

We oppose eliminating the following data element: "presence of a sibling attachment that can be maintained only through a particular placement." We believe this is an important data element that reflects legal requirements related to sibling placement and visitation that have been in effect since 2008, and that this data element is essential to ensure the provision of permanency and well-being to youth.

The Fostering Connections to Success and Increasing Adoptions Act requires that reasonable efforts be made to place siblings together. The only exception to this requirement is if the safety or well-being of either sibling is compromised by the joint placement. 42 U.S.C.A. § 671 (31). Federal law specifically requires that failing to jointly place siblings due to these exceptions must be documented by the child welfare agency. 42 U.S.C.A. § 671 (31)(A). The importance of this requirement cannot be understated for the achievement of permanency and well-being. Research shows that keeping siblings together increases the chances of permanency and reduces the trauma that youth experience when removed from the home.[1] Research also shows that sibling relationships improve a child's resilience.[2]

Young people repeatedly tell us what the research shows: sibling separation is devastating. Most youth and alumni of the foster care system identify sibling separation as an issue of the highest priority. For example, it is one of the policy priorities of the Foster Care Alumni of America. Yet, sibling separation continues to be all too common despite the clear mandate of federal law. For example, in Texas of the 7,253 sibling groups, only 65% of those groups are placed together.[3] We believe this data element is essential to track vital information about sibling placement, connection, and separation so that it can be monitored and systems can provide targeted responses so connections can be maintained. It is already required that this information is documented in the case plan, making this a data element that is easy to access and collect in AFCARS. This is not overly detailed and qualitative information that would be burdensome to collect.

2. Inclusion of the Transition Planning Data Element

We oppose eliminating the data elements related to transition planning and believe omitting them will further harm transition age youth in the child welfare system who already face multiple challenges in receiving the transition services they are due under the law and achieving adult outcomes that set them up for success.

The transition planning requirement has been in federal law since 2008 when Fostering Connections was enacted. This key component of child welfare law ensures that youth are supported in their transition to adulthood, beginning with planning at age 14 and continuing, alongside permanency planning, until the youth leaves the system and a transition plan is finalized prior to discharge. *See* 42 U.S.C.A.§ § 675 (1)(D) & (5)(H). Recent data from the Fostering Youth Transitions Report reveals that states continue to struggle to meet the needs of transition age youth. During the last decade, we have made few gains in improving permanency outcomes for older youth. [4] Moreover, large numbers of youth are not receiving the transition services mandated by law. For example, nationally, only 23% of transition age youth in foster care received transition services related to employment and vocational training, and financial assistance. [5] Only 36% received assistance with budget and financial management and 22% received mentoring services.[6] The adult outcomes

[1] Sibling Issues in Foster Care and Adoption (Child Welfare Information Gateway January 2013)(reviewing the research).
[2] Armeda S. Wojciak et. al., Sibling Relationships of Youth in Foster Care: A Predictor of Resilience, 84 Children and Youth Services Review (November 2017).
[3] Sibling Separation in Foster Care: An Impetus for Change (April 10, 2019).
[4] Older Youth Need Support Transitioning from Foster Care to Adulthood (ChildTrends 2019).
[5] Older Youth Need Support Transitioning from Foster Care to Adulthood (ChildTrends 2019).
[6] Youth Transitioning Out of Foster Care: Received John H. Chafee Foster Care Independence Program Services in the United States (Kids Count Data Center).

for youth leaving foster care in comparison to their peers continue to show that we are not supporting them as we should to make a successful transition.

Including the 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 also serves as a key catalyst for improving the provision of services to youth in accordance with legal requirements. It is argued that this information should not be included in AFCARS because it is covered in the National Youth in Transition Database (NYTD). While NYTD is a rich source of data, it has various limitations. Not only is NYTD a voluntary survey that young people complete, it only covers a portion of the transition age youth child welfare population. In addition, while NYTD does ask young people very important questions about service receipt and outcomes, it does not ask about transition planning and the planning process. The data that AFCARS collects is required for all youth and must be provided by the agency responsible for serving young people in the child welfare system.

Moreover, contrary to the NPRM, these data elements are not "too detailed or qualitative for a national data set." Rather, the Rule proposes to collect very basic information that verifies that a transition plan has been developed consistent with the case planning requirements as set forth in federal law. This is an important accountability measure that is a decade overdue and will provide valuable information at the state and national level related to meeting the needs of older youth who desperately desire and are entitled to transition planning services.

Importantly, the cost of collecting this data is minimal as transition planning is a pre-existing requirement that is already part of case planning processes. By contrast, the financial cost to individuals and communities of failing to prepare youth for adulthood is substantial. The Annie E. Casey Foundation reports that "closing the gaps in education, housing, early parenting and juvenile justice outcomes [between youth in the foster care system and their peers] would reduce costs to society by $4.1 billion for each new group of young people aging out of foster care."[7] Any minimal cost associated with collecting this data is far outweighed by the benefit to young people and society in general as collecting such data will inform and improve how we serve and support transition age youth. Accordingly, we strongly support retaining the transition plan data element and believe it is a core accountability measure that will help states improve outcomes of older youth in foster care.

3. Inclusion of the Juvenile Justice Involvement Data Element

We oppose eliminating this basic and critical data element that ultimately allows for child welfare agencies to effectively serve "dual status" youth, who are involved in both the child welfare and the juvenile justice systems. This data element helps ensure that systems are able to better serve these youth, and also that they are tracked and do not get lost, which is a high risk when there is dual system involvement. This data element is also important to FFPSA implementation, which requires that states develop measures to ensure that efforts to reduce group care do not result in entrance into the juvenile justice system from the child welfare system. This data element will be instrumental in monitoring compliance with this important provision of federal law.

As noted in the Office of Juvenile Justice and Delinquency Prevention (OJJDP) April 2019 newsletter, "[y]outh who have been involved with both the child welfare and juvenile justice systems—commonly known as 'dual system youth'—often are not recognized and do not receive services targeted to their individual needs because of challenges in cross-system communication and collaboration."[8] Black youth and girls are also overrepresented in the population of youth who are dually involved. OJJDP's study on this population struggled

[7] Future Savings: The Economic Potential of Successful Transitions from Foster Care to Adulthood 5 (Annie E. Casey Foundation 2019).

[8] Office of Juvenile Justice and Delinquency Prevention, News at a Glance (April 2019), https://www.ojjdp.gov/newsletter/252570/pfv.html.

to obtain even a national estimate for the number of youth who are involved in both systems given "[t]he inconsistent quality of child welfare data and the limited availability of juvenile justice data across states and jurisdictions."[9] AFCARS is a critical way to gain this information across jurisdictions and track effective services to meet the needs of this vulnerable population.

Over the past decade, the Administration for Children and Families (ACF) has acknowledged the critical importance of collecting this data element and has continually took steps to reduce the burden of collecting the data. The 2016 Final Rule reflects a balanced approach that responds to the concerns of states while maintaining the importance of collecting this important data element. Having repeatedly decided that the data element would result in the collection of important data, ACF is obliged to acknowledge it is changing its position and must give a reasoned explanation for doing so. *See FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515-16 (2009). The NPRM fails to do so. ACF now claims that the juvenile justice involvement data element should be removed "because the information is too detailed or qualitative for a national data set, it may be inaccurately reported and therefore would be difficult to portray in a meaningful way and it does not have a specific purpose for title IV-B/IV-E statute and program monitoring, Congressional reporting, or budgeting." 84 Fed. Reg. 16,572, 16,576 (April 19, 2019). There is no evidence that any of these rationales apply here.

ACF has recognized the importance of collecting this data element for years. ACF reported that it had "heard through a variety of sources, including the CFSRs, that it is important to clarify the characteristics of the reporting population so that we can analyze potential differences in the experiences of children involved in the juvenile justice system versus those who are not." 73 Fed. Reg. 2081, 2108 (Jan. 11, 2008). "Additionally," ACF explained, "States indicate that they have experienced a marked increase in the number of juvenile justice-involved children in their child welfare systems. This new data element will allow us to establish those numbers and determine whether or not juvenile justice-involved children have different experiences than other children in out-of-home care." *Id*. at 2108-2109. ACF concluded that this data element "will assist States and the Federal government to understand the experiences of children who are dually involved in out-of-home care and juvenile justice, which in turn, will help States in their program improvement efforts to better serve such children." *Id*. at 2109.

In its 2015 NPRM, summarizing the comments it received to the 2008 NPRM, ACF stated that "commenters did support collecting information on children in foster care who also are involved with the juvenile justice system." 80 Fed. Reg. 7131, 7135 (Feb. 9, 2015). More specifically, ACF "received many supportive comments to the 2008 NPRM to require reporting information on a child's juvenile justice involvement." *Id*. at 7175. ACF likewise concluded that this data was "important to understand more about children in foster care who are also involved in the juvenile justice system" and would permit ACF "to analyze the overlap between the juvenile justice and child welfare systems." *Id*.

Steps have been taken throughout the years of discussion and comment to streamline and reduce the burden of collecting this data element. For example, states only must report yes or no as to whether or not a court found the child to be a status offender or adjudicated delinquent, no longer requiring the agency to distinguish between the two. 81 Fed. Reg. 90,524, 90,555 (Dec. 14, 2016). In addition, comments provided from the states indicated that collecting this data element is likely to improve case work and did not reveal that collecting the data would be too detailed or qualitative. For example, California noted that its "experience" with data elements that require "reporting court findings," such as juvenile justice involvement, was that "any burden of such reporting is outweighed by the benefit."[10]

[9] *Id.*
[10] https://www.regulations.gov/document?D=ACF-2018-0003-0016

Additionally, the juvenile justice involvement data element has a specific purpose for statute and program monitoring and budgeting. Dual status youth are young people who have had involvement in both the child welfare and juvenile justice systems. Research suggests that as many as 50% of youth referred to juvenile courts have had dual system involvement.[11] Without proactive support and interventions by the state, which provides care and supervision to these youth, dual status youth face tragic outcomes with respect to their education,[12] mental health[13] and employment.[14] Based on this research and the realities that child welfare and probation professionals see on the ground, local jurisdictions have crafted thoughtful partnerships over the years to ensure the agencies share information, collect data and coordinate services such that these young people receive adequate support that steer them away from negative outcomes such as homelessness, school drop-out, unemployment, or adult criminal justice involvement.

Removal of the juvenile justice involvement data element from AFCARS would be a step backward relative to the local, state and national trends toward collecting more standardized data about dual status youth, who are a uniquely vulnerable group of children. Collecting this data is not burdensome and will result in improvements of how these youth are identified and provided much-needed services.

4. Inclusion of the Health Assessment Data Element

Juvenile Law Center opposes the proposed removal of these data elements, which record the date and timeliness of a child's health assessment within AFCARS. This information is important for assessing access to care for the foster care population at the state and national level. Youth in the child welfare system have higher health care needs than their peers who are not in care and have higher than average adverse childhood experiences that directly corelate with heath challenges.[15] Timely health assessments are the gateway to ensuring identification of needs and access to care and treatment, making them vital to ensuring safety and well-being.

Collecting—and monitoring—this data element will help states identify and respond to the needs of young people in ways that will assist them in implementing the FFPSA because meeting the trauma and any special medical needs will be crucial to delivering effective prevention services and developing a service array that keeps youth in family settings rather than institutions.

This data element is an important aspect of measuring a state's compliance with its Title IV-B Health Oversight and Coordination Plan. Juvenile Law Center supports the inclusion of health assessment dates in the 2016 final rule, which provide a baseline understanding of the health of children entering the child welfare system. ACF needs this data to assess whether states are complying with important federal requirements under the Title IV-B program.

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[11] D. Thomas, When Systems Collaborate: How Three Jurisdictions Improved Their Handling of Dual Status Cases (National Center for Juvenile Justice 2015), http://www.ncjj.org/pdf/Juvenile%20Justice%20Geography,%20Policy,%20Practice%20and%20Statistics%202015/WhenSystemsCollaborateJJGPSCaseStudyFinal042015.pdf.

[12] Helemba, G. et al., Arizona Dual Jurisdiction Study: Final Report (2004), http://www.ncjj.org/pdf/azdual_juri.pdf.

[13] Herz, D. C., & Ryan, J. P. Exploring the characteristics and outcomes of 241.1 youths in Los Angeles County. (The Administrative Office of the Courts 2008).

[14] California Child Welfare Co-Investment Partnership, Crossover Youth: A Shared Responsibility (Winter 2016), http://co-invest.exedor.us/wp-content/uploads/insights_volume10-1.pdf.

[15] L.F. Stambaugh et. al, Adverse childhood experiences in NSCAW. OPRE Report #2013-26. (Administration for Children and Families, U.S. Department of Health and Human Services 2013).

5. **Inclusion of the Education Stability Data Elements**

Juvenile Law Center has repeatedly submitted comments regarding the importance of including education-related data elements, which are essential to monitoring compliance with the Fostering Connections to Success and Increasing Adoptions Act (Fostering Connections) and the Every Student Succeeds Act (ESSA). We have heard directly from youth, and from stakeholders around the country, about how essential educational stability and continuity is for their success. When youth in care change schools, they often miss school days, their IEPs may not timely transfer or be properly implemented, they frequently have to repeat classes or entire grades due to lost or delayed records or when their credits do not transfer, and they lose vital connections to supportive social and mentoring networks as well as the extra-curricular programs that keep them engaged in school. As Juvenile Law Center has a core goal of increasing opportunities for youth with experience in the child welfare system, we believe it is vital that this information be reliably collected across states via AFCARS.

The data element relating to educational stability should not be removed because it is critical to measuring effective implementation of federal child welfare and education law**.** 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. Since 2008, many state and county agencies have improved their policies and practices to support school stability.

The Every Student Succeeds Act (ESSA) further reinforces Fostering Connections by promoting, among other things, school stability and interagency data sharing related to students in foster care. For the first time, state departments of education are required to report on the educational performance of students in foster care in the SEA 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.

Without AFCARS including this crucial data point related to education stability, it will be nearly impossible to measure progress and trends or gauge effectiveness of policies and practices established under Fostering Connections and ESSA. 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 the most effective way to collect educational stability data because it allows for straightforward quantitative reporting of how often children change schools and the reason. No other vehicle is better suited to tracking this type of data on a national scale. 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. In addition, states should already have begun planning for how they may update their existing Statewide Automated Child Welfare Information Systems (SACWIS) to comply with new Comprehensive Child Welfare Information System requirements, including an emphasis on the importance of data elements and interoperability between child welfare agencies and schools.

Although educational information was not part of AFCARS before the 2016 Final Rule, educational information about school stability is already being collected by states under Fostering Connections and should not create an unnecessary burden for child welfare professionals. Documenting whether children have moved school placements and the reasons is required by the Fostering Connections Act as part of the child's case plan.

Consequently, reporting should not create an unnecessary burden, and will allow for better analysis of the school stability-related challenges students in foster care face.

The education data elements included in the AFCARS 2016 Final Rule have already been open for extensive public comment and debate. The Final Rule was the end result of identifying a finite number of basic education data elements that will yield critical national level data. The new data collection requirements were thoughtfully considered and seek to ensure child welfare agencies are gathering data on key child and family-related outcomes to ensure safety, permanency, and well-being.

6. **Inclusion of the Data Elements Related to LGBTQ Youth and Caregivers**

Juvenile Law Center opposes the removal of data elements related to the sexual orientation and gender identity and expression of youth in foster care as well as caregivers. We believe not collecting this data will negatively impact the safety, permanency, and well-being of LGBTQ children who are over-represented in the child welfare system, tend to experience poor treatment in the system, and to be placed in group settings.

Collecting data elements about sexual orientation and gender identify allow systems to better identify youth and tailor services to their needs. We believe a well trained staff can collect this information with sensitivity, while respecting the youth's identify and confidentiality. Child welfare staff routinely must discuss and collect sensitive and confidential information from youth and families with the goal of using that information to better serve the family.

Juvenile Law Center advocates for the dignity of youth in the child welfare system, which includes affirming youths' gender identity, gender expression, and sexual orientation and working to end harmful disparities. We believe ACF should maintain the data elements in the AFCARS Final Rule related to sexual orientation, gender identity, and gender expression so that states and tribes can improve outcomes, identify and fund needed resources, and reduce disparities experienced by LGBTQ children and youth in foster care. Eliminating this national dataset would undermine the ability to track demographic trends and identify gaps in services and would place LGBTQ youth and prospective parents at continued risk of harassment, discrimination, and harm. We believe children and youth who we work with will be harmed by this action. This data set is needed for states to fulfill their legal obligation to ensure the safety and well being of all youth in the child welfare system, which includes LGBTQ youth who are over-represented in the child welfare system.

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. 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 out-of-home care. 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 eliminates the ability to measure efforts to reduce disparities and improve care and outcomes and places LGBTQ children at great risk.

We believe that data should be collected on the sexual orientation of adoptive and foster parents and guardians to respond to the need for family based settings for youth in foster care and to support the legal requirement for permanency. 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. 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. 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.

We also believe that AFCARS should include a gender identity question for youth and families. 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."[16] Because of the particular challenges faced by transgender foster youth, adding gender identity questions for both foster youth and foster and adoptive parents and guardians will help states and tribes save costs by identifying affirming placements and reducing placement instability.

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. 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.

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

7. **Inclusion of the ICWA Data Elements**

We oppose eliminating collecting the data elements related to ICWA and believe that the failure to collect this data compromising the well being of Native youth and the capacity of systems to adequately serve them. The data in the 2016 Final Rule is vital to the federal government, Congress, states, and tribes to effectively address the needs of American Indian and Alaska Native (AI/AN) children and families. Juvenile Law Center opposes any streamlining, modification, or elimination of the AFCARS data pertaining to the Indian Child Welfare Act (ICWA) for AI/AN children. AI/AN children have been overrepresented in state foster care systems for over two decades, going back to the initial implementation of the AFCARS system.

Prior to the 2016 Final Rule, AFCARS only asked questions related to whether a child in state care and custody was self-identified as AI/AN. This self-identification does not provide necessary information to understand whether a child has a political relationship with a federally recognized tribe as a citizen of that tribe and whether

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

other federal law requirements under ICWA are being implemented, especially those related to the placement of the child in substitute care and whether the child's tribe was engaged in supporting the child and family. As a result, AFCARS data has provided little help in understanding how to address chronic and persistent issues, such as foster care disproportionality, that are barriers to the well-being of AI/AN children and families—issues that not only affect the well-being of children, but also cost states and tribes considerable amounts of their finite resources. The AFCARS data elements for AI/AN children in the 2016 Final Rule have incredible potential to improve outcomes for this population and should be retained.

Collecting the data elements proposed would clearly help states meet their obligation to meet the safety, well-being and permanency need of Native youth in the child welfare system. States, tribes, federal agencies, and policymakers need better data for Native children and families to understand how to effectively address persistent and long-term poor outcomes for Native children and families. While ACF is proposing to retain five of the ICWA data elements from the 2016 Final Rule, the 2019 NPRM eliminates many of the data elements that are needed to understand the unique issues that Native children experience related to poor outcomes in state child welfare systems.

ACF is in the best position to capture necessary data on Native children and families in state child welfare systems and AFCARS is the only federal data system that has the ability to capture placement-related data. Several of the ICWA data elements in the 2016 Final Rule proposed for elimination provide important information that inform case planning and systems efforts to improve outcomes such as the following data elements. They should be easily retrievable from any case file, are quantitative data that is easy to record, and have important value.

Collecting this data is manageable and is likely to lead to cost savings. The 2016 supplemental notice of proposed rulemaking and the 2016 Final Rule addressed issues related to burdens on states. They concluded that there were burdens for states and were warranted given the lack of basic data for Native children and the benefits for policy development, technical assistance and training, and programming. 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 to every child in state custody. These are 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)?, and 3) Does ICWA apply? These questions are necessary to determine if ICWA applies while other data elements in the 2016 Final Rule would only need to be asked if ICWA does apply. Only nine states have foster care or other out of home placement rates where ICWA applies over 4% of the total state foster care population. In 41 states the rates are under 3% with 37 states under 1 percent. While some of ICWA's requirements involve court determinations, most of the actions required are based on state IV-E agencies' efforts. Good case management practice requires child welfare agencies to document court findings in case files, including those related to ICWA findings. A number of states have begun integrating the 2016 Final Rule ICWA data elements and are finding the data to be very helpful in addressing ICWA implementation challenges, policy development, and program management effectively.

Conclusion

For the reasons outlined above, Juvenile Law Center urges the U.S. Department of Health and Human Services, ACYF, ACF, Children's Bureau to retain all of the data elements in the 2016 AFCARS Final Rule, including the data elements related to sibling connections, transition planning, juvenile justice involvement, health assessment, education, LGBTQ children and families, and ICWA. We look forward to working with child

welfare stakeholders to move forward with implementation of the Final Rule. Thank you for the opportunity to comment.

Sincerely,

Jennifer Pokempner

Jennifer Pokempner, Esq.
Katherine Burdick, Esq.

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Docket: ACF-2018-0003
AFCARS 2018-2020

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

Document: ACF-2018-0003-0346
Massachusetts Department of Children and Families

Submitter Information

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Government Agency Type: State
Government Agency: Massachusetts Department of Children and Families

General Comment

See attached file(s)

Attachments

Massachusetts DCF

Massachusetts Comments

Commonwealth of Massachusetts
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CHARLES D. BAKER
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MARYLOU SUDDERS
Secretary
♦
LINDA S. SPEARS
Commissioner
♦

June 18, 2019

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

RE: 45 CFR Part 1355
Docket RIN: 0970-AC72

Dear Ms. McHugh:

Thank you for the opportunity to comment on the proposed AFCARS changes. Attached please find effort and cost estimates and comments from the Massachusetts Department of Children and Families.

Sincerely,

Tomy Abraham
Director of Information Technology

Massachusetts Department of Children and Families

AFCARS NPRM Comments – June 2019

Level of Effort Estimates – Recurring Annual Efforts	- Searching for and gathering the information required to be reported for the data elements	15851 hours (caseworker staff time)
	- Entering the information into the system	15851 hours (caseworker staff time)
	- Reporting the data to ACF	160 hours (IT staff time)
	- Developing and administering staff training, ongoing monitoring, and quality assurance	1040 hours (administrators and analysts)
Level of Effort Estimates – One Time Costs	- Analyzing policies, practice, and casework to determine and implement modifications to capture and report data	$89/hour * 1040 hours = $92,560 (planning and business analysis)
	- Systems changes (for example, contract and staff costs to revise systems)	$89/hour * 1560 hours = $138,840 (coding and testing)
	- Development and design of new version of extracts	$89/hour * 3660 hours = $325,740 (design, coding and testing)

Topic	Data Elements	Citation	Page	Comment
'As of date'	Health , behavioral or mental health conditions Educational level Pregnant or parenting Special education Siblings in living arrangement	1355.44(b)(10) 1355.44(b)(12) 1355.44(b)(13) 1355.44(b)(14) 1355.44(b)(21)		Please clarify the use of 'as of dates' in several elements. There are some elements which are to be reported as of the last day of the report period and other elements which are to be reported as of the earlier of the last day of the report period or the day of exit for a child exiting out-of-home-care prior to the end of the report period. Should the language for all of these elements be changed so that data is to be supplied for the earlier of the last day of the report period or the day of exit for a child exiting out-of-home care prior to the end of the report period?
ICWA Data Elements	Child welfare agency actions to identify children coming under ICWA protection	1355.44(b)(3) 1355.44(b)(4)(i) 1355.44(b)(4)(ii) 1355.44(b)(5)(i) 1355.44(b)(5)(ii) 1355.44(b)(6)	16591	We agree with the need to cast a wide net to determine if a child is an American Indian and if an Indian child comes under ICWA protection and we agree that the revised items are the important ICWA elements.
Non-ICWA Data Element	Health, behavioral or mental health conditions.	1355.44(b)(10)	16592	It is not clear how collecting the value "previous condition" will help with longitudinal analyses as it will not include the time period in which the diagnosis applied. If the child is in placement over several reporting periods, the presence of the value "existing condition" can be strung together to determine if a condition pertains to the period in focus.
Non-ICWA Data Element	Pregnant as of the end of the report period	1355.44(b)(13)(b)(i)	16593	Asking case workers to determine if each applicable child in placement is pregnant as of two specific dates each year is not reasonable. It is a burdensome requirement for workers.
Non-ICWA Data Element	Prior adoption date	1355.44(b)(15)(i)	16593	A child's adoption prior to the current placement episode is currently recorded. Determining and recording the exact date of the adoption, particularly those which occurred outside the United States could be a time-consuming effort for case workers without any casework benefit.

Topic	Data Elements	Citation	Page	Comment
Non-ICWA Data Element	Prior adoption intercountry	1355.44(b)(15)(ii)	16593	Capturing whether a child's prior adoption occurred outside the United States is unnecessary record keeping and may not have any current relevance since international adoption regulations change over time.
Non-ICWA Data Element	Prior guardianship and date	1355.44(b)(16)(i) 1355.44(b)(16)(ii)	16593	Data on children with a prior in-state guardianship is available. If a child's prior guardianship occurred in another state, this would be another unnecessary data collection burden for case workers.
Non-ICWA Data Element	Child financial and medical assistance	1355.44(b)(17)	16593	Collecting support information after a child has been returned home (even if in state custody) is not meaningful.
Non-ICWA Data Element	Siblings	1355.44(b)(19) 1355.44(b)(20) 1355.44(b)(21)	16594	Sibling data is better captured as qualitative data due to the complexity and the possibility that a worker may not initially have access to complete information. Additionally, children and families may identify persons as siblings who do not meet the definition listed in the proposed rule which included only a brother or sister by a biological, legal or marital connection, reducing the meaning of national data.
Non-ICWA Data Element	Removal transaction date Exit transaction date	1355.44(d)(2) 1355.44(g)(2)	16594 16598	Reducing the number of days from 45 to 30 for a transaction to be considered tardy puts excessive pressure on case workers.

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AFCARS 2018-2020

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

Document: ACF-2018-0003-0347
The Trevor Project

Submitter Information

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Organization: The Trevor Project

General Comment

See attached file(s)

Attachments

The Trevor Project

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) 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).

The Trevor Project is the world's largest suicide prevention and crisis intervention organization for LGBTQ (lesbian, gay, bisexual, transgender, queer, and questioning) young people. The Trevor Project seeks to protect LGBTQ youth. This is made much more challenging when we are denied data helping us to know where they are, how many there are, and what their needs are. By eliminating this dataset, it will be impossible to accurately represent how many LGBTQ youth are in the adoption and foster care systems, and thus to track their experiences or appropriately address their needs. LGB youth are 4 times more likely to seriously consider suicide than their straight counterparts, and are at the same elevated risk to have a suicide plan. An estimated 40% percent of the homeless youth population identifies as LGBTQ, meaning a significant portion of the homeless youth population is at an elevated risk to attempt suicide, even without taking into account documented evidence that LGBTQ youth experience significant discrimination and other negative outcomes from the child welfare system.

The proposed rulemaking justifies the removal of these questions on the basis that because of past trauma or discrimination, youth may contraindicate or falsely report their sexual orientation or gender identity. We refute this. There is no data suggesting that LGBTQ youth would not

accurately report their identity when asked, so long as they are properly assured that such data would be kept confidential (as is required). Moreover, to the extent that LGBTQ youth would be tempted to misreport because of their experience of discrimination on the basis of sexual orientation or gender identity, that only speaks to the greater need for exactly the policies this data would enable. To reduce the potential for contraindications, proper training for social and case workers is required, and precautions must be taken, and also explained to said youth, to ensure information privacy. Removing these questions would make it impossible to accurately track the number of LGBTQ youth. That it turn makes it more difficult to allocate resources and time appropriately to help those youth in times of crisis. The AFCARS is among the most direct and reliable ways to collect this information.

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,

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[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).

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 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

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[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.

[7] 45 C.F.R. § 1355 (2019) 16576

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 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]

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[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).

[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.

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 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

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[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.

[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.")

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 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

[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)."

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 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,
Sam Brinton
Head of Advocacy
The Trevor Project

[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/.

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

Document: ACF-2018-0003-0348
Cherokee Nation

Submitter Information

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Organization: Cherokee Nation
Government Agency Type: Tribal
Government Agency: Cherokee Nation

General Comment

See attached file(s)

Attachments

Cherokee Nation

GWY DBP
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Office of the Chief

Bill John Baker
Principal Chief

S. Joe Crittenden
Deputy Principal Chief

June 17, 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 Analysis Reporting System 2016 Final Rule; RIN 0970-AC72.

Dear Ms. McHugh:

The Cherokee Nation ("Nation") appreciates this opportunity to comment on the proposed rule changes regarding the final Adoption and Foster Care Analysis 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 Nation opposes the proposed changes to the ICWA-related data that were originally included in the Final Rule.

The Nation 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 being 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.

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[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.

If you have any questions or require further information, please contact our Director of Government Relations, Kimberly Teehee at Kim-Teehee@cherokee.org or (202) 615-9505.

Sincerely,

Bill John Baker,
Cherokee Nation Principal Chief

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

Document: ACF-2018-0003-0349
Andrew Barclay

Submitter Information

Name: Andrew Barclay

General Comment

RE: Proposed rule on streamlining the Adoption and Foster Care Analysis and Reporting System (AFCARS) data elements [Docket # ACF-2018-0003 / Docket RIN: 0970-AC72]

Dear Ms. McHugh:

I urge you to retain the Juvenile Justice Involvement data element in the 2016 Final Rule. (See the list of data elements to be removed at https://www.federalregister.gov/d/2019-07827/p-75.)

Perhaps there are existing justifications (e.g. Congressional reporting & budgeting), but I also submit that future-proofing is a legitimate justification for this element. Given the major state-level statutory and policy changes over the past 5 years in juvenile justice linked to the larger criminal justice reform momentum, I think it is inevitable that AFCARS will be the best vehicle for identifying dual-system youth in the very near future. Once dual-system youth episodes are identified, other data sources can then be used to gather detailed information, but without the AFCARS Juvenile Justice Involvement data element we have no starting points.

Sincerely,
Andrew Barclay

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Education Law Center

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General Comment

See attached file(s)

Attachments

Education Law Center

EDUCATION LAW CENTER

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 the Education Elements of the Adoption and Foster Care Analysis and Reporting System (AFCARS) 2016 Final Rule

Dear Ms. McHugh,

Thank you for the opportunity to provide comments regarding the Adoption and Foster Care Analysis Reporting System (AFCARS) Final Rule. Pursuant to the notice published in the Federal Register on April 19, 2019 (84 Fed. Reg 16572), the **Education Law Center – PA ("ELC")** submits these comments **expressing strong support of the educational stability data element** of the AFCARS Final Rule issued in 2016. In addition, we urge the inclusion of transition planning data elements in AFCARS.

I. Who We Are

ELC is a statewide non-profit education advocacy organization that advocates on behalf of Pennsylvania's most educationally "at risk" children, including children living in poverty, children of color, children with disabilities, English Language Learners, students experiencing homelessness and children in the child welfare system. Over its almost forty-year history, ELC has helped thousands of individual children in foster care obtain the educational services they desperately need to achieve life-long stability. We have also advanced effective state and national legislative and policy reforms to improve educational outcomes for children in foster care. Along with the Juvenile Law Center and the American Bar Association Center on Children and the Law, ELC co-founded the ***Legal Center for Foster Care and Education***[1] and is a founding member of the ***National Working Group on Foster Care and Education***.[2] Through the Legal Center, we advocate for better educational opportunities for youth in care in Pennsylvania and nationwide. The Legal Center has been instrumental in helping jurisdictions implement the educational requirements of the Fostering Connections to Success and Increasing Adoptions Act of 2008, and the school stability requirements of the ***Every Student Succeeds Act***

[1] See *Legal Center for Foster Care and Education* website at http://www.fostercareandeducation.org/
[2] *See* http://fostercareandeducation.org/OurWork/NationalWorkingGroup.aspx.

of 2015. In addition, ELC also plays a leadership role at the state level. ELC was an active member of the ***Pennsylvania State Roundtable on Educational Success and Truancy Prevention***, which focuses on improving educational outcomes for our state's children in the dependency system.[3] In addition, ELC is currently an active member of the **Pennsylvania's Child Welfare Council** and recently participated in a statewide workgroup initiated by Pennsylvania's Department of Human Services that drafted amendments to strengthen the state's child welfare regulations.

ELC submitted comments related to AFCARS in 2008, 2010, and 2015 in support of updating AFCARS requirements to better reflect new and changing federal laws and improve the quality of data collected about children in foster care. In April 2018, we submitted comments opposing the proposed delay of the AFCARS Final Rule. ELC has submitted comments in response to numerous NPRMs, emphasizing the importance of including elements relating to education in AFCARS. The data element relating to educational stability should be retained as it is critical to measure effective implementation of federal child welfare and education law. For example:

- 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. Since 2008, many state and county agencies have improved their policies and practices to support school stability.

- The *Every Student Succeeds Act* (ESSA) further reinforces Fostering Connections by promoting, among other things, school stability and interagency data sharing related to students in foster care. For the first time, state departments of education are required to report on the educational performance of students in foster care in the SEA 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.

II. Importance of Collecting Data Re School Stability

It is well-documented that youth in foster care are among the most educationally at risk of all student populations. They experience lower academic achievement, lower standardized test scores, higher rates of grade retention, and higher dropout rates than their peers who are not in

[3] *See, e.g.*, 2014 Report to Pennsylvania State Roundtable (May 2014), *available at* http://www.ocfcpacourts.us/assets/upload/2014%20Educational%20Success%20Report%282%29.pdf.

foster care.[4] About half of foster youth complete high school by age 18 compared to 70% of youth in the general population.[5] Other studies show that as few as 11% attend college.[6]

Research has consistently demonstrated that high rates of school mobility – which often occur upon a child's initial entry into foster care and as a consequence of subsequent placement changes – are a key cause of poor educational outcomes.[7] As reflected in our comments submitted in 2008, 2010, 2015, and 2018, the addition of a school stability data elements to AFCARS is a critical step towards ensuring education success as a critical "well-being outcome" for vulnerable children in foster care. This data element also aligns with federal requirements for monitoring states' compliance with the education requirements of *Fostering Connections* and *ESSA*, which require state and local child welfare and education agencies to ensure school stability for all children in foster care and to disaggregate educational achievement data for children in foster care.

Without AFCARS including this crucial data point related to school stability, it will be nearly impossible to measure progress and trends or gauge effectiveness of policies and practices established under *Fostering Connections* and *ESSA*. 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. As such, ELC enthusiastically supports retaining the education stability-related data element included in the 2016 Final Rule.

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 why and how often children change schools. No other vehicle is better suited to tracking this type of data on a national scale. 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, resulting in more accurate data without creating an unnecessary burden for child welfare professionals. 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

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[4] National Working Group on Foster Care and Education, *Fostering Success in Education: National Factsheet on the Educational Outcomes of Children in Foster Care* (January 2014), http://fostercareandeducation.org/ (under "Research and Statistics").

[5] Wolanin, T. R. (2005). *Higher education opportunities for foster youth: A primer for policymakers.* Washington, DC: The Institute for Higher Education Policy.

[6] Burley, M. (2009). *Foster Care to College Partnership: Evaluation of education outcomes for foster youth.* Washington State Institute for Public Policy, *available at* http://www.wsipp.wa.gov/rptfiles/09-12-3901.pdf.

[7] Smithgall, C., Jarpe-Ratner, E. & Walker, L. (2010). *Looking back, moving forward: Using integrated assessments to examine the educational experiences of children entering foster care*; Choice, P., D'Andrade, A., & Gunther, K. (2001). *Education for foster children: Removing barriers to academic success.* Berkeley, CA: University of California, Berkeley. School of Social Welfare. Bay Area Social Services Consortium.

shows increased attention to educational issues is critical – and that students with high mobility face many educational challenges.

The education data elements included in the AFCARS 2016 Final Rule have already been open for extensive public comment and debate. The Final Rule was the end result of identifying a finite number of basic education data elements that will yield critical national level data. The new data collection requirements were thoughtfully considered and seek to ensure child welfare agencies are gathering data on key 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 outcomes.

The updated requirements in the 2016 Final Rule also represent a shift away from "point-in-time" data toward a more longitudinal data approach that will help agencies address children and families' needs more effectively. 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. Any claims of cost burdens by states are overstated, as all states will expend these costs to update their systems regardless. AFCARS allows these updates to have a finite number of data elements that are universal across states and are necessary to identify trends and continue improving our child welfare system responses.

III. Importance of Collecting Data Regarding Transition Planning

Transition planning requirements have been embedded in federal law since 2008 when *Fostering Connections* was adopted. This key component of child welfare law ensures that youth are supported in their transition to adulthood, beginning with planning at age 14 and continuing, alongside permanency planning, until the youth leaves the system. *See* 42 U.S.C.A.§ 675 (1)(D).

Recent data reveals that states continue to struggle to meet the needs of transition age youth. During the last decade, we have made few gains in improving permanency outcomes for older youth.[8] Moreover, large numbers of youth are not receiving the transition services mandated by law. For example, nationally, only 23% of transition age youth in foster care received transition services related to employment and vocational training, and financial assistance.[9] Only 36% received assistance with budget and financial management and 22% received mentoring services.[10] In addition, the adult outcomes reported in the National Youth in Transition Database (NYTD) similarly reveal that youth leaving foster care continue to lag behind their peers in high school graduation, employment, and stable housing.[11]

Including 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 also serves as a key

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[8] Older Youth Need Support Transitioning from Foster Care to Adulthood (ChildTrends 2019).
[9] Fostering Youth Transitions (Annie E. Case Foundation 2018), https://www.aecf.org/resources/fostering-youth-transitions/#summary
[10] Youth Transitioning Out of Foster Care: Received John H. Chafee Foster Care Independence Program Services in the United States (Kids Count Data Center).
[11] Highlights from the NYTD Survey: Outcomes reported by young people at ages 17, 19, and 21 (November 2016) available at https://www.acf.hhs.gov/sites/default/files/cb/nytd_data_brief_5.pdf.

catalyst for improving the provision of services to youth in accordance with legal requirements. While it is argued that this information is not necessary to be included in AFCARS because it is covered in NYTD, that data set is incomplete and not representative due to the voluntary nature of NYTD and narrow scope of its inquiries.

Moreover, contrary to the NPRM, these data elements are not "too detailed or qualitative for a national data set." Rather, the Rule proposes to collect very basic information that verifies that a transition plan has been developed consistent with the case planning requirements as set forth in federal law. This is an important accountability measure that is a decade overdue and will provide valuable information at the state and national level related to meeting the needs of our older youth who desperately desire and are entitled to transition planning services.

Importantly, the cost of collecting this data is minimal as transition planning is a pre-existing requirement that is already part of case planning processes. By contrast, the financial cost to individuals and communities of failing to prepare youth for adulthood is substantial. The Annie E. Casey Foundation reports that "closing the gaps in education, housing, early parenting and juvenile justice outcomes [between youth in the foster care system and their peers] would reduce costs to society by $4.1 billion for each new group of young people aging out of foster care."[12] Any minimal cost associated with collecting this data is far outweighed by the benefit to young people and society in general as collecting such data will inform and improve how we serve and support transition age youth. Accordingly, we strongly support retaining the transition plan data element as a core accountability measure that will help states improve the educational and life outcomes of older youth in foster care.

IV. Conclusion

ELC continues to support 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 implementation of federal law and 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.

Respectfully submitted,

Reynelle Brown Staley
Policy Director

Maura McInerney
Legal Director

Education Law Center
1315 Walnut Street, Suite 400,
Philadelphia, PA 19107

[12] Future Savings: The Economic Potential of Successful Transitions from Foster Care to Adulthood 5 (Annie E. Casey Foundation 2019).

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Adoption and Foster Care Analysis and Reporting System

Document: ACF-2018-0003-0351
Children's Advocacy Institute, University of San Diego School of Law

Submitter Information

Name: Robert Fellmeth
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San Diego, CA,
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General Comment

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 AFCARS 2016 Final Rule

Dear Ms. McHugh,

The Childrens Advocacy Institute (CAI) appreciates the opportunity to comment on the Proposed Rulemaking amending the Adoption and Foster Care Analysis Reporting System (AFCARS), as set forth in the Notice of Proposed Rulemaking published in the Federal Register on April 19, 2019 (84 Fed. Reg 16572).

CAI, founded at the University of San Diego School of Law in 1989, is one of the nations premiere academic, research, and advocacy organizations working to improve the lives of all children and youth, with special emphasis on reforming the child protection and foster care systems and improving outcomes for youth aging out of foster care. Conducted through offices in San Diego, Sacramento, and Washington, D.C., CAIs research and advocacy component leverages change for children and youth at the federal and state levels through impact litigation, regulatory and legislative advocacy, and public education, while CAIs academic component trains law

students to be effective child advocates throughout their legal careers.

CAI opposes the proposed changes set forth in the Notice. Professionals working within the child welfare system as well as policymakers charged with developing and overseeing policies and appropriating funds to carry them out rely on AFCARS data to inform their work and guide their decisionmaking. The proposed elimination of data points will deprive these individuals of critical information and thwart efforts to engage in robust and meaningful oversight. As stated in the submitted comments of The Hon. Ron Wyden, dated June 17, 2019, the proposed changes would further shield our view of who in the foster care system is in need of Congressional attention and which resources and programs would ensure the best interests of these vulnerable children. The need to provide professionals and policymakers with comprehensive data about the health, safety, and well-being of these children justifies any alleged burden on those responsible for reporting it.

Further, CAI opposes any attempt to delay implementation of the 2016 Final Rule. We adamantly urge you to continue moving forward with implementation of the Final Rule without further change or delay.
Sincerely,

ROBERT C. FELLMETH
Price Professor of Public Interest Law, University of San Diego School of Law
Executive Director, Childrens Advocacy Institute

Attachments

Children's_Advocacy_Institute_AFCARS_Comments

Children's Advocacy Institute

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Kathleen McHugh
U.S. Department of Health and Human Services
Administration for Children and Families
Director, Policy Division
330 C Street SW
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June 18, 2019

Re: Response to Request for Public Comments on Elements of AFCARS 2016 Final Rule

Dear Ms. McHugh,

The Children's Advocacy Institute (CAI) appreciates the opportunity to comment on the Proposed Rulemaking amending the Adoption and Foster Care Analysis Reporting System (AFCARS), as set forth in the Notice of Proposed Rulemaking published in the Federal Register on April 19, 2019 (84 Fed. Reg 16572).

CAI, founded at the University of San Diego School of Law in 1989, is one of the nation's premiere academic, research, and advocacy organizations working to improve the lives of all children and youth, with special emphasis on reforming the child protection and foster care systems and improving outcomes for youth aging out of foster care. Conducted through offices in San Diego, Sacramento, and Washington, D.C., CAI's research and advocacy component leverages change for children and youth at the federal and state levels through impact litigation, regulatory and legislative advocacy, and public education, while CAI's academic component trains law students to be effective child advocates throughout their legal careers.

CAI opposes the proposed changes set forth in the Notice. Professionals working within the child welfare system — as well as policymakers charged with developing and overseeing policies and appropriating funds to carry them out — rely on AFCARS data to inform their work and guide their decisionmaking. The proposed elimination of data points will deprive these individuals of critical information and thwart efforts to engage in robust and meaningful oversight. As stated in the submitted comments of The Hon. Ron Wyden, dated June 17, 2019, the proposed changes would "further shield our view of who in the foster care system is in need of Congressional attention and which resources and programs would ensure the best interests of these vulnerable children." The need to provide professionals and policymakers with comprehensive data about the health, safety, and well-being of these children justifies any alleged burden on those responsible for reporting it.

Further, CAI opposes any attempt to delay implementation of the 2016 Final Rule. We adamantly urge you to continue moving forward with implementation of the Final Rule without further change or delay.

Sincerely,

Robert C. Fellmeth

ROBERT C. FELLMETH
Price Professor of Public Interest Law, University of San Diego School of Law
Executive Director, Children's Advocacy Institute

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Ak-Chin Indian Community

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Government Agency: Ak-Chin Indian Community

General Comment

Please find the attached comments from the Ak-Chin Indian Community regarding the Administration for Children and Families' Notice of Proposed Rulemaking, RIN No. 0970- AC72.

Attachments

Ak-Chin Indian Community

AK-CHIN INDIAN COMMUNITY
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Via electronic mail

June 18, 2019

Jerry Milner
Acting Director, Administration on Children, Youth and Families
330 C Street, S.W.
Washington, D.C. 20201

Re: Comments to Administration for Children and Families' Notice of Proposed Rulemaking, RIN No. 0970-AC72

Dear Mr. Milner:

The Ak-Chin Indian Community ("Community"), a federally recognized Tribe, submits these comments in response to the Administration for Children and Families' Notice of Proposed Rulemaking published in the Federal Register on Friday, April 19, 2019, RIN 0970-AC72 ("NPRM"). Administration for Children and Families' ("ACF") proposes to repeal regulations adopted by final rule in 2016, codified at 45 CFR 1355, which require it to collect data regarding states' compliance with the Indian Child Welfare Act, 25 U.S.C. § 1901, *et seq.* ("ICWA") through the Adoption and Foster Care Analysis and Reporting System ("AFCARS"). The Community strongly opposes the NPRM because the 2016 final rule represents an opportunity for ACF—for the first time since ICWA's enactment 41 years ago—to collect reliable data regarding states' compliance with ICWA. In particular, the Community is concerned about the rising number of American Indian children in Arizona's foster care system.[1] Our children and families deserve the protections to which they are entitled under ICWA. We believe that ACF's collection of ICWA data would hold states accountable for their compliance with ICWA and improve outcomes for our children. For this reason, the Community urges ACF to maintain the ICWA data elements enacted in the 2016 final rule.

I. BACKGROUND

In enacting ICWA, Congress established "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster and adoptive

[1] *See, e.g.*, A. Summers, *Disproportionality Rates for Children of Color in Foster Care* 12 (Nat'l Council of Juvenile & Family Court Judges 2015) at Table 1, 21, *available at* http://www.ncjfcj.org/sites/default/files/NCJFCJ%202014%20Disproportionality%20TAB%20Final.pdf

homes which reflect the unique values of Indian culture."[2] "ICWA was specifically designed to protect the best interests of Indian children."[3] Unfortunately, over four decades after ICWA's enactment and despite the strong procedural protections set forth therein, Indian children remain disproportionately represented in foster care and adoption across the country.[4] ACF's historic neglect of its responsibility to oversee of states' compliance with ICWA directly contributes to this problem and is well-documented. The 2016 final rule required ACF to collect data regarding states' compliance with ICWA's procedural safeguards on a case-by-case basis; however, due to ACF's delay in the implementation of this rule, ACF has never collected this data.

Having failed to establish an effective system for monitoring ICWA compliance over the past 41 years, ACF now proposes to repeal the ICWA data elements from the 2016 final rule on the basis that it is too costly and burdensome for states to submit data on ICWA compliance.[5] ACF's removal of ICWA data elements would further excuse states' non-compliance and their failure to meet the best interest of Indian children. In the absence of other effective means of ensuring ICWA compliance, removing ICWA data elements falls far short of the Department of Health and Human Services' long-standing trust responsibility to Indian tribes and their children. *See Worcester v. Georgia*, 31 U.S. 515 (1932).

II. DISCUSSION

ACF is responsible for determining whether states are in "substantial conformity" with the Social Security Act Title IV-B (child welfare funding) and Title IV-E (foster care and adoption funding) based in part on the "State's compliance with the Indian Child Welfare Act."[6] In furtherance of this responsibility, the purpose of ACF's data collection through AFCARS is "[t]o promote improved knowledge on how best to ensure strong, permanent families for children."[7] ACF does not deny that collecting ICWA-related data fits squarely within its authority and the purpose of AFCARS. In fact, the 2016 final rule was thoughtfully designed, and if implemented, it would have generated valuable data on states' ICWA compliance. But for ACF's three-year delay in implementing the final rule,[8] ACF would now be analyzing data that it received to identify some of the root causes of Indian children's overrepresentation in foster care and adoption. Instead, through the Advanced Notice of Proposed Rulemaking ("ANPRM") and NPRM, ACF is eschewing its congressionally-mandated responsibility to oversee ICWA compliance. ACF's bases for gutting the final rule are unfounded.

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[2] 25 U.S.C. § 1902.
[3] Indian Child Welfare Act Proceedings; Final Rule, 81 Fed. Reg. 38797 (June 14, 2016) (25 CFR pt. 23).
[4] *See, e.g.*, A. Summers, *supra* note 1; U.S. Dep't of Health and Human Servs., *Race/Ethnicity of Public Agency Children Adopted* (July 2015), *available at* https://www.acf.hhs.gov/cb/resource/race-2014.
[5] Adoption and Foster Care Analysis and Reporting System ("AFCARS"), 84 F.R. 16573-16574 (proposed Apr. 19, 2019).
[6] 45 C.F.R. § 1355.34.
[7] 42 U.S.C. § 679(d).
[8] *See* 84 Fed. Reg. 16573 (discussing Executive Order 13777 Enforcing the Regulatory Reform Agenda (Feb. 24, 2017), the formation of the Health and Human Services Regulatory Reform Task Force and its promulgation of a rule delaying the implementation of the final rule until October 1, 2020 (citing 83 Fed Reg. 4225)).

A. ACF's Justifications for Removing and Revising ICWA Data Elements Are Unfounded

As ACF explains, the NPRM arises from Executive Order ("EO") 13777 which instructs federal agencies to reduce regulatory burdens.[9] EO 13777 directs agencies to "prioritize, to the extent permitted by law, those regulations that the agency's Regulation Reform Task Force has identified as being outdated, unnecessary, or ineffective."[10] The ICWA data elements adopted in the 2016 rule do not satisfy any of these three criteria—they are long overdue, they are necessary for ACF to fulfill its duty to oversee Title IV-E agencies' ICWA compliance, and they are the most effective tool to gather data on ICWA compliance and to secure greater compliance with the law. As explained below, the ANPRM and NPRM reveal ACF's bias in its assumption that implementation costs outweigh the beneficial impact of increased ICWA compliance for children and families. Therefore, the ANPRM and NPRM do not provide a reasoned basis for stripping ICWA data elements from the 2016 rule.

1. The ANPRM Reflects ACF's Bias and Places the Goal of Reducing Costs Over Improving Outcomes for Children

The Community is troubled by the unfounded premise on which the NPRM is based — that the costs and burden of the final rule outweigh its benefits. The NPRM explains that the ANPRM solicited specific feedback from Title IV-E agencies, most of which are operated by states, by posing questions regarding (1) AFCARS data elements, (2) costs to implement the final rule, and (3) "burden hours" needed to complete the work required to comply with the 2016 final rule.[11] These questions focus narrowly on the burden arising from the final rule, while entirely excluding information regarding its benefit. For this reason, the ANPRM supporting this NPRM reflects ACF's bias against collecting ICWA data elements from the start. A more objective methodology would have asked whether the benefit of updating AFCARS data outweighed the cost and burdens associated with updating AFCARS software, training social workers, and time spent inputting data.

In addition, the questions posed in the ANPRM precluded quality responses from tribes as a practical matter. The NPRM states that tribes "did not provide specific comments on or estimates for cost or burden related to the final rule."[12] As non-state entities, and majority non-Title-IV-E agencies, however, tribes simply had no way to test the responding states' cost and burden estimates for recordkeeping and reporting that ACF found so compelling.[13] This information deficit put tribes at a material disadvantage in their response to the ANPRM.

Increased program costs are justified for the same reasons that supported ACF's adoption of the final rule, including: (1) updating information collected through AFCARS for the first time in *twenty-one years* (1995 to 2016) during which time, numerous changes to the foster care and adoption system have occurred; (2) the need for "more comprehensive information to deepen our understanding of the unique needs of Indian children . . . who are in the state's placement

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[9] *See* EO 13777, Enforcing the Regulatory Reform Agenda, 82 Fed. Reg. 12285 (Feb. 24, 2017).
[10] 82 Fed. Reg. 12286.
[11] *Id.*
[12] *Id.*
[13] *Id.* at 16573-16574.

and care responsibility"; and (3) the fact that the data would further ACF's work to draw national statistics and trends in the field of foster care and adoption to assess the "current state" of these federal programs and "inform national policies."[14] Moreover, ACF suggested that in connection with the final rule funding would be available to support the revised data collection requirements.[15] Most importantly, the anticipated costs associated with implementing the final rule were justified by the valuable information that they would generate and the far-reaching system improvements that they would drive.

2. Collection of ICWA Data Elements Does Not Unnecessarily Divert State Resources

States' claims that the final rule will dramatically increase the number of "burden hours" lacks credibility. Any program improvement involving software updates will increase staff training hours. If that burden is sufficient to avoid updating data systems, those systems would quickly become archaic and fail to produce useful, current information.

Moreover, in states with small populations of Indian children, social workers who identify that ICWA does *not* apply to a particular case would not be prompted with further questions relating to ICWA. Given the minority of states with any significant population of Indian children,[16] the burden hours of social workers in the majority of states will not be impacted by ICWA data elements at all. The same logic applies to states in which Indian children represent a small percentage of the children in foster care—which is the vast majority of states. There are only ten states in which American Indian children represent five percent or more of children in foster care.[17] Asking social workers in forty states to input additional data in less than five percent of their cases is *not* overly burdensome; nor is asking social workers in ten states to input additional data. Conversely, for those states with large numbers of Indian children in the system, the need for data collection is critical to determine how well the child welfare system is meeting their needs.[18]

3. ICWA Data Elements Do Not Require Qualitative Information

The ANPRM asked for "recommendations on data elements to retain, simplify, and remove with justifications…why the data would not be reliable…and would be better asked through a qualitative case review."[19] This justification is inapposite. Qualitative assessments require reporting in narrative form, which takes far longer to generate than clicking through a menu of "yes" or "no" questions. Moreover, the NPRM only identifies two areas of data:

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[14] *Id.*
[15] *Id.*
[16] As of 2017, only eight states have populations of American Indians over two percent. *See* Native American population by state, *available at* http://worldpopulationreview.com/states/native-american-population/.
[17] *See* Children in Foster Care by Race and Hispanic Origin in the United States, Kids Count Data Center https://datacenter.kidscount.org/data/tables/6246-children-in-foster-care-by-race-and-hispanic-origin?loc=1&loct=1#detailed/2/2-53/false/38,35,18/2601/12992,12993 (last accessed on June 7, 2019)
[18] Washington State has already recognized the importance of this data and has instituted systems to collection additional ICWA data on their own. *See* https://www.dcyf.wa.gov/sites/default/files/pdf/TribalCoordination.pdf at 12.
[19] 84 Fed. Reg. 16573

transfers and "reason to know a child is an Indian Child" as better suited for qualitative assessment and provides no explanation to support their position.

All but a few of the ICWA data elements which were added in 2016 were answerable in "yes" or "no" format.[20] For example, only if a social worker indicates "yes" to questions in 45 C.F.R. § 1355.44(b)(4) or (b)(5) (indicating that ICWA applies) would he or she be required to answer subsequent questions under 45 C.F.R. § 1355.44(b)(7) and (b)(8)(i)-(iii) (regarding transfer of jurisdiction over an ICWA case).[21] For this reason, the generalized justification that ICWA data elements are better suited to qualitative assessments does not stand to reason and serves as mere pretext for their elimination.

4. Any Burden Is Outweighed By the Fact That Collection of Data on ICWA Compliance Is Long Overdue and Will Significantly Benefit Indian Children

The NPRM rests on the flawed assumption that the benefit of collecting data on ICWA compliance is limited to policymaking. Rather, data on ICWA compliance is urgently needed to improve outcomes for Indian children in state foster care and adoption and to carry out ACF's congressionally-mandated duty to oversee ICWA compliance among Title IV-E agencies.

ACF claims that the "suggestion that more data elements in AFCARS is essential for policymaking was not sufficiently validated in the ANPRM comments."[22] ACF faults commenters for failing to identify "specific policies that they felt needed the detailed level of AFCARS data so urgently."[23] However, the policy "need[ing] the detailed level of AFCARS data so urgently" is already in place—*it is ICWA*. The urgent need for collecting the data is the fact that Indian children remain disproportionately represented in the foster care system due in large part to states' continued non-compliance with the law. Moreover, ACF should use the ICWA data elements to "Address the unique needs of Indian children . . . and their families" and to "Monitor title IV-E agency compliance with title IV-B and IV-E requirements."[24]

ACF's mandate to monitor and enforce—not just encourage—states' compliance with ICWA under Title IV-B and Title IV-E should not be minimized. Recognizing the lack of compliance reporting required for ICWA, Congress specifically amended Title IV-B to require state agencies to report their efforts to comply with ICWA.[25] As a result, Title IV-B (family preservation) funding is now conditioned upon states' submission of a child and family service plan ("CFSP") including . . . "measures taken by the state to comply with ICWA."[26] ACF is then charged with determining whether a state is in "substantial conformity" with Title IV-B and E

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[20] *See* Attachment A—Out-of-Home Care Data file Elements § 1355.44.
[21] 81 Fed. Reg. 90537
[22] 84 Fed. Reg. 16575.
[23] *Id.*
[24] *Id.*
[25] *See* U.S. GAO, Report to Congressional Requesters Re: Indian Child Welfare Act, Existing Information Issues Could be Used to Target Guidance and Assistance to States (April 2005) at 47.
[26] 42 U.S.C. § 622(b)(9).

based on certain criteria, including "the extent to which the title IV-E agency has . . . implemented . . . section 422(b)(9) of the Act regarding the State's compliance with [ICWA]."[27]

In 2000, ACF issued guidance regarding "suggested" ICWA activities that states could choose to address in their program improvement plans; yet a study by the GAO five years later reported that states failed to report basic issues regarding ICWA's implementation.[28] As of 2005, ACF observed that states had difficulty reporting ICWA compliance, yet it still had never established standards for reviewing and evaluating the completeness of ICWA compliance reporting. Ultimately, GAO concluded that the "structure of ACF's CFSR reviews of states' overall child welfare systems does not ensure that ICWA issues will be addressed."[29] Moreover, GAO reported that "[t]he limited information gathered from the case file reviews may not accurately reflect a state's implementation of ICWA."[30]

Ten years later in 2015, the ACF reported that only 12 of the 50 states had provided the required compliance assessment data.[31] The 38 remaining states had submitted no data or minimal data on ICWA compliance, even including seven of the top ten states with the largest American Indian populations.[32] Moreover, many of the states identified problems with threshold tasks for the application of ICWA, such as identifying American Indian children and notification to Indian parents and tribes.[33] ACF and GAO's conclusions regarding states' disparate compliance with ICWA were further confirmed by the Department of Interior's ("Interior") conclusion in 2016 that "implementation and interpretation of the Act has been inconsistent across States and sometimes can vary greatly one within one State" which has led to "significant variation in applying ICWA statutory terms and protections."[34]

Having failed to develop an effective system for monitoring and enforcing ICWA compliance over the past *41 years*, ACF should prioritize, not repeal, the collection of ICWA compliance data. In fact, the process of inputting the data will prompt social workers to apply the law, to engage tribes early on in the case, and to correct errors when they occur. In this way, any "burden hours" resulting from the 2016 final rule will benefit states, tribes, Indian children and families by likely reducing the number of Indian children in care and overall costs for states.

5. ACF Should Not Rely on the Court Improvement Program to Justify Removal of Data Elements

As a basis to abandon the 2016 rule, ACF claims that it can rely on data collected from a Court Improvement Program ("CIP"). "Specifically, CIP grantees will be encouraged and

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[27] 45 C.F.R. § 1355.34.
[28] *Id.* at 48-49.
[29] *Id.* at 51, 53.
[30] *Id.* at 55.
[31] *See* States' Consultation and Collaboration with Tribes and Reported Compliance with the Indian Child Welfare Act: Information from States' and Tribes' 2015-2019 Child and Family Service Plans ("Information from States and Tribes' 2015-2019 CFSPs").
[32] *See* note 26, *supra* (these states include Montana, New Mexico, North Dakota, Oregon, South Dakota, Washington and Wyoming).
[33] *See* note 10, *supra* at 6 (noting Arizona's submission that it had identified as an area for improvement "increased consistency in identifying Native American children and improvements in notification to Indian parents and tribes").
[34] 81 Fed. Reg. 38779.

supported to collect and monitor data on court inquiries, orders and findings related to" certain areas of ICWA.[35] In effect, ACF asks tribes to trust that ICWA compliance data will be collected through a program that is not yet implemented and that only "encourages" and does not mandate data collection. Based on evidence from the past 41 years, only encouraging data collection has not worked. ACF further justifies data collection through CIP on the basis that "the requirements of ICWA and accompanying regulations are upon state courts."[36] This claim is patently incorrect; many of ICWA's requirements are imposed on state agencies, not courts.[37]

In conclusion, the ANPRM was irreparably biased in favor of eliminating ICWA data elements from the start. As a result, the responses to ACF's ANPRM fail to support the elimination of valuable ICWA data elements.

B. Removing ICWA Data Elements Will Impede ACF From Tracking States' ICWA Compliance and Determining Whether States are Meeting Indian Children's Best Interests

ACF proposes to remove five categories of ICWA data elements.[38] For the following reasons, the Community urges ACF to maintain all but a few of these data elements.

1. Data Elements Relating To Transfers Of Jurisdiction To Tribal Court Should Be Retained

ACF proposes to eliminate five data elements which provide crucial information regarding transfer of jurisdiction from state to tribal court. *See* 45 C.F.R. 135544(b)(7)(request to transfer), (8)(denial of transfer), (8)(i)-(iii)(bases for denial of transfer). ICWA's jurisdiction transfer provision, 25 U.S.C. § 1911(b), establishes a presumption that a state court will transfer an ICWA case to the tribe on petition of the tribe or the parent, absent good cause to the contrary. In *Mississippi Band of Choctaw Indians v. Holyfield*, the Supreme Court highlighted the importance of transferring jurisdiction, explaining that §1911(b) "insures that the rights of the child as an Indian, the Indian parents or custodian, and the tribe are fully protected."[39] The statute and the Court thus emphasize that ICWA's preference in favor of transferring jurisdiction to the tribe aligns with the best interests of the child.

The 2016 final rule acknowledges that collection of this data received support from tribal and state entities alike.[40] In addition, collecting this will enable ACF to identify whether state courts are complying with the regulation. Data related to transferring jurisdiction should be retained because it will help identify state courts that frequently deny transfer requests to which ACF could prioritize technical assistance.

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[35] 84 Fed. Reg. 16578.
[36] *Id.*
[37] *See, e.g.*, 25 U.S.C. § 1911 (requiring the party seeking foster care placement or termination of parental rights to notify the Indian child's parent and tribe); 25 C.F.R. § 23.2 (defining activities of Title IV-E agency which constitute "active efforts"); 25 C.F.R. § 23.107 (imposing due diligence requirement to show that party seeking out-of-home placement has inquired whether the child is an Indian child); 25 C.F.R. § 132(b) (party seeking the departure from placement preferences has the burden of demonstrating good cause).
[38] 84 Fed. Reg. 16577-16578.
[39] 490 U.S. 30, 61 (1989) (citation omitted).
[40] *See* 81 FR 90538.

Under the label "transfers," the NPRM explains that ACF proposes to collect data on whether a child "exits out of home care to an Indian tribe."[41] This statement is entirely unclear. The term "transfer," as used in ICWA § 1911(b), refers to a state court's transferring *jurisdiction* over an Indian child welfare case to a *tribal court*. Certainly, an Indian child who is under the jurisdiction of a state court does not exit out-of-home care every time the case is transferred to tribal court. Thus, it is unclear exactly what data ACF is attempting to collect. In addition, ACF provides no justification for why it is collecting this data.

2. Data Elements Related To Court Findings On Termination Of Parental Rights, Including The Required Evidentiary Standard, Qualified Expert Witness And Active Efforts Should Be Retained

ACF proposes to eliminate eight data elements regarding compliance with protections during proceedings to voluntary or involuntary terminate parental rights. *See* 45 C.F.R. § 1355.44(c)(6)(i)(finding that beyond a reasonable doubt, continued custody is likely to result in serious emotional or physical damage to the Indian child); (ii)(testimony of qualified expert witness); (iii)(active efforts). This data will identify whether Indian children are in fact receiving the benefit of ICWA's heightened procedural protections. Collection of this data is particularly urgent given the Interior's finding of states' "disparate application of ICWA", which prompted it to adopt ICWA regulations in 2016.[42] In particular, one study of compliance with qualified expert witness requirements found that a qualified expert witness was used in only 71% of foster care placements.[43] Another study found that testimony from a qualified expert witness was present in 38% of adjudication hearings, but in none of the three other types of hearings sampled.[44]

The 2016 final rule likewise justified the collection of this data based on the importance of states' compliance with ICWA's protections for voluntary and involuntary terminations of parental rights.[45] In fact, if these congressionally-mandated requirements are not met, courts' placement of Indian children in out-of-home care and termination of parental rights is unauthorized, unlawful and causes unnecessary emotional harm to the child.

The lack of uniform data on states' compliance with termination standards impedes meaningful efforts to improve outcomes for Indian children. Thus, ACF should use this data to determine how often and in which jurisdictions Indian children are not afforded the protections to which they are entitled. For this reason, data on key

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[41] 84 Fed. Reg. 16577.
[42] *See* 81 Fed. Reg. 38770.
[43] *See* Casey Family Programs, Measuring Compliance, Indian Child Welfare Act.(Mar. 2015) at 9 (citing Limb, G. Chance, T., & Brown, E. (2004); An empirical examination of the Indian Child Welfare Act and its impact on cultural and familial preservation for American Indian children. *Child Abuse and Neglect*, 28, 1279-1289.
[44] A. Summers, *Disproportionality Rates for Children of Color in Foster Care* 12 (Nat'l Council of Juvenile & Family Court Judges 2015) at Table 1, *available at* http://www.ncjfcj.org/sites/default/files/NCJFCJ%202014%20Disproportionality%20TAB%20Final.pdf.
[45] 81 Fed. Reg. 90156.

procedural protections in voluntary and involuntary terminations will drive better outcomes for Indian children and should be maintained.

3. Data Regarding Good Cause Findings To Deviate From Placement Preferences Should Be Retained

ACF proposes to eliminate seven data elements related to courts' "good cause" findings to deviate from ICWA's placement preferences for placements in foster care and adoption. 45 C.F.R. §§ 1355.44(e)(10), (11)(i)-(v) (foster care placements); 45 C.F.R. § 1355.44(h)(22)(i)-(v) (adoption and guardianship placements). A finding of good cause is necessary for a court to deviate from ICWA's placement preferences under § 1915(a) and (b). The placement preferences reflect ''Federal policy that, where possible, an Indian child should remain in the Indian community.''[46] As Interior determined, "The preferences in ICWA and the final rule codify the best practices in child welfare of favoring extended family placements, including placement within a child's broader kinship community."[47] In fact, the placement preferences represent the "most important substantive requirement [that ICWA] imposed on state courts."[48] Interior further substantiated its final rule regarding "good cause"[49] on numerous studies concluding that "[p]lacing children with their extended family benefits children" and described how federal law already required preferences for placement of all children with their relatives.[50] It further explained that a good cause rule was needed so that good cause remained a "limited exception rather than a broad category that could swallow the rule."[51]

To date, tribes have no way to determine how frequently, on a state or national level, state courts are invoking the good cause exception and whether the good cause findings regularly comply with the new federal regulation under 25 C.F.R. § 23.132. If the good cause exception is invoked too frequently, it will, as Interior intimated, swallow the rule. Data on good cause determinations will reveal barriers to states' placement of Indian children according to ICWA's placement preferences. Improving placements will improve outcomes for Indian children, and therefore, the data outweighs any costs or burdens associated with its collection.

4. Data elements related to active efforts should be retained

ACF proposes to eliminate thirteen data elements identifying active efforts employed in a particular case. Active efforts are "one of the primary tools provided in ICWA to address" the failure to "recognize immediate practical means to reduce the incidence of neglect or separation."[52] These data elements track the activities which constitute active efforts listed in Interior's 2016 ICWA Rule.[53] If a state social worker is already identifying active efforts for a particular case, it would require little additional effort to click a button indicating which active efforts the social worker actually pursued. Thus, inputting additional data is not burdensome.

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[46] *Holyfield*, 490 U.S. at 37 (citations omitted).
[47] 81 Fed. Reg. 38838 (citations omitted).
[48] *Holyfield*, 490 U.S. at 36.
[49] *See* 25 C.F.R. § 23.132(c).
[50] *See* 81 Fed. Reg. 38838-39.
[51] *Id.* at 38839.
[52] 81 Fed. Reg. 38790 (citing H.R. Rep. No. 95-1386, at 12).
[53] 25 C.F.R. § 23.2 (defining activities that constitute active efforts).

Once data on active efforts is reported, state agencies and the ACF can use the data to identify which active efforts are most frequently utilized and which active efforts correlate to reunification of the Indian child's family. Conversely, state agencies and the ACF can use the data to identify which active efforts are infrequently utilized as areas in which state agencies need greater training, funding or other support. For these reasons, data on active efforts will increase reunification of Indian children with their parents, a benefit which outweighs costs or burdens associated with collecting the data.

5. Data elements related to placement preferences should be retained

To reiterate, the Supreme Court held that placement preferences represent the "most important substantive requirement [that ICWA] imposed on state courts."[54] States' long history of failing to place children according to ICWA's placement preferences and states' current challenges regarding placement[55] weighs heavily in favor of collecting basic data on Indian children's foster care and adoptive placements. At the very least, ACF should collect the following data: (A) Available foster care and pre-adoptive placements, whether the placement complied with ICWA, and which placement was selected. 42 C.F.R. § 1355.44(e)(8), (e)(9).; (B) Child's relationship or non-relationship to the child's adoptive parents or guardians. 42 C.F.R. § 1355.44(h)(2)(i)-(viii); (C) Placement agency. 42 C.F.R. § 1355.44(h)(17); (D) Whether siblings are in the adoptive home. 42 C.F.R. § 1355.44(h)(19); and (E) Whether ICWA-compliant adoptive placements were available and which placement was selected. 42 C.F.R. § 1355.44(h)(20)(i)-(iv), (h)(21). This data directly parallels social workers' steps during the permanency planning process to identify viable placements for an Indian child; therefore, inputting this data does not constitute a burden and should be retained.

C. Revising ICWA Data Elements Will Remove Key Information on Whether States Are Protecting Indian Children's Best Interests

ACF proposes to "[keep] and revise" five categories of ICWA data.[56] For the following reasons, the Community urges ACF to maintain all but a few of these data elements in their original form.[57]

1. Data Regarding Whether The State Title IV-E Agency's Inquiries Of Regarding Indian Child Status Should Be Retained

The NPRM generally states that ICWA data elements from the 2016 final rule would be "kept but revised" including "whether the state title IV-E agency made inquiries of whether the child is an Indian child as defined in ICWA."[58] The proposed data element asks state agencies to indicate "whether the Indian child's tribe(s) was sent legal notice in accordance with 25 U.S.C.

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[54] *Holyfield*, 490 U.S. at 36; *see* Section B(3), *supra*.
[55] *See* ("Information from States and Tribes' 2015-2019 CFSPs") at 6-11 (listing states which identified challenges placing Indian children according to ICWA's placement preferences).
[56] 84 Fed. Reg. 16577.
[57] The Community does not oppose ACF's proposal to streamline data regarding the child's tribal membership and all federally recognized tribes that may potentially be the Indian child's tribe. *See* 81 Fed. Reg. 16577.
[58] *Id.*

1912(a). Indicate yes or no."[59] In comparison, 2016 final rule, codified at 45 C.F.R. 1355.44(b)(6)(i)-(iii), asked straight-forward questions aimed at ensuring timely identification of a child as an Indian child, which significantly increases the likelihood that a court will apply ICWA and that notice will be sent promptly.

In addition, ACF's response to comments on these data elements in 2016 explained, "The data will help identify of which sources Title IV-E agencies most often inquire about whether a child is an Indian child . . . and for which sources Title IV-E agencies may need resource or training to support inquiry."[60] Further, these questions correlate with the requirements set forth in 25 C.F.R. § 23.107(a) and states admit that they have challenges identifying Indian children.[61] Social workers can easily answer these simple questions as they are in the process of inquiring about Indian child status. Thus, this data prompts social workers to abide by 25 C.F.R. § 23.107(a) and ensures that they accurately and timely identify all Indian children.[62]

Finally, Interior found that "[e]arly compliance promotes the maintenance of Indian families, and the reunification of Indian children with their families whenever possible, and reduces the need for disruption in placements."[63] For this reason, questions regarding efforts to determine the child's status as an Indian child should be maintained in their 2016 form.

2. Data Regarding Whether And When ICWA Applies And The Child's Indian Tribe Should Be Retained

The NPRM proposes to eliminate the data element involving "the Indian tribe that the court determined is the Indian child's tribe for ICWA purposes" under 45 C.F.R. § 1355.44(b)(5)(ii).[64] Including the child's tribe is a quick and easy way to identify which tribes experience high volumes of ICWA cases and in which states their children are located. Having this data would allow ACF to target its support to tribes with large volumes of ICWA cases, but minimal funding to engage in ICWA cases in state court. Data regarding a child's tribe also could be used to identify whether certain tribes are achieving better or poorer outcomes in out-of-home placement and why. The Community does not oppose the proposed combination of other data elements in this category.

3. Data regarding whether the Indian child's tribe(s) was sent legal notice in accordance with 25 U.S.C. § 1912(a) should be retained

The NPRM generally states that ICWA data elements from the 2016 final rule which would be "kept but revised" include "whether the Indian child's tribe(s) was sent legal notice in accordance with 25 U.S.C. 1912(a)."[65] The data elements related to notice in the 2016 Final Rule, 45 C.F.R. § 1355.44(b)(6)(i)-(iii) included whether the child's parent and tribe were sent

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[59] *Id.* at 16591.
[60] 81 Fed. Reg. 90535.
[61] *See* ("Information from States and Tribes' 2015-2019 CFSPs") at 6-11 (listing states which identified challenges identifying Indian children).
[62] *See* 84 Fed. Reg. 16579.
[63] 81 Fed. Reg. 38779.
[64] 84 Fed. Reg. 16577.
[65] *Id.*

legal notice 10 days prior to the first child custody proceeding and the name of the tribe that was sent notice.[66] These data elements easily enable ACF to check whether notice was properly effectuated: *i.e.,* a state agency sent notice to the same tribe which was determined by a court to be the child's Indian tribe for ICWA purposes. In addition, "[t]imely notification ensures that Tribal agencies have meaningful opportunities to provide assistance and resources to the child and family. And early implementation of ICWA's resources conserves judicial resources by reducing the need for delays, duplication and appeals."[67] Thus, providing notice will trigger the agency to begin providing active efforts to parents and may prompt a tribe to intervene or transfer the case to tribal court or to engage the family in preservation services. For these reasons, ACF should retain the data elements regarding notice in their original form.

4. Data regarding the tribal membership of mother, father, foster parents, adoptive parents, and legal guardians should be retained

The NPRM generally states that ICWA-related data elements from the 2016 final rule which would be "kept but revised" include tribal membership of mother, father, foster parents, adoptive parents and legal guardians."[68] The NPRM does not sufficiently identify which rules it proposes to revise or streamline with regard to the tribal membership of the mother, father, foster parents, adoptive parents and legal guardians. Thus, the Community can neither oppose nor support this rule's revision.

Finally, the Community takes no position on the revision or elimination of non-ICWA data elements.

The Community appreciates ACF's consideration of these comments. In furtherance of ACF's trust responsibility to Indian children and tribes, ACF should maintain the ICWA data elements identified herein as a key mechanism to monitor and enforce states' compliance with ICWA and improve outcomes for Indian children.

Regards,

Robert Miguel
Chairman, Ak-Chin Indian Community

[66] 81 Fed. Reg. 90585.
[67] 81 Fed. Reg. 38779.
[68] 84 Fed. Reg. 16577.

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AFCARS 2018-2020

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

Document: ACF-2018-0003-0353
FosterClub

Submitter Information

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Organization: FosterClub

General Comment

Comments are attached.

Attachments

FosterClub

FosterClub

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: Notice for Proposed Rulemaking amending the Adoption and Foster Care Analysis and Reporting System (AFCARS)
(Apr. 19, 2019) [RIN 0970-AC72]

Dear Ms. McHugh:

FosterClub, the national network for young people in foster care, is pleased to provide comments on decisions related to the proposed data removal in AFCARS.
If you would like to discuss further, please contact Celeste Bodner, FosterClub, 503-717-1552 or
celeste@fosterclub.com.

Thank you for the opportunity to submit.

Sincerely,

Celeste Bodner
Executive Director
celeste@fosterclub.com

620 S. HOLLADAY DR #1, SEASIDE OR 97183 - 503-717-1552 - - WWW.FOSTERCLUB.ORG

Comments from FosterClub on proposed rulemaking amending the Adoption and Foster Care Analysis and Reporting System (AFCARS)

We are pleased that the Children's Bureau is soliciting feedback on the Adoption and Foster Care Analysis and Reporting System (AFCARS).

As an overarching message, we applaud ACF efforts to engage youth and alumni in shaping what's counted under federal data and hope that ACF will continue to engage young people in elevating current needs, challenges and successes experienced by youth and alumni in order to lead to better outcomes for children, youth and families served by the system.

The Bureau highlighted a concern for the burden of AFCARS data collection on states as a core reason for eliminating several data elements from the December 2016 Proposed Final Rule. While we recognize the value in reviewing data collected to ensure usefulness, we also know that accountability can't happen without data.

As young leaders from FosterClub discussed the proposed elimination of certain data elements, youth felt the "burden" of data collection, as defined by the Children's Bureau, ultimately translates into the burden of recognizing the experiences, identities and support of children. We strongly urge the Children's Bureau to prioritize accountability, well-being, and visibility of children and youth over consideration to the burden of data collection to jurisdictions.

It is important to track key data elements to ensure the foster care population is being represented accurately and funding needs can be assessed and provided accordingly. Recording this data gives child welfare agencies concrete evidence of the population they are serving and can use these data elements to implement innovative change to issues surrounding child welfare. We at FosterClub believe that listening to the voice of the people you serve results in improvements. The child welfare system can't serve that voice if you don't track that voice. Refusing to gather the most comprehensive data of the populations you serve does a disservice to the youth, parents, and families you serve.

Based on the perspectives collected by our young leaders, and through input collected from the FosterClub team, we are pleased to provide our recommendations regarding several data element sets:

Transition Plan - Sections 1355.44(f)(8) and 1355.44(f)(9)

In the Notice of Proposed Rule-Making, two data elements included in the 2016 final rule (whether or not transition planning has taken place and the date it took place) are proposed to be eliminated. Challenges faced by transition age-youth are well-documented; for example: 56% of foster youth have completed high school or GED at age 19, compared to 87% of the general

population peers.[1] In addition, "by age 21, young people who experienced foster care reported significantly lower rates of high school completion and employment than all young people in the general population."[2] Data relating to transitional planning is vital to keep track of to hold states accountable to ensuring transitioning youth are provided the services that are needed. Anecdotally, we hear from our young leaders that although it is federally required, they are not receiving the transition planning.

> "When exiting out of foster care at the age of 18, I never received a transition plan. I didn't even know what it was. Now that I know it is federally required, I'm disappointed my state didn't enforce this."
> — Kassidy, 2 years in Montana's foster care system

Measuring whether or not a transition plan has been provided is the base level of measurement for transition planning. While we hear from young people that transition plan effectiveness varies from state to state and, even, caseworker to caseworker, reporting whether or not a transition plan has been provided (as is required by federal law) will help to ensure the foster care system's compliance with young peoples' hard-fought requirement that a transition plan be developed prior to aging out of the system.

Recommendation: FosterClub strongly condemns removing data relating to transition planning as states should be held accountable for ensuring youth receive transition plans prior to aging out of foster care.

Juvenile Justice Involvement - Section 1355.44(f)(5)

It is critical to keep data elements relating to juvenile justice involvement. Foster youth are disproportionately affected by the juvenile justice system. Among foster youth who have had five or more placements, more than 90 percent will be involved in the juvenile justice system, according to research by the Juvenile Law Center. The "foster care to prison" pipeline is consequently negatively impacting our youth.

Members of the National Foster Care Youth & Alumni Council, a group administered by FosterClub, have been exploring the experiences of crossover youth and how policies impact

[1] Transition-Age Youth in Foster Care in the U.S. Child Trends. August 29, 2017.

[2] Fostering Youth Transitions: Using Data to Drive Policy & Practice. Annie E. Casey Foundation. November 18, 2019.

the experiences and outcomes of crossover youth. Council members believe that the barriers faced by crossover youth are compounded by the barriers they faced while in the foster care system, making this population especially at-risk for falling through the cracks. These barriers stem from the lack of data shared between systems and the lack of data informing research and literature on the experiences and outcomes of crossover youth. Council members created a poll for crossover youth to explore the circumstances leading to a foster youth's involvement in the Juvenile Justice system, services available to foster youth after they crossover, and the support they receive during and after their crossover experience.

Recommendation: FosterClub strongly condemns erasing data elements relating to juvenile justice involvement, as it is critical the child welfare system have an understanding of how many young people in foster care also have juvenile justice involvement.

> "Once I entered the Juvenile Justice System, I had an entirely new team of adults working with me. They didn't know anything about me and it was a huge interruption to try and adjust to the new system. It would have helped to have the same judge, lawyer, advocate, and adults through my crossover experience."
>
> — Anonymous, Foster Care Alumni

Assessment & Date of Health Assessment - Sections 1355.44(b)(11)(ii) and 1355.44(b)(12)

FosterClub opposes the proposed removal of thee data elements, which record the date and timeliness of a child's health assessment within AFCARS, This information is important for assessing access to healthcare for children and youth in foster care have at the state and national level.

This data element is an important aspect of measuring a state's compliance with its Title IV-B Health Oversight and Coordination Plan. FosterClub supports the inclusion of health assessment dates in the 2016 final rule, which provides a baseline understanding of the health of children entering the child welfare system. ACF needs this data to assess whether states are complying with important federal requirements under the Title IV-B program.

Collecting and monitoring this data element will help states identify and respond to the needs of young people in ways that will assist them in implementing the FFPSA because meeting the trauma and any special medical needs will be crucial to delivering effective prevention services

and developing a service array that keeps youth in family settings rather than institutions.

Recommendation: FosterClub strongly condemns erasing data elements relating to health assessment and date of health assessment.

Educational Stability - Sections 1355.44(b)(16) - 1355.44(b)(16)(vii)

Data elements regarding if a child experienced a change in school enrollment due to proximity, district/zoning rules, residential facility enrollment, services/programs, youth's request, or parent/legal guardian request are proposed to be eliminated. It is crucial to collect data concerning educational stability because it reflects how educational instability contributes to the challenges or successes young people in foster care experience and allows for states to address how to minimize unnecessary school changes.

Studies indicate youth in foster care regularly experience school instability. The amount of school changes experienced by youth varies, but about 31% - 75% of youth change schools upon initially entering foster care (National Education Data Sheet 2018). Youth who experience frequent school changes show to have many negative effects, including lower scores on standardized tests, greater risk of dropping out, and trouble creating supportive adult relationships (National Education Data sheet2018). Additionally, in a national study of 1,087 foster care alumni, youth who had even one fewer change in living arrangement per year were almost twice as likely to graduate from high school before leaving foster care (National Education Data sheet 2018).

> "From 9th to 12th grade, I moved through 5 different school districts and 7 different schools in those 4 years. Transitioning from district to district was difficult; many of my credits were mixed up and some didn't transfer to the new district. I went to an alternative school to make up the missing credits that were lost in that process; although I worked hard, I still graduated almost a year later than I could have if I hadn't experienced all of those moves."
> — Miguel, 4 years in Utah's foster care system

Young people who have experienced foster care often relate that school served as a safe-haven through their foster care experience. School stability is essential if we are to ensure children and

youth are to maintain a sense of safety, connection to community and peers, and support from reliable adults; data collection is a key strategy to ensure child welfare and school districts are maximizing school stability.

Recommendation: FosterClub strongly condemns removing data elements relating to educational stability.

Data Relating to Personal Identity - Sections 1355.44(b)(2)(ii) - 1355.44(b)(3)

Removing these vital data elements will erase visibility to specific populations of young people in foster care, such as youth who identify as LGBTQ or Native American. Too many young people report ‘losing who I am’ when they enter foster care. A child’s parents are generally the protectors and promoters of a child's evolving personal identity, and entry into foster care jeopardizes a child’s ability to maintain or grow in their personal identity. Without data elements to track ties young people have to specific identities, these children and youth are not 'seen.' Further, we are unable to determine disproportionate representation or disparate outcomes for children and youth tied to a specific identity.

Recommendation: FosterClub strongly condemns removing data elements relating to a child’s personal identity.

In closing, FosterClub asks that the Children’s Bureau retain the data elements outlined in this document. Additionally, we align with and affirm comments from national advocates including the Juvenile Law Center, Children's Defense Fund, and the National Association of Counsel for Children, in retaining additional data elements.

Thank you for your time and consideration.

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Adoption and Foster Care Analysis and Reporting System

Document: ACF-2018-0003-0354
Nevada_Clark County Dept of Family Services

Submitter Information

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Organization: Nevada_Clark County Dept of Family Services
Government Agency Type: Local
Government Agency: Nevada_Clark County Dept of Family Services

General Comment

See attached file(s)

Attachments

Nevada_Clark County Dept Family Services

Department of Family Services

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Timothy Burch, Administrator
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June 18, 2019

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

RE: Comments on AFCARS NRPM as published in the Federal Register April 19, 2019 Data Report

Dear Ms. McHugh,

Clark County Department of Family Services is grateful for the opportunity to provide comments on AFCARS NRPM as published in the Federal Register April 19, 2019. Overall Clark County is pleased with the care taken to reduce and modify data elements for future submissions. Likewise, we are impressed that special consideration was given on how collecting various data elements would impact the children and families we serve.

After review of the proposed changes we respectfully offer the following comments and recommendations for your consideration:

- Provide additional guidance regarding the additions to "circumstances at removal," and whenever possible, remove those circumstances wherein a singular observation or fact about the family or child could be indicated across multiple selections. For example, a child with oppositional defiant disorder (ODD) could be considered by some workers as a *child behavior disorder* or a *diagnosed condition* by another; and yet a third worker could consider the fact to indicate both a *child behavior disorder* and a *diagnosed condition*. This lack of specificity raises concerns of over-reporting circumstances about the family and over-all concerns about accuracy and data quality of this item.

- Dates related to court filings for termination of parental rights, and specifically modification/relinquishment of parental rights, while readily available in the case file, are not consistently entered into the information system. Due to current practices, data regarding relinquishment of parental rights will always be incomplete. In Clark County, parents wishing to relinquish parental rights are not obligated to petition the court. Parents may relinquish their parental rights in the presence of a licensed social worker and in those circumstances; there would be no petition filed and therefore no filing date to report.

- Consider striking the requirement for *caseworker visit information* and similarly related data elements in AFCARS, due to the unnecessary burden it would place upon the agency, especially considering much of this data is already provided via *Monthly Case Worker Visit* compliance data submitted annually as part of Title IV-B requirements. If needed, additional details regarding the actual dates and locations of the monthly case worker visits could be provided as part of this annual submission. We believe including this data in AFCARS submission, in addition to the annual *Monthly Case Worker Visit* submission, approximates a duplication of work on an already over-burdened child welfare system.

- Consider the impact that self-reporting has upon the accuracy of the child health data elements, specifically as they relate to the requirement to report previously diagnosed conditions. This historical information may not have any bearing upon the current case circumstances, and in those situations collecting the historical data would pose a burden upon the worker and not yield any meaningful insight into the child's current needs.

- Likewise, "circumstances at removal" and specifically the *caretaker significant impairment* is also vulnerable to inaccurate and incomplete data. Parents may be unable to provide this data, and/or unwilling to provide the proper releases of information for the agency to obtain this information. When a parent is unwilling or unable to supply this information, requiring a worker to supply it, which in some cases may actually call for a medical or psychiatric diagnosis, is outside the scope of their work and unrealistic.

Clark County anticipates major changes to practice that will impact UNITY (Nevada's data system) such as: pending PIP goals as part of round three of the CFSR, implementation of Family First Act, CCWIS implementation, and changes resulting from the 2019 legislative session. We also anticipate that all available staff and resources will be directed to meet these goals and that adding major revisions to AFCARS will require staff and resources that are not available to us.

We anticipate that in order to comply with these new regulations we will be expected to develop new business practices, train the workforce, revise existing and write new policies, retool internal compliance and quality reports, and manage data quality concerns. To accomplish all of this, additional staff will be necessary. The exact fiscal impact upon the agency is unknown at this time, although it is anticipated that several additional staff positions will need to be added to the workforce.

Given these concerns we respectfully request consideration of the following:

- Requiring these changes to be in-effect one year following the final rule is unreasonable. Given the volume and complexity of the proposed changes, five years would be required to enact all changes.

- Delay substantive changes to AFCARS until those states that have chosen to implement CCWIS have completed their CCWIS implementation projects. If this is not palatable, consider staging when these requirements are to be enacted so that agencies are not over-burdened with a multitude of simultaneous changes.

- Consider suspending penalties for the first two years following enactment, so as to allow child welfare agencies to focus limited resources upon making comprehensive and quality enhancements to the data systems, remedying data quality issues and retooling existing business practices rather than prematurely pushing quick fixes to avoid a potential penalty.

- During the first three years following the final rule, hold regular trainings, and workgroups to provide support to the child welfare agencies as AFCARS changes are implemented.

We thank you for the opportunity to comment on the proposed changes. Please feel free to contact our office with any questions regarding the above comments.

Respectfully,

Timothy Burch
Administrator of Human Services

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Pechanga Band of Luiseno Indians

Submitter Information

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Government Agency Type: Tribal
Government Agency: Pechanga Band of Luiseno Indians

General Comment

Good afternoon, attached please find the Pechanga Tribe's comment letter on the Adoption and Foster Care Analysis and Reporting System (RIN: 0970-AC72) dated June 18, 2019.

Attachments

Pechanga Band of Luiseno Indians

PECHANGA INDIAN RESERVATION
Temecula Band of Luiseño Mission Indians

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June 18, 2019

Attn: Kathleen McHugh
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Administration for Children and Families
Policy Division
330 C Street SW
Washington, DC 20024

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 (April 19, 2019)

Dear Sir or Madam:

The Pechanga Band of Luiseño Indians (Tribe) submits 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. The Tribe submitted comments previously on May 9, 2016, and August 29, 2017, (attached), in support of the ICWA data elements, and hereby incorporates those comments by reference.

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 from the 2016 Final Rule.

General Comments:

The Absence of Appropriate Consultation with Tribal Nations.

By way of demonstrating tribal consultation, ACF has listed previous meetings with tribal nations as consultation for this NPRM. However, these meetings were not identified as consultation to tribal leaders and often did not specifically address issues of concern to tribal leaders and representatives present. As a result, tribal leaders and representatives were not given an opportunity to prepare for meaningful consultation and thoroughly express issues and concerns with this NPRM.

The lack of consultation on this issue is even more problematic given the mandate by both Presidents Bush and Obama regarding consultation with tribes. The purpose of Executive Order 13175 is "to establish regular and meaningful consultation with tribal officials in the development of Federal policies that have tribal implications, [and] to strengthen the United States government-to-government relationships with tribes..." The Order defines "Policies that have tribal implications" as "regulations, legislative comments or proposed legislation, and other policy statements or actions that have *substantial direct effects on one or more tribes*, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes." (Emphasis Added, Section 1 (a)). In this instance, ACF's proposed rule directly effects all tribes in the United States, including our most vulnerable population – our children. As such, ACF is required to "consult with tribal officials as to the need for Federal Standards... [and] preserve the prerogatives and authority of Indian tribes." (Section 3(c)(3)). President Obama's Memorandum on Tribal Consultation (November 5, 2009) reaffirms the policy in Executive Order 13175.

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.

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/Alaskan Native (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 March 2018 Advanced Notice of Proposed Rulemaking (ANPRM), 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 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, 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 March 2018 ANPRM which sought information only on the costs and burdens associated with the ICWA data elements.

As required by law, the 2016 Final Rule conducted a careful analysis of the benefits and burdens of the ICWA data elements, and appropriately amended the proposed rule to alleviate some of the burdens identified by states. 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 13777 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 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 fulfill 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 AI/AN 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.

As provided in the Tribe's August 29, 2017 comments (attached), which are hereby incorporated herein by this reference, the Tribe continues to believe that these regulations are essential for tribes, federal agencies, states, and organizations to continue to work on addressing and reducing the disproportionality of AI/AN children in foster care. The ICWA-related data in AFCARS is a step in the right direction to ensure that Indian families will be kept together when possible, will help prevent AI/AN children from entering the foster care system, and will help assess how the child welfare system is working for AI/AN children. Additionally, the ICWA-related data elements in the 2016 Final Rule would provide essential data that will provide meaningful consultation and collaboration between states and tribes.

Nothing has changed since ACF made it 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. Furthermore, 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 the 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 NPRM 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, and is thus not a solution to the current dearth of ICWA-related data on the federal level.

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 Indian Child Welfare Act is widely considered the "gold standard" of child welfare, and a refinement of family reunification objectives mandated by nearly every state. Any hindrance or stoppage of ICWA data point collection 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,

Steve Bodmer
General Counsel

Enclosure

PECHANGA INDIAN RESERVATION
Temecula Band of Luiseño Mission Indians

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August 29, 2017

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

Attn: ACF Reports Clearance Officer
Administration for Children and Families
Office of Planning, Research and Evaluation
330 C Street SW.
Washington DC 20201

Re: Adoption and Foster Care Analysis Reporting System for Title IV– B and Title IV–E (AFCARS) Proposed Information Collection Activity; Comment Request – Federal Register (June 30, 2017)

Dear Sir or Madam,

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

General Comments:

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

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

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

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

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

The Final Rule thoroughly responded to comments on both the benefits and burdens of the proposed regulatory action. Given the multiple opportunities to comment throughout this time period, any additional collection activity is unnecessary. In addition, tribes, tribal organizations, and advocates received notice of all of these opportunities, and with ample time to comment on this vital and important rule change. In fact, this Tribe provided comments in response to the SNPRM (please see attached letter dated May 9, 2016).

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

In contrast, this Proposed Information Collection Activity was not distributed to tribes in a timely manner and tribes were pressed for time to provide comment.

Unlike the previous sequence of comments and review, the pending Proposed Information Collection Activity was not widely distributed – indeed this Tribe did not receive notice of it until August 20, 2017. Absent further explanation, it is unclear whether, or why the Agency needs a *third* set of comments on the previously vetted elements – but nevertheless tribes should have been notified and consulted about this request.

This collection activity in no way comports with the requirements of the ACF Tribal Consultation Policy, 76 Fed. Reg. 55678, 55685 which requires, "timely, respectful, meaningful, and effective two-way communication and consultation with tribes."

States are already in the process of implementing these changes.

Since these regulations have been effective for approximately seven months, all states should be in the process of implementing them. We are aware, for example, that California, a state with 109 federally-recognized tribes, is already well under way with its implementation efforts. Any delay of the implementation of the ICWA-related data points would be contrary to the best interest of tribal children and families, a waste of finite state child welfare resources, and creates confusion over whether to continue implementation.

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

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

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

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

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

For the foregoing reasons, we request this proposed information collection activity be withdrawn by the agency.

Specific Comments:

The Department specifically requests comments on the following (a) – (d) items:

(a) **Whether 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.**

Comment: Further collection of information related to the AFCARS at this stage is not necessary and will only serve to create uncertainty and confusion, waste child welfare resources, and delay the reporting of data for which benefits and burdens have been heard and a decision made that the benefits outweigh the burdens.

It is unclear why additional information is being sought, as comments have been provided multiple times with regard to the critical importance of having ICWA-related data points which served and continue to serve the agency and its functions.

(b) **The accuracy of the agency's estimate of the burden of the proposed collection of information.**

Comment: Accuracy of the estimate of the burden of AFCARS data collection was addressed in comments to both the 2015 NPRM and 2016 SNPRM, some of which challenged the accuracy of the estimates. In response, the Final Rule addressed those comments by creating and explaining a new estimate for the burdens associated with changing data systems and collecting and reporting data. The new burden estimates are sufficient.

Additionally, to solicit information solely regarding the potential burden of the regulations without also soliciting information and comments on its potential benefits is arbitrary, capricious, an abuse of discretion, and not in accordance with the AFCARS authorizing statute.

(c) **The quality, utility, and clarity of the information to be collected.**

Comment: The Agency received comments for both the 2015 NPRM and the 2016 SNPRM regarding the specific data elements to ensure it would be quality data in keeping with the AFCARS authorizing statute. As already documented in prior comments and as highlighted by the Final Rule, the data to be collected will produce necessary information which will guide, clarify and improve outcomes for all children and families in state child welfare systems.

To reassess the data elements one more time does more harm than good where states have already begun, in some instances in consultation with tribes, to develop data systems in accordance with the 2106 Final Rule.

(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.**

Comment: Rather than change the 2016 Final Rule, we recommend the Agency conduct an evaluation of state case management systems to determine if there is technology sufficient to allow for a streamlined approach to data sharing between states and the Agency. Moreover, this is not the appropriate stage at which to be soliciting comments, since an in-depth investigation is required.

In closing, the Indian Child Welfare Act is widely considered the "gold standard" of child welfare, and a refinement of family reunification objectives mandated by nearly every state. Any hindrance or stoppage of ICWA data point collection significantly impacts tribal children, families, and county agencies trying to comply. In fact, the process driven delay impairs the child welfare system as a whole. There is no logical reason to change the regulations as currently in effect. Modifications at this stage of implementation will only create costly delays and confusion. **This proposed information collection activity is unnecessary and should be withdrawn.** In the interest of protecting our children and families, we respectfully submit these comments.

Sincerely,

Steve Bodmer
General Counsel

Enclosure

PECHANGA INDIAN RESERVATION
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May 9, 2016

Ms. Kathleen McHugh, Director Policy Division
Administration for Children and Families
United States Department of Health and Human Services
330 C Street, SW
Washington, DC 220024

Re: Supplemental Notice of Public Rulemaking—Proposed AFCARS data elements related to the Indian Child Welfare Act of 1978 (*Federal Register*, Volume 81, No. 67, published April 7, 2016, pages 20283–20301)

Dear Ms. McHugh:

On behalf of the Pechanga Band of Luiseño Indians, we welcome the opportunity to provide comments on the Supplemental Notice of Public Rulemaking (SNPRM) regarding proposed Adoption and Foster Care Automated Reporting System (AFCARS) data elements related to the Indian Child Welfare Act of 1978 (ICWA). American Indian and Alaska Native (AI/AN) children have a unique legal status as citizens of tribal governments with federal laws, like ICWA, that provide important safeguards to help them maintain their tribal and family relationships.

Since its passage, the unique legal status and the requirements of federal laws like ICWA have not been addressed in current federal reporting requirements for state child welfare systems that serve AI/AN children and families. This has contributed to states feeling less comfortable in examining their implementation of ICWA, and difficulty in developing responses that can effectively address disproportionality and other areas for improvement. Tribes also suffer under the current data limitations, as they experience significant limitations in their ability to track the progress of their tribal members' children and families effectively across multiple states and collaborate successfully with partner states. As states and tribes together try to understand the best approaches to address these issues, access to reliable data is critical if effective solutions are going to be developed. With AI/AN children nationally facing disproportionate placement in state foster care at a rate over two times their population, the need for ongoing, reliable, and accessible data has never been greater.

The SNPRM proposes the first federal data elements that can provide detailed information on ICWA implementation. It proposes a series of data elements tied to ICWA requirements that will allow tribes, states, and federal agencies the ability to develop a more detailed understanding of the trends in out-of- home placement and barriers to permanency for AI/AN children. Improved policy development, technical assistance, training, and resource allocation can flow from having reliable data available. Establishing the data elements proposed in the SNPRM will provide AI/AN children the same opportunities to benefit from data that other children currently have, and will better inform responses that address the unique issues in both policy and practice.

Data elements proposed in the SNRPM include data that is easily obtained in the case files of Title IV-E managing agencies. This includes common case management data that details the activities of the Title IV-E agency and related activities of the court in particular cases. The full AFCARS NPRM, like the SNPRM, also proposes data from Title IV-E agencies and courts. Examples of similar AFCARS data elements include Transfer to Another Agency (1355.43(g)(4)), Living Arrangement and Provider information (1355.43(e)(1-16), Authority for Placement and Care court order (1355.43(d)(4)), Termination of Parental Rights date (1355.43(c)(3)(ii)), and Date of Judicial Finding of Abuse or Neglect date (1355.43(c)(4). The integration of ICWA-related data provides for the unique legal issues for AI/AN children, while following a very similar framework and sources of data that have been a part of AFCARS requirements for many years and proposed in the current full AFCARS NPRM.

We would also note that Title IV-E of the Social Security Act provides authority for the Secretary of the Department of Health and Human Services (DHHS) to regulate the collection and reporting of data regarding children who are in the care of a Title IV-E agency (42 U.S.C. 679). This has more recently been interpreted by DHHS to include the collection and reporting of data related to implementation of ICWA involving AI/AN children in state child welfare systems. For many years, tribal advocates, and in some cases states, have argued for this interpretation, and we are pleased to see the current Administration adopt this common sense clarification of current authority.

We want to thank DHHS for their efforts to correct significant data gaps in federal data collection concerning AI/AN children and families, and express our support for the establishment of the proposed data elements contained in the SNPRM. It has been over 36 years since the enactment of ICWA, and while conditions and outcomes for AI/AN children have improved since that time, there are still substantial issues that need attention in order to reduce AI/AN disproportionality and improve tribal, state, and federal responses. We look forward to working with DHHS in the future to strategize on how to use the new data proposed in this SNPRM. Our more specific comments on the SNPRM are attached to this letter.

Sincerely,

Michele Hannah

Michele Hannah
Associate General Counsel

SPECIFIC COMMENTS ON SNPRM

Identifying an "Indian Child" under ICWA – The data elements proposed under this category provide information about efforts and sources to identify an Indian child. While asking the birth or adoptive mother and father and/or Indian custodian are good sources, it would also be highly beneficial to include whether extended family members have been questioned as well, since many times they will have critical information that a particular birth parent may not. This also fits well with Title IV-E requirements to notice all adult relatives when a child in their family has been removed (42 U.S.C. 671(29)).

We would also suggest improving the language regarding whether a child is domiciled or resident on an Indian reservation to "on an Indian reservation or in a predominately Indian community." This tracks the language in the revised federal guidelines that is intended to address whether a state agency or court has a reason to believe a child is an Indian child for ICWA purposes, not to address jurisdictional issues. In addition, adding the recommended language is in alignment with recognizes that many tribal members live off tribal lands in nearby areas, especially in Public Law 280 states (i.e., California), where tribal lands can be much smaller in size.

Transfer to tribal court – These data elements capture the request from eligible parties to transfer jurisdiction from state to tribal court. The data is critical to understanding changes in the case that can impact future agency and court decisions. We would recommend that one additional data element be included that provides a date on when the transfer of jurisdiction petition was approved.

Active efforts to prevent removal and reunify with Indian family – The data elements under this category provide important information that impacts the ability to prevent removal in the first place and help reunify after removal. These are tied to the efforts by the state agency and court in these areas. While the data elements track many of the federal guidelines, there are some important missing elements that characterize active efforts and support our recommendations. First, we recommend adding language to the third bulleted data element "Invite representatives of the Indian child's tribe to participate in the proceedings." We recommend adding language so it will read, "~~Invite~~ **Engage** representatives of the Indian child's tribe to participate in the **legal** proceedings **and planning for and providing rehabilitative services to the child's family**."

ICWA and the accompanying federal guidelines direct state agencies to make active efforts that are appropriate to the Indian child and family's unique needs. Under A.2 of the revised federal guidelines the language specifies active efforts as "Taking into account the Indian child's tribe's prevailing social and cultural conditions and way of life, and requesting the assistance of representatives designated by the Indian child's tribe with substantial knowledge of the prevailing social and cultural standards;." We recommend that the first bullet under this category be amended to include this language so it would read "Identify appropriate services to help the parent that take into account the Indian child's tribe's prevailing social and cultural conditions and way of life, and request the assistance of the representatives designated by the Indian child's tribe."

Removals – The data elements in this category follow the ICWA requirements for involuntary placements, but do not address ICWA requirements for voluntary placements. These include parental

consent provisions regarding voluntary foster care placement that are not addressed elsewhere in the SNPRM or the full AFCARS NPRM section which addresses voluntary placements. Since the voluntary consent requirements of ICWA are the same for foster care as they are for termination of parental rights (25 U.S.C. 1913(a), we recommend that the three SNPRM data elements addressing voluntary consent in the termination of parental rights category be added to the removal category with language adjusted to reflect consent to a voluntary foster care placement (see 1355.43(i)(22), 1355.43(i)(23), and 1355.43(i)(24)). We also recommend adding a data element that addresses the ICWA requirement regarding the return of the child to the birth parents if consent is withdrawn (25 U.S.C. 1913(b)).

Foster care and pre-adoptive placement preferences – These data elements specify information related to two of the three types of placements that are covered under the ICWA placement preferences for foster care and pre-adoptive placements (25 U.S.C. 1915(b)). ICWA defines foster care placement to include foster care, guardian or conservator, or institutional placement (25 U.S.C. 1903(1)(i)). While the full AFCARS NPRM provides data elements that address guardianships more generally, these data elements do not cover the placement preferences included under ICWA fully. For example, the AFCARS NPRM provides data elements that can identify relative and non-relative guardianship homes, but there are no data elements that can identify whether the guardian home was a tribally licensed or approved home or another Indian family guardian home licensed by the state. Our recommendation is to add clarifying language to the SNPRM in this section as follows:

"Indicate which foster care or pre-adoptive placements that meet the placement preferences of ICWA in 25 U.S.C. 1915(b) were available to accept placement. "Foster Care Placement" is defined under ICWA as a "...temporary placement in a foster home or institution or the home of a guardian or conservator..." (25 U.S.C. 1903(1)(i))."

Termination of parental rights – This category creates data elements that track ICWA requirements regarding involuntary and voluntary termination of parental rights. Three of the four ICWA requirements are addressed in the data elements (evidentiary standard – beyond a reasonable doubt, expert witness testimony, and continued custody resulting in serious damage). However, arguably one of the most important requirements to avoid termination of parental rights, the provision of active efforts, is not included. This is important because the first determination of active efforts in a removal can occur within the first few months of a case being opened, while the termination of parental rights hearing can occur several months or even a year or more from the first active efforts determination. We recommend adding a data element that asks if the court made a determination, in a court order that active efforts were made by the Title IV-E agency between removal/placement in foster care and before the termination of parental rights.

In addition, we suggest adding in a data element that considers alternatives to termination of parental rights that may be available to the Title IV-E agency. In California for example, one alternative permanent plan is a Tribal Customary Adoption wherein the parental rights are not severed, but rather modified. The adoptive parent in this case is granted the same rights and responsibilities as they would under a contemporary adoption. This addition to state law was in direct recognition that the severance of the parental relationship is incongruous with some tribal customs and traditions. The Pechanga Band requests a Tribal Customary Adoption in state court child custody proceedings, unless there is a

compelling reason to consider a contemporary "western" adoption (termination of parental rights). While not all states may offer this option, failing to account for alternative permanent plans (outside of guardianships and long-term foster care) will not accurately capture data on more culturally appropriate outcomes for tribal children and families.

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PUBLIC SUBMISSION

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AFCARS 2018-2020

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

Document: ACF-2018-0003-0356
Equality California

Submitter Information

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General Comment

On behalf of our 800,000 members, Equality California appreciates the opportunity to express our strong opposition to the removal of questions related to sexual orientation in the Adoption and Foster Care Analysis and Reporting System (AFCARS).

On the contrary we not only urge HHSs Administration on Children Youth and Families to retain sexual orientation questions, and to go beyond, by including questions related to gender identify and expression.

Attachments

Equality California

FOR ALL

EQUALITY CALIFORNIA

20 YEARS

June 18, 2019

Ms. 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
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:

On behalf of our 800,000 members, Equality California appreciates the opportunity to express our strong opposition to the removal of questions related to sexual orientation in the Adoption and Foster Care Analysis and Reporting System (AFCARS). On the contrary – we not only urge HHS's Administration on Children Youth and Families to retain sexual orientation questions, and to go beyond, by including questions related to gender identify and expression (SOGIE).

Equality California is the nation's largest statewide lesbian, gay, bisexual, transgender and queer (LGBTQ) civil rights organization. We work within California, at the Federal level, and directly with other states to win and protect full equality for LGBTQ people through education, electoral, advocacy and mobilization programs to achieve our mission.

Comprehensive LGBTQ data collection from foster youth and adoptive families is needed in order to identify trends, including the types of placements for foster youth, the number of foster placements, and the rate of disruptions. Improving data collection inform Federal law, policy and funding determinations, thereby saving costs, and most importantly, translate into permanent adoptive placements for foster children. The reverse is just as grim as the inclusion of SOGIE questions is salutary: Eliminating this national dataset would make it impossible to track demographic trends in order to identify gaps in Federal, state and tribal services, which would in turn harm vulnerable LGBTQ youth and prospective LGBTQ parents.

Nationwide, there are currently half a million children youth in foster care, of whom more than 120,000 are waiting to be adopted. In California alone, there were nearly 52,000 youth in the child welfare system in 2017, of whom more than 15,000 waited to be adopted. Numerous studies indicate that many of those children are LGBTQ; while data is limited because there is no Federal requirement to track this data, existing research indicates LGBTQ youth are overrepresented in the foster care system – possibly as high as 19%. But until the Federal government, states and tribes have more information about these youth, their experiences and their outcomes, institutions will be unable to meet the needs of acutely vulnerable children.

Equality California
3701 Wilshire Blvd, Suite 725
Los Angeles, CA 90010

LGBTQ youth enter foster care for the same reasons as their non-LGBTQ peers — abuse, neglect and parental substance abuse. But many have experienced further trauma stemming from family rejection or mistreatment and school bullying because of their sexual orientation, gender identity or gender expression. Presumably as a direct result of discrimination and its resulting trauma, LGBTQ youth in foster care have a higher average number of placements and a higher likelihood of living in group homes than their non-LGBTQ peers. The impact is highest on children of color who comprise more than 50% of children in foster care, including Alaskan and Native American children who are subject to the Indian Welfare Act.

Once LGBTQ youth enter the foster care system, they're less likely than their non-LGBTQ peers to be placed in a safe and supportive home. According to a Williams Institute survey[1], 12.9% of LGBTQ youth (aged 12-21) in Los Angeles County reported being treated poorly by the foster care system, compared to 5.8% of non-LBTQ youth. This finding is highly disturbing, given that California's non-discrimination protections are more robust than in most states in the country.

Unsupported foster youth are more likely to experience school interruptions, miss class, fall behind academically, which too often translates into eventual school drop-out, putting these young people at much higher risk for poverty, homelessness, incarceration, and early parenthood. Nor are the effects confined to education; LGBTQ youth are more likely to be hospitalized for emotional reasons and self-harm -- lesbian, gay and bisexual youth are 3-4 times more likely than their non-gay peers to attempt suicide, and a staggering 60% of transgender youth report having suicidal ideation.

Equality California opposed the delay in implementing the Final Rule, and we believe that claims that data elements in the Final Rule are 'burdensome' are marginal in importance when weighed against the potential benefit of more informed state and Federal policy resulting in improved outcomes for some of the most marginalized children in the child welfare system and reduced systemic costs. Furthermore, we strongly urge the retention of the **data element related to the removal of a child from a family home** due to "family conflict related to child's sexual orientation, gender identity or gender expression" because if social services have funding and supportive resources in place to encourage family acceptance and family preservation, LGBTQ children might not enter the foster care system in the first place.

Equality California also strongly supports the retention of a voluntary question about sexual orientation of prospective guardians, adoptive and foster parents because this is most likely where loving and affirming homes will be found. In advocating for affirming placements at the national and state level, Family Equality Council cites Williams Institute findings[2] that nearly two million LGBTQ adults have expressed interest in becoming foster or adoptive parents.

Moreover, same-sex couples are six times more likely[3] to foster children and at least four times more likely to adopt than non-LGBTQ couples. Sadly, because of systemic discrimination, more than 20,000 foster youth who are eligible for adoption will "age out" of foster care, despite the willingness of prospective LGBTQ adoptive and foster parents to provide permanent homes.

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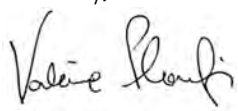
[1] https://files.lalgbtcenter.org/pdf/rise/Los-Angeles-LGBT-Center-RISE-LAFYS-Executive-Summary.pdf

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

[3] http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf

For the reasons set forth above, Equality California urges the U.S. Department of Health and Human Services, ACYF, ACF, and the Children's Bureau to retain all of the data elements in the 2016 AFCARS Final Rule, including the data elements related to sexual orientation, and to add additional questions related to gender identity and expression.

Sincerely,



Valerie Ploumpis
National Policy Director
Equality California

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Adoption and Foster Care Analysis and Reporting System

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Anonymous

Submitter Information

Name: Anonymous Anonymous

General Comment

See attached file(s)

Attachments

2019 AFCARS NPRM Final

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,

I support the Administration for Children and Families' (ACF) proposal to retain most of the ICWA-related data elements from the 2016 Adoption and Foster Care Analysis Reporting System (AFCARS) Final Rule and the data element documenting a circumstance at removal of whether there was family conflict related to the child's sexual orientation, gender identity, or gender expression. *See* Notice of Proposed Rulemaking, 84 Fed. Reg. 16,572 (April 19, 2019) [hereinafter, "2019 NPRM"].

I write today to again raise concerns about ACF authority for actions taken with respect to AFCARS regulation after December 14, 2016. These concerns are documented in prior public comment and have yet to be addressed by ACF. *See* 2018 NPRM proposal to delay Final Rule, 83 Fed. Reg. 11450 [hereinafter "2018 Proposed Delay"] and 2018 ANPRM soliciting additional feedback on costs and burdens of the Final Rule, 83 Fed. Reg. 11449 [hereinafter "2018 ANPRM"]. The authority for agency action is fundamental to the legitimacy of any regulation and ACF must, but consistently fails to, provide a reasoned explanation of the authority upon which they rely to reverse recent prior decisions.

My concerns are:

a) ACF reliance on E.O. 13777 as the authority for reversing course on any aspect of the 2016 AFCARS Final Rule;
b) ACF's failure to use the statutory requirements of sec. 479 of the Social Security Act to assess the 2016 AFCARS Final Rule *See* Adoption and Foster Care Analysis and Reporting System, 81 Fed. Reg. 90,524 (Dec. 14, 2016) [hereinafter, "Final Rule"].; and
c) ACF's arbitrary and unlawful disregard of the benefits of the Final Rule to justify further reductions in the data elements states are required to report to AFCARS.

The 2019 NPRM proposal to remove specific data elements from the Final Rule is not authorized by statute, nor does ACF claim that it is. Rather, the impetus for the proposal rests upon E.O 13777. An executive order, and E.O. 13777 in particular, is an inadequate authority for agency action. And the ACF failure to cite an appropriate authority enables ACF to employ a one-sided analysis of costs and burdens that fails adequately to consider the benefits, as required by Supreme Court precedent. Further, the proposal arbitrarily and unlawfully discounts the interests of American Indian and Alaska Native (AI/AN) children and lesbian, gay, bisexual, or transgender (LGBTQ) youth and foster or adoptive parents. Moreover, in delaying implementation of the Final Rule, ACF continues

to collect the outdated 1993 AFCARS data elements – falling well short of the statutory obligation to regulate "comprehensive national" data with respect to the foster care population.

I also write to encourage ACF to include all the data elements related to implementation of the Indian Child Welfare Act (ICWA) and LGBTQ youth and foster or adoptive families as finalized in the Final Rule. ACF has not demonstrated that the Final Rule, nor any of the data elements, separately or together, meet the requirements of E.O. 13777 for deregulation. In contrast, the Final Rule is comprehensive with respect to national demographics and characteristics of foster and adoptive children and their biological and foster and adoptive parents, as required by Congress in Section 479(c) of the Social Security Act. Without all of the data elements in the Final Rule a subsequent final rule fails to meet the standards of the authorizing statute for AFCARS.

Executive Order 13777 is Not a Statutory Basis for Agency Action.

I have serious concerns about the authority for agency action taken with respect to the Final Rule after it was published on December 14, 2016. ACF cites Executive Order 13777 (issued February 24, 2017) as authority for the proposal to delay and reverse ultimate decisions made in the Final Rule. *See* 2018 NPRM proposal to delay Final Rule [83 FR 11450]; 2018 ANPRM soliciting additional feedback on costs and burdens of the Final Rule [83 FR 11449]; and 2018 NPRM decision to delay implementation of the Final Rule until October 1, 2020, [83 FR 42225]. Fundamental principles of administrative law require an agency to offer a reasonable and lawful explanation when it reverses course after adopting a final rule based upon an extensive administrative record. Simply pointing to an executive order is not sufficient authority for this action because executive orders do not override statutes. This issue was specifically raised in public comment to the Proposed Delay of the 2016 Final Rule and the 2018 ANPRM. ACF should implement the Final Rule or provide a reasoned explanation for why E.O. 13777 is sufficient authority for agency action.

The Supreme Court has been clear that agencies should not consider non-statutory policy reasons for not regulating. (*Massachusetts v. EPA*, 549 U.S. 497 (2007)). The Court's clear requirements in *Massachusetts v. EPA* exclude E.O. 13777 as an authority for ACF action. Yet, the 2019 NPRM again relies on E.O. 13777 "that directed federal agencies to establish a Regulatory Reform Task Force to review existing regulations and make recommendations regarding their repeal, replacement, or modification." [84 Fed. Reg. at 16573] ACF provides no explanation or analysis of how or why the Final Rule is subject to E.O 13777. Considering Supreme Court precedent, ACF should provide a reasoned explanation for why *Massachusetts v EPA* does not apply to its action and why the Final Rule is subject to E.O 13777.

HHS asserts in the 2019 NPRM that "The HHS Regulatory Reform Task Force identified the AFCARS regulation as one in which the reporting burden may impose costs that exceed benefits." [84 Fed. Reg. at 16573] While there is no doubt the Final Rule results in administrative burden, such burden was thoroughly considered and weighed against the more substantial, significant, and on-going benefits, both tangible and intangible, to state and federal governments, LGBT youth and foster or adoptive parents, Indian children, Indian families, and Indian tribal governments. These benefits were articulated consistently in the decade-long administrative record on which the Final Rule relies, including in public comment on the 2018 ANPRM. And yet, ACF provides no description of when HHS Regulatory Reform Task Force was created, who served on it, how they were chosen, by what processes the Task Force identified regulations subject to E.O 13777, or what

"cost" and "benefit" criteria were used by the Task Force to override the voluminous administrative record evidencing the benefits of the Final Rule to conclude that the Final Rule "imposes costs that exceed benefits." In describing the regulatory history of the AFCARS rule, ACF should provide a description of the process by which the Final Rule was identified by the Task Force, including the ways in which the Task Force complied with HHS and ACF Tribal Consultation policies; whether the Task Force reviewed the administrative record related to the benefits of the Final Rule to assess costs and benefits of the rule; and on which criteria the Task Force relied to determine the costs and benefits of the Final Rule.

Even if Executive Order 13777 is sufficient authority for ACF's proposed actions, the executive order does not apply to the Final Rule because the Final Rule does not meet any of the requirements of E.O 13777 for reducing regulatory burden. Executive Order 13777 identifies specific requirements for whether a regulation is subject to the executive order: the regulation eliminates jobs or inhibits job creation; or the rule is outdated, unnecessary or ineffective. The Final Rule does not eliminate jobs or inhibit job creation, nor does ACF allege that it would have such an effect. ACF does not allege that the Final Rule is outdated, unnecessary, or ineffective. In fact, ACF cites public comment that "suggested that updates to AFCARS were long overdue" [84 Fed. Reg. at 16575]. If E.O. 13777 provides the authority for ACF action, then ACF should provide a reasoned analysis of how proposed rule, or each specific data element they propose to eliminate in the 2019 NPRM, protects jobs or job creation, is necessary or otherwise updates or makes the Final Rule more effective.

Instead of applying the express terms of E.O. 13777, ACF "believe[s] 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."[84 Fed. Reg. at 16575] However, there is no basis in statute to apply "the spirit" of an executive order to modify recent agency action. Moreover, ACF's stated reasoning contradicts the express language of the executive order as well as the letter and the spirit of the AFCARS authorizing statute.

Neither "Burden" nor "Cost" Are a Statutory Basis for Regulating AFCARS

Under *Massachusetts v. EPA* agencies are required to consider only those factors contained in the statute governing the agency's action. Section 479(c) of the Social Security Act identifies the Congressionally required factors to consider when regulating the national foster care and adoption data system. The burden and costs of collecting and reporting data are not factors identified in the statute nor were they contemplated by Congress when it added section 479 to the Social Security Act. Therefore, burdens and costs should not be the basis for an agency decision with respect to regulating AFACRS. Without a statutory basis for reviewing the Final Rule, ACF is impermissibly modifying an authorized, lawful, and long overdue Final Rule. ACF should identify the statutory source of the "burden" and "cost" criteria they are using to reassess the Final Rule.

The Congressional requirements for regulating AFCARS are clear. AFCARS is to be regulated in a manner that avoids unnecessary diversion of resources from foster care agencies and collects comprehensive national demographic and status data that is reliable and consistent over time by using uniform definitions and methodologies. To the extent that ACF may reassesses the regulatory burden of the Final Rule on states its analysis should be in relation to those burdens that unnecessarily divert resources from child welfare agencies or that do not have uniform definitions and methodologies which affect the reliability or consistency of AFCARS data. With respect to

diversion of resources, ACF should explain how and to what extent each specific data element they propose to eliminate in the 2019 NPRM avoids diversion of resources. In its decision making ACF should apply the criteria of the the authorizing statute or provide a reasoned explanation for why it substitutes any other criteria for the factors required by Congress in sec. 479.

Proposed Agency Action is Based on a Selective Accounting of Costs and Burdens

Even if reduction in cost or burden were factors contemplated by sec. 479, the 2019 NPRM fails to articulate a rational source of any burden or cost savings. ACF contends that "streamlin[ing] the AFCARS data elements… will reduce the title IV-E agency reporting burden from the 2016 final rule, thus resulting in an estimated $39.2 million in total annual savings." [84 Fed. Reg. at 16572] ACF assumes that reducing the number of data elements by one-third will reduce the burden of collecting the data and the costs by one-third. [84 Fed. Reg. at 16587] This calculation is not rational because the availability of information for any given data element varies from case to case. And, as ACF articulates, "there is considerable variability across states in sophistication of information systems, availability of both staff and financial resources, and populations of children in care." [84 Fed. Reg. at 16573] Training and systems modification must already be done to comply with any final rule and the number of data elements has little to no influence on those costs. Clearly there is not a direct 1/3 reduction in burden or cost by reducing the number of data elements by 1/3. Thus ACF's use of the median burden hours estimated by comments of just 38 states (not all of whom provided evidence of their reported burden or costs, and not all of whom provided estimates in comment on the 2018 ANPRM) is not rational but an administratively convenient oversimplification.

The 2019 NPRM cost and burden analysis does not take into consideration the loss of savings that would have benefited states "moving forward with a new or transitional Comprehensive Child Welfare Information Systems." (CCWIS) [See also 45 CFR 1355.50 et seq; 2016 Final Rule, p. 90567]. Throughout the Final Rule, ACF assumed that burdens associated with AFCARS data collection and reporting would be reduced and efficiencies gained by simultaneously building or revising state data systems. It is clear that improving AFCARS and offering a CCWIS option to states simultaneously was intended to improve state systems and reduce the variability of the sophistication of information systems in order to a) regulate an information system according to the standards of sec. 479 and b) reduce burden and costs for all title IV-E agencies, the federal government, and ultimately taxpayers. Delaying implementation of the Final Rule and the 2019 NPRM both abandon this cost and burden saving opportunity which will result in increased costs because it extends the timeline for modifying data systems. The inability to implement CCWIS and AFCARS together is very likely to unnecessarily divert resources, particularly in states implementing CCWIS who have already relied on the Final Rule and have long been awaiting a data map from ACF.

In assessing the costs and burden of AFCARS implementation, ACF fails to consider the additional burden on title IV-E agencies and on children, families, the child welfare workforce, and the child welfare community *because of the implementation delay*. The Final Rule was effective on January 13, 2017 except for removal of the prior AFCARS data elements (§ 1355.40) and their replacement with the new AFCARS data elements (Appendices A through E to Part 1355) which were to be effective October 1, 2019. The Final Rule provided a two-year implementation timeline (*See* Sec. V, p. 90529). ACF received comments on the 2018 ANPRM from many states on the implementation timeframe and several commenters offered suggestions. The final implementation timeline published in the

Final Rule was based on these comments. ACF upended this final agency action without adequate authority or reasoning (see above).

Had ACF not delayed the requirement to report the data elements in the Final Rule, §1355.40 would have been effective October 1, 2019. To meet the data reporting timeline, states would have started collecting the new AFCARS data elements April 1, 2019. States would report data collected April 1 through September 30, 2019 no later than November 14, 2019. Thus, in the time it took ACF to complete an unauthorized and burdensome notice and comment process all states could have updated their systems, implemented the new requirements, and reported the first set of AFCARS data that meets the statutory requirements of sec. 479. Instead, ACF continues to collect data required in the 1993 rule that does not meet sec. 479 requirements. ACF should explain why reducing the number of data elements in the Final Rule necessitates their continued failure to meet the statutory requirement that the information collected is comprehensive.

In summary, neither burdens nor costs are criteria articulated by sec. 479 of the Social Security Act for regulating national data on child welfare. If reducing burden and cost savings are legitimate regulatory criteria contemplated by Congress in sec. 479, ACF should reasonably tie the specific costs of the Final Rule to the ways in which the Final Rule would "unnecessarily divert resources from foster care agencies." In the 2019 NPRM ACF does not articulate whether the expected costs to affected entities includes any penalties that may be assessed nor does it articulate whether the estimated $39.2 million in costs savings includes the loss of savings and efficiencies that were expected if CCWIS and AFCARS implementation occurred simultaneously. ACF should give a detailed accounting of the estimated costs of the Final Rule that includes the costs associated with delaying implementation of the Final Rule. ACF should also explain how the proposed actions either do not unnecessarily divert resources or divert resources necessarily. These reasoned explanations are required so the public has a better understanding of how the agency is implementing the statutory requirements to prevent unnecessarily diverting resources while providing comprehensive national data.

Proposed Agency Action Fails to Meet Statutory Requirements

Section 479(c)(3) requires that "any data collection system developed and implemented under this sections shall: provide comprehensive national information with respect to (A) the demographic characteristics of adoptive and foster children and their biological and adoptive or foster parents, (B) the status of the foster care population (C) the number and characteristics of (i) children placed in or removed from foster care.

Opening the Final Rule to a deregulation process has jeopardized the opportunity to meet the statutory obligation to collect comprehensive national information. During the additional notice and comment periods ACF has continued to collect the outdated 1993 AFCARS data elements. The 1993 AFCARS data are insufficient for making common national administrative decisions with respect to LGBTQ youth and foster or adoptive parents, and AI/AN children and families, in title IV-E funded placements and adoptions. The 1993 data elements are also insufficient to implement Children's Bureaus' responsibility to assess state compliance with requirements under title IV-B for state plans to have provide details of specific measures taken by the state to implement the Indian

Child Welfare Act (ICWA). The Final Rule cured these shortcomings and for the first time in its history AFCARS finally met the statutory obligation imposed by sec. 479.

The actions proposed in the 2019 NPRM do not produce a dataset that meets the statutory requirements of sec. 479(c). Section 479(c) requires HHS to collect comprehensive national information with respect to demographics of foster and adoptive children and their biological and foster or adoptive parents; the status of the foster care population; characteristics of foster and adoptive children and; the nature of assistance provided by federal, state and local governments. Section 479(c)(2) further requires that any data that is collected is reliable and consistent over time and among jurisdictions through the use of uniform definitions and methodologies.

ACF asserts that they have "demonstrated that the detailed ICWA-related information from the 2016 final rule is not appropriate for AFCARS" [2019 NPRM at 16577] but they do not effectively demonstrate this assertion. They assert that some of the deleted data elements can be assessed with remaining data elements, but they do not provide justifications for removing each of the ICWA-related data elements they propose to remove. This is in stark contrast to the clear reasoning in the Final Rule for including each element.

AFCARS is the Best Method for Collecting LGBTQ and ICWA-related Data

AFCARS is the best method for collecting and reporting LGBTQ and ICWA-related data. Without quantitative data about LGBTQ youth and foster or adoptive parents, and without quantitative data on ICWA implementation the national information collected in AFCARS is not comprehensive with respect to demographics or characteristics of children in foster care. The Final Rule cured these shortcomings and others. The 2019 NPRM proposes to remove some data elements from the Final Rule altogether, and to collect some of the removed ICWA-related data through other methods. Whereas the Final Rule meets all the statutory requirements of sec. 479, the 2019 NPRM as proposed fails to assure that data collected is reliable and consistent among jurisdictions. The 2019 NPRM also fails to propose comprehensive national information on the demographics and characteristics of children placed in or removed from foster care.

ACF proposes in the 2019 NPRM to collect some data elements from the Final Rule via state Court Improvement Programs or through state Child and Family Services Plans (CFSP). This is not the best method for collecting ICWA-related data. Children's Bureau has been collecting ICWA-related child welfare data as required by title IV-B through state Child and Family Services Plans and qualitative methods such as case file reviews. Neither of these methods has resulted in reliable, consistent, comprehensive national data on children to whom ICWA applies. This fact is evidenced by Children's Bureau's report entitled "*States' Consultation and Collaboration with Tribes and Reported Compliance with the Indian Child Welfare Act: Information from States' and Tribes' 2015-2019 Child and Family Services Plans.*" [hereinafter, "The Report"] The Report explains that the primary way that states assess ICWA implementation is through case reviews as part of Court Improvement Program audits, Continuous Quality Improvement Reviews, Best Practice case reviews, and Child and Family Services Reviews. Thus, implementing case file review as a means for collecting national data on ICWA -as suggested by some states and proposed in the 2019 NPRM- is currently happening. The Report found that 23 states and the District of Columbia did not report any data on their assessment of ICWA compliance. It also found that 14 of the 30 tribes reviewed reported some degree of

concern about how the state(s) comply with ICWA or how the state(s) consult and collaborate with the tribe. Collecting ICWA-related data by these haphazard and qualitative methods explains why a majority of states (27) do not report the ICWA-related data required in CFSP. The result of collecting ICWA-related data outside of AFCARS is that the data is not comprehensive or national as required by sec. 479. In addition, states report different data. States that do report ICWA-related data often use state definitions and methods. Other states report using the definitions of the federal ICWA law. These differences result in data that is not reliable or consistent over time, as required by sec. 479. Clearly, it is known to ACF that qualitative and voluntary methods of collecting ICWA-related data have been tried and proved unsuccessful.

AFCARS is the best method for collecting all ICWA-related data because other methods of collecting ICWA-related data have been tried and proven unsuccessful. ACF provides no evidence that using these unsuccessful methods in Court Improvement Programs will result in more reliable or better quality data than if collected as required in the Final Rule. Moreover, ACF knows from its pre-AFCARS history that collecting data voluntarily or through surveys results in data that is not useful because it is not comprehensive, national, or reliable and consistent over time and among jurisdictions. In assessing the findings in The Report it is clear that collecting ICWA-related data outside of AFCARS does not result in "national information" because not all states provide the information as required. Nor is the data collected outside of AFCARS "comprehensive" and reliable and consistent over time and among jurisdictions because few states comply with the requirement and those states that comply do so differently.

AFCARS is the best method for collecting ICWA-related data because states comply with AFCARS data requirements to a greater degree when the data is collected electronically and because there is a threat of penalties if states do not comply. There are no such implementation and enforcement mechanisms for the requirements of the Court Improvement Program or under any part of title IV-B without also including those requirements in AFCARS.

ACF should explain how continuing to collect ICWA-related data by voluntary and qualitative means it knows by its own reporting to be insufficient will provide data that is reliable and consistent over time and among jurisdictions resulting in a comprehensive national information with respect to the demographic characteristics of adoptive and foster children and their biological and adoptive or foster parents.

ICWA-related "Active Efforts" Data Are Not "Qualitative" and Should be Collected in AFCARS

The Indian Child Welfare Act requires that "active efforts" are made to prevent removal of an Indian child or termination of parental right. Specifically, "Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." 25 USC 1912(d). Child welfare data related to "active efforts" is not "qualitative" because such efforts are defined in BIA regulation, as identified in the Final Rule. The BIA definition and examples assures "that the data collected are reliable and consistent over time and among jurisdictions through the utilization of uniform definitions" as required by sec. 479. Moreover, tracking the primary types of "active efforts" (1355.44(f)(10)) identified by the BIA would provide comprehensive national data on the types of services most frequently provided to prevent

the removal of an Indian child. These types of services are not qualitative. They are clearly defined in federal regulation. The data would be used for budgeting, planning, research, and training and technical assistance for supporting "active efforts."

The data required in the 2016 Final Rule could help not only improve ICWA implementation, it would help ACF understand, nationally and by region, what types of efforts are effective for preserving all families in the absence of national data on "reasonable efforts." Moreover, "active efforts" should not be confused with "reasonable efforts" required by title IV-E. There are no federal definitions for "active efforts"therefore "active efforts" data could not be reliably and consistently collected in AFCARS. In the absence of "reasonable efforts" data, "active efforts" data could help implement and monitor the Family First Prevention Services Act and could be the first such data that could help assess services that could be provided under Family First.

The Final Rule Does Not Unnecessarily Divert Resources

Sec. 479(c)(1) requires that any data collection system developed and implemented shall avoid unnecessary diversion of resources from agencies responsible for adoption and foster care. ACF asserts that "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 16575]

Yet ACF does not provide evidence in the 2019 NPRM that the costs and burden associated with "Searching for and gathering the information required to be reported for the data elements" will increase with respect to the ICWA-related data elements ACF proposes to remove. Nor could these elements significantly increase burden with respect to data collection since these data are already required by federal law. [See 81 FR 38778] As states assert in their comments, they are already collecting the data electronically or in case narratives because states are required by federal law, including by title IV-B of the Social Security Act, to document ICWA implementation. Requiring that title IV-E agencies report the data through AFCARS ensures that they comply with existing requirements. Similarly, the ICWA-related data elements do not significantly increase the burden for training. To help those affected by the final rule on Indian Child Welfare Act proceedings—in particular States courts, State agencies, Tribes, private agencies—the Bureau of Indian Affairs offered several training sessions on their final rule. [81 FR 47288 issued July 21, 2016] Therefore a majority of the costs and burdens associated specifically with collecting and reporting ICWA-related data elements or associated with training ought to have already been counted. They are not additional costs or burdens separate from updating AFCARS and thus do not unnecessarily divert resources from agencies responsible for adoption and foster care.

ACF further asserts that "the information we require title IV–E agencies to report to ACF via AFCARS must take into consideration and reflect the circumstances and capacity of all title IV–E agencies in setting the AFCARS requirements." [84 Fed Reg at 16575]. However there is there no basis for these considerations in E.O. 13777 on which ACF relies for its authority for the proposed deregulatory actions. Nor is there a statutory basis for requiring consideration of the circumstances and capacity of all title IV-E agencies in setting AFCARS requirements. Unless ACF can articulate a statutory basis for these requirements they must adhere to the requirements of sec. 479. To remove the data elements from the Final Rule, ACF must provide evidence that they unnecessarily divert resources from agencies responsible for adoption and foster care.

To the Extent the Final Rule Diverts Resources it Does So Necessarily

Availability of quality data for decision-making is one of Congress' objectives in passing sec. 479. (See, Committee on Finance United States Senate Report, September 1990, p. 113) Congress was specifically concerned that the data collected prior to 1986 was "of limited use" primarily because "case-specific information is not available, common confirmation of service utilization by specific segments of the foster care population cannot be obtained." The AFCARS data currently collected and the data collection proposed in the 2019 NPRM is of similarly limited use. For example, AFCARS data has never been analyzed to gain an understanding of the experiences of AI/AN children in state child welfare systems. Nor could the government assess the experiences of LGBTQ families and children or children to whom ICWA applies because they never collected the data. As in 1986, the 1993 data elements and the actions proposed in the 2019 NPRM fail to meet Congress objectives in creating sec. 479 because information on these specific segments of the foster care population are not obtained. ACF has been making decisions -and under the 2019 NPRM will continue to make decisions- about resource allocation, training and technical assistance, and support for tribal-state relations in the absence of quantitative data about LGBT children and families or children to whom ICWA applies.

Even if ACF demonstrates that further streamlining of the Final Rule prevents diversion of resources, it must also demonstrate that the diversion of resources is unnecessary. When measured against Congress' purposes for creating sec. 479, it is clear that any diversion of resources required to collect and report data on ICWA implementation or LGBTQ children and families is necessary to meet the letter and spirit of sec. 479.

The Final Rule is Already Streamlined

The 2019 NPRM proposes revisions to streamline the AFCARS data elements that were finalized in the Final Rule. Yet, the Final Rule is already a streamlining of data elements proposed in the 2015 AFCARS NPRM and 2016 AFCARS SNPRM. For example, in the 2016 Final Rule, ACF concurred with 13 APHSA recommendations to streamline or eliminate ICWA-related data elements in the proposed rule. Additional streamlining is unwarranted.

Further streamlining the number of data elements does not significantly reduce the costs or burden cited by states in comments to the ANPRM because the following systems and process modifications and on-going tasks must be completed regardless of the number or specificity of data elements collected:

- Developing or modifying policies, procedures, rules, case management systems, and electronic case records to comply with the AFCARS requirements,
- Training staff on the requirements and changes.
- Developing and administering staff training
- Analyzing policies, practice, and casework to determine and implement modifications to capture and report data,
- Systems changes (for example, contract and staff costs to revise systems),
- Developing and administering staff training, ongoing monitoring, and quality assurance,
- Reporting the data to ACF.

The Final Rule already streamlines the ICWA-related "active efforts" data elements proposed in the 2016 SNPRM in response to public comment. "We retained nearly all of the data elements proposed in the 2016 SNPRM for the out-of-home care reporting population specific to Indian children as defined in ICWA, but removed two data elements: one data element requiring states to report if they provided additional information requested by tribes related to notification and one data element indicating the date when the state title IV–E agency began making active efforts." ACF does not provide a justification for proposing in the 2019 NPRM to further streamline the "active efforts" data elements.

Proposed Agency Action Unlawfully Discounts the Rights of American Indians and Alaska Natives

A review of the AFCARS administrative record is helpful for understanding how states in 2018 came to claim that reporting ICWA-related data elements in AFCARS results in additional burden. In response to the 2016 SNPRM, APHSA suggested consolidating the proposed ICWA-related "active efforts" data elements. However, most states commenting on the 2016 SNPRM did not suggest consolidation or elimination the "active efforts" data elements. In response to the 2016 SNPRM states that suggested particular data elements were best suited for case file review made the same comments about the non-ICWA related data elements in the 2015 NPRM. Thus some states told issue with reporting data elements in AFCARS at all, not with particular ICWA-related data elements proposed in the 2016 SNPRM. If some states are now saying they specifically object to collecting ICWA-related data elements in AFCARS it because the 2018 ANPRM signaled that if states want to reduce the overall burden of the Final Rule, then states should look to reducing the ICWA-related data elements. ACF has no basis in law or the administrative record for singling out the ICWA-related data elements in the 2018 ANPRM or in the 2019 NPRM.

In public comments to the 2018 ANPRM, four states reported that ICWA-applicable children in their out-of-home care populations were well under one percent (1%). The 2019 NPRM states that the small tribal population justifies not "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 there is no statutory provision, in sec. 479 or elsewhere, that requires ACF to discount the rights of American Indian and Alaska Native children simply because American Indians and Alaska Natives are not a numerical majority. To the contrary, the 2016 Final Rule's ICWA-related data elements are consistent with Congress's mandate in Section 479. Section 479(c)(2) and (c)(3) requiring 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(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 title IV-E agencies. The statute makes no distinction between AI/AN children and other children. To be sure, AI/AN children are not a numerical majority. But this bare fact is not a lawful basis for ACF to reverse decisions made in the 2016 Final Rule by removing crucial ICWA-related data elements from the 2016 Final Rule.

Proposed Agency Action Unlawfully Removes LGBTQ-related Data Elements

The 2019 NPRM asserts, "Information on sexual orientation is not required by the Act to be in the child's case plan, and while states agreed that the individual workers knowing this information about children and families they work with may help them in assisting families, there is no statutory requirement that it be reported to a national administrative data set." However, this assertion is false. Section 479 of the Social Security Act requires HHS to regulate the national data collection system to provide *comprehensive case* level information. HHS is required to collect demographics on foster and adopted children and biological, foster, and adoptive parents, the number of children entering/exiting foster care and awaiting adoption, and information on placements and permanency plan goals. To be comprehensive as required by sec. 479, AFCARS must include data elements related to race, sex, sexual orientation, gender. Moreover, nothing in sec. 479 requires ACF to exclude LGBTQ-related data elements.

As the 2016 Final Rule makes clear, data that allows for intersectional analysis useful for strengthening legislation, policy, and supports for these children in foster care. ACF made the decision to include LGBT-related data elements in AFCARS and took into consideration the very arguments that ACF now asserts for removing them. In the 2016 Final Rule, ACF provided its decision to include some LGBTQ-related data elements and it's reasons for requiring them:

> "By requiring this information to be reported, we hope to move closer toward our goal to better support children and youth in foster care who identify as LGBTQ and ensure that foster care placement resources and services are designed appropriately to meet their needs. We are aware of situations where youth in foster care have been unsupported in their foster care placements when their foster caregivers became aware of their sexual orientation."

The 2019 NPRM provides no legal justification for reversing the 2016 decision to include LGTBQ data in AFCARS. There has been no change in circumstances or law that require the reversal. Youth in foster care continue to be unsupported in their foster care placement when their foster caregivers [become] aware of their sexual orientation. The only circumstance that has changed may that ACF no longer seeks to "better support children and youth in foster care who identify as LGBTQ and ensure that the foster care placement resources and services are designed appropriately to meet their needs."

Conclusion

For the forgoing reasons, I urge ACF to retain all of the data elements in the 2016 Final Rule and to begin implementation immediately. If ACF delays further or removes data elements, they should articulate a legitimate authority and statutory criteria for amending a rule so recently promulgated. ACF should also articulate statutory reasons for removing the data elements it chooses to remove.

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Submitter Information

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Organization: Lambda Legal-Family Equality-NCLR-CAP-NCAP

General Comment

See attached file(s)

Attachments

Lambda Legal, Family Equality, Center for American Progress, National Center for Lesbian Rights, & National Center on Adoption and Permanency

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.
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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 foster children and youth, foster and adoptive parents, and guardians in the Adoption and Foster Care Analysis and Reporting System ("AFCARS"). **Family Equality Council, Lambda Legal, the National Center for Lesbian Rights, the Center for American Progress, and the National Center on Adoption and Permanency urge you to retain all of the data elements from the AFCARS 2016 Final Rule and to add in gender identity questions for foster youth, foster and adoptive parents, and guardians as outlined below.**

The collection of sexual orientation and gender identity ("SOGI") data from foster youth, foster and adoptive parents, and guardians is critical to help identify trends in types of placements, rate of disruptions, and the number of foster placements within lesbian, gay, bisexual, transgender, queer and questioning ("LGBTQ") families that will translate into permanent adoptive placements. 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; place LGBTQ youth, foster and adoptive parents, and guardians at continued risk of harassment and discrimination; and result in additional costs to state and tribal child welfare agencies. We urge you to retain in AFCARS the questions on sexual orientation of foster youth, foster and adoptive parents, and guardians. We also urge you to add to AFCARS gender identity data elements for foster youth, parents, and guardians.

Family Equality Council connects, supports, and represents the three million LGBTQ parents and their six million children. We are a community of parents and children, grandparents and grandchildren that reaches across this country. For nearly 40 years we have raised our voices toward fairness for all families. Family Equality Council also supports LGBTQ youth, including foster youth, seeking family formation.

Lambda Legal is the oldest and largest national legal organization whose mission is to achieve full recognition of the civil rights of lesbians, gay men, bisexual, transgender people, and everyone living with HIV through litigation, education, and public policy work. Lambda Legal's Youth in Out-of-Home Care Project specifically advocates for the rights of LGBTQ young people in foster care, juvenile justice settings, and systems of care for youth experiencing homelessness.

The National Center for Lesbian Rights ("NCLR") is a non-profit, public interest law firm that litigates precedent-setting cases at the trial and appellate court levels, advocates for equitable public policies affecting the LGBTQ community, provides free legal assistance to LGBTQ people and their legal advocates, and conducts community education on LGBTQ issues. NCLR's Youth Project, established in 1993, engages in litigation, public policy advocacy and system reform efforts to promote the health and well-being of LGBTQ youth in their families, schools and public systems of care.

The Center for American Progress ("CAP") is a leading independent, nonprofit, nonpartisan policy institute that is dedicated to improving the lives of all Americans. Since 2003, CAP has pursued that goal by developing bold, progressive, evidence-based policy ideas and advocating for those ideas. Our aim is not just to change the conversation, but to change the country.

The National Center on Adoption and Permanency ("NCAP") is a unique nonprofit organization that provides a broad range of information, resources, consultation, and multidisciplinary services relating to adoption, foster care, and child welfare. NCAP's mission is to achieve permanency for all children—in their families of origin when possible and in new ones when necessary—by advancing child welfare policy and practice in the U.S. from its current "child placement" model to a new paradigm with the goal of enabling children and families to succeed.

The Exclusion of Data Elements Related to Foster Youth's Sexual Orientation and Gender Identity 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 ensure their safety, permanency, and well-being.

In 2011, guidance from the U.S. Department of Health and Human Services' Administration on Children, Youth and Families ("ACF") confirmed and reiterated "the fundamental belief that every child and youth who is unable to live with his or her parents is entitled to safe, loving and affirming foster care placement, irrespective of the young person's sexual orientation, gender identity or gender expression."[1] ACF further stated that LGBTQ youth are overrepresented in foster care and in the population of youth experiencing homelessness.[2] A federally-funded study of Los Angeles county's foster care system in 2013 similarly found that nearly 20% of youth

[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.*

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, ACF has also found that LGBTQ youth are more than 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 straight and cisgender youth, including higher total numbers of placements, higher rates of placement in group homes, longer stays in residential care, greater rates of hospitalization for emotional reasons, higher rates of homelessness, and greater rates of justice-system involvement.[5] 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]

Placement instability and the associated disruption of education disproportionately experienced by LGBTQ foster youth compromises their wellbeing and educational outcomes. LGBTQ youth are more likely to experience multiple placements, which often requires them to switch schools; such school mobility is associated with significantly lower tests scores and higher frequency of repeating grades.[8] Further, placement instability is associated with negative mental health effects: a 2007 study found that youth who experience placement instability are at a heightened risk (36% to 63% higher) of behavioral problems.[9] Children who experience unstable placements are also at heightened risk of aging out of care without a permanent placement, which is associated with increased rates of homelessness and risky behaviors. A 2012 study found that placement instability is associated with increased rates of substance use in young adulthood, risky sexual practices and unplanned pregnancies, and experiences of intimate partner violence.[10]

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[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 6, 35-38; Bianca D. M. Wilson et al., *Disproportionality and Disparities among Sexual Minority Youth in Custody*, 46 J. OF YOUTH & ADOLESCENCE 1547 (2017), https://link.springer.com/article/10.1007/s10964-017-0632-5.

[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] ADVOCATES FOR CHILDREN OF NEW YORK, *The Importance of School Stability for Youth in Foster Care* (Sept. 2009), https://www.advocatesforchildren.org/sites/default/files/library/school_stability_youth_fostercare.pdf?pt=1.

[9] David M. Rubin et al., *The Impact of Placement Stability on Behavioral Well-Being for Children in Foster Care*, 119 PEDIATRICS 336 (Feb. 2007).

[10] Tonia Scott, *Placement Instability and Risky Behaviors of Youth Aging Out of Foster Care*, 29 CHILD ADOLESC. SOC. WORK J. 61 (2012).

Ultimately, placement instability has been shown to be associated with an increased risk of experiencing homeless after leaving the child welfare system.[11]

In order to identify and address these risks which are disproportionately experienced by LGBTQ foster youth, 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, uninformed decisions that seriously undermine the child's stability, 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 provide needed supports to groups experiencing disparities. Eliminating questions related to sexual orientation and gender identity in AFCARS keeps invisible the experiences of LGBTQ foster youth, parents, guardians, and families and leaves the Federal government blind to the unique needs of LGBTQ individuals and families. The absence of administrative data on the national level will continue to obscure the experiences of this vulnerable population and will make it impossible to track whether the system is making improvements to address almost twenty percent of youth in 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 youths' experiences in care and will inform evidence-based policies and practices. Thus we urge you to retain the sexual orientation data elements for foster youth.

The Educational Stability Data Element Should be Retained.
Further, the data element relating to educational stability should be retained as it is critical to measure stability for all foster children as well as to measure effective implementation of federal child welfare and education law. Without this data, the federal government will be unable to measure progress and trends or gauge effectiveness of policies and practices established under the Fostering Connections to Success and Increasing Adoptions Act of 2008 (Fostering Connections) and Every Student Succeeds Act of 2015. 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. As such, we strongly support retaining the education stability-related data element included in the 2016 AFCARS Final Rule.

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 how often children change schools and the reason. No other vehicle is better suited to tracking this type of data on a national scale. 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. In addition, maintaining data elements regarding sexual orientation and gender identity for youth and educational stability will provide an opportunity to track progress and measure interventions to

[11] Amy Dworsky et al., *Homelessness During the Transition From Foster Care to Adulthood*, 103 AM. J. OF PUB. HEALTH 318, 320 (2013).

address educational disparities for LGBTQ youth who, as described above, have disproportionately negative educational experiences.

All Data Elements in the 2016 AFCARS Final Rule Relating to the Indian Child Welfare Act Should be Retained.

We oppose eliminating data elements relating to the Indian Child Welfare Act ("ICWA") from the 2016 AFCARS Final Rule. Under the 2016 AFCARS Final Rule, states and tribal entities will only be required to report most of the ICWA-related data elements if ICWA applies in a child's case, greatly reducing any burden associated with collecting and reporting these elements. Eliminating the collection of demographic information regarding American Indian and Alaska Native youth not only negatively impacts another vulnerable population with poor outcomes, but inhibits the ability to learn more about the specific experiences of LGBTQ-identified American Indian and Alaska Native youth.

The Date of Health Assessment and Timely Health Assessment Data Elements Should Be Retained.

We oppose the proposed removal of health assessment data elements, which note the date and timeliness of a child's health assessment within AFCARS. This information is important for assessing access to care for a significant portion of the foster care population at the state and national level. This is an important aspect of measuring a state's compliance with its Title IV-B Health Oversight and Coordination Plan. The inclusion of health assessment dates in the 2016 Final Rule provided a baseline understanding of the health of children entering the child welfare system. ACF needs this data to assess whether states are complying with important federal requirements under the Title IV-B program.

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 with significant trauma. Children can manifest this trauma by developing various physical, developmental, educational, and mental health conditions. 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. Given that Alaska Native and American Indian children as well as LGBTQ youth experience trauma at disproportionately high levels, the ability to cross reference health assessment data elements with identity-related demographic information is critical to ensuring well-being.

The Sexual Orientation and Gender Identity and Gender Expression Data Elements of Foster Youth can be Administered Safely and Effectively.

The NPRM justifies the erasure of sexual orientation data collection of LGBTQ youth based on 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.[12]

[12] Adoption and Foster Care Analysis and Reporting System, 84 Fed. Reg. 16572, 16576 (April 19, 2019) (to be codified at 45 C.F.R. pt. 1355), *available at* https://www.federalregister.gov/documents/2019/04/19/2019-07827/adoption-and-foster-care-analysis-and-reporting-system [hereinafter "2019 NPRM"].

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.[13] 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 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.[14] 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 residents who may be vulnerable to sexual assault.[15] More and more state and local child welfare and juvenile justice agencies, as well as providers serving youth experiencing homelessness, have developed protocols to collect SOGIE data.

In addition, child welfare agencies routinely collect, record, and manage sensitive information. AFCARS already requires case workers to collect information that is highly personal, private, and confidential information, such as physical and sexual abuse backgrounds, histories of sexual exploitation, emotional and psychological abuse histories, and mental health diagnoses and medications. Child welfare personnel should, after ensuring protections against discrimination are in place and completing training, collect SOGIE data in the same manner as they collect other sensitive information. Federal law already protects the confidentiality of information contained in child welfare records.

Further, the rule already requires agencies to collect and report data on family conflict over the child's SOGIE in the *Child and family circumstances at removal* data element. Thus, the rule effectively requires some inquiry into the SOGIE of children experiencing family conflict. Contrary to the rationale cited in the NPRM, collecting data about a child's SOGIE from third parties is likely to lead to speculation rather than accurate data. As written, the NPRM would require caseworkers to make decisions about children based on their SOGIE without requiring training and education to ensure that these decisions are made by informed and culturally competent staff.

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[13] 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.

[14] 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).

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

Most advocacy organizations, particularly those that commented on sexual orientation data, opposed streamlining the data and emphasized the important information that collection would yield.[16] Both child welfare professionals and professionals who advocate for the rights and fair treatment of LGBTQ youth have acknowledged the importance of collecting SOGIE information about children in order to tailor individualized case plans. 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.[17] 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.[18] Given that an ACF-funded study found that almost twenty percent of youth in care are LGBTQ, it is clear that any AFCARS structure that does not require collection of SOGIE demographic information cannot be comprehensive in nature. While some states may express concern over collecting SOGIE-related information, the role of ACF should be to support and assist states rather than retain a data approach that has left the needs of LGBTQ youth largely unaddressed.

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 is an important resource for children and youth needing both foster and permanent families. According to a 2007 study, gay, lesbian, and bisexual foster parents are raising six percent of foster children in the United States.[19] And 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.[20] Yet fear of discrimination discourages many prospective LGBTQ parents from contacting foster and adoption agencies. The concern is well founded: 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.[21]

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 both a larger number of homes available to children and the greatest chance for success and permanency.

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[16] 2019 NPRM, 84 Fed. Reg., at 16577.
[17] 2019 NPRM, 84 Fed. Reg., at 16574-75.
[18] *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.
[19] Gary J. Gates et al., *Adoption and Foster Care by Gay and Lesbian Parents in the United States*, WILLIAMS INST. & URBAN INST. (Mar. 2007), https://www.urban.org/sites/default/files/publication/46401/411437-Adoption-and-Foster-Care-by-Lesbian-and-Gay-Parents-in-the-United-States.PDF
[20] 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.
[21] 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.

Almost 40 years of research has demonstrated that children raised by same-sex couples are just as healthy and psychologically sound as children raised by heterosexual parents.[22] 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.

The Children's Bureau Should Add Gender Identity Questions for Foster Youth, Foster and Adoptive Parents, and Guardians.

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."[23] Further, the federally-funded study of Los Angeles county's foster care demonstrated that transgender youth face even higher rates of over-representation in care compared to their presence in the general population than their lesbian, gay, and bisexual peers.[24] Because of the particular challenges faced by transgender foster youth, adding gender identity questions for both foster youth, foster and adoptive parents, and guardians will help states and tribes save costs by identifying affirming placements, reducing placement instability, and reducing over-representation.

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. 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").

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[22] *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.").

[23] Brandon Andrew Robinson, *Child Welfare Systems and LGBTQ Youth Homelessness: Gender Segregation, Instability, and Intersectionality*, 96 CHILD WELFARE 47, 31 (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)." *Id.*

[24] *Sexual and Gender Minority Youth*, at 7.

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 was 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 NPRM for eliminating this data.

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 exhaustive 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.

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

Collecting the Data Elements in the Final Rule will Decrease Costs in the Child Welfare System by Improving Outcomes for LGBTQ Youth.

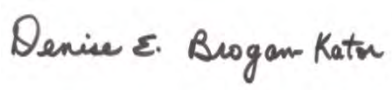
Failing to collect SOGIE information about youth in the foster care system will impose its own burdens, including substantial additional costs. The poor outcomes documented for LGBTQ foster youth, including a greater number of foster care placements, overrepresentation in congregate care, and hospitalization for emotional reasons, carry substantial costs to state and tribal child welfare systems. Identifying LGBQ foster youth through the voluntary sexual orientation question and implementing effective interventions to reduce instability; minimize costly stays in group homes, hospitals, and juvenile justice facilities; and improve permanency in family home settings would provide tremendous cost savings. Adding a gender identity question for foster youth would similarly provide cost savings.

For example, the average annual cost of foster care maintenance payments under Title IV-E and administrative costs per foster child in FY10 was $25,782.[25] That same year, subsidies for adopted children and administrative costs for an adopted child averaged $10,302 in costs.[26] Thus, identifying an affirming, supportive family for an LGBTQ child leading to adoption—which would be impossible to do if the child's sexual orientation or gender identity was unknown—could lead to an annual cost savings of $15,480 per child. A more recent Center for American Progress estimate using FY16 figures indicates that a child adopted from foster care costs a state only 25% per year as much as a child who remains in foster care, amounting to a $29,000 cost savings per year.[27] Further, congregate care (in which LGBTQ foster youth are overrepresented) including group homes, residential treatment facilities, psychiatric institutions and emergency shelters costs state governments 3-5 times more than family foster care.[28] Based on average annual foster care maintenance payments per child of $19,107 in FY2010,[29] placing an LGBTQ child with an affirming, supportive foster family rather having her remain in congregate care would save a minimum of $38,214 per child per year.

Conclusion

For these reasons, we strongly oppose eliminating 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, foster and adoptive parents, and guardians. Without the data in the 2016 AFCARS Final Rule there will be no national data on LGBTQ foster youth or prospective parents to measure and improve outcomes for LGBTQ foster youth and families. Further, we urge ACF and HHS to retain all data elements from the 2016 AFCARS Final Rule on educational stability, health assessments, and the Indian Child Welfare Act. We welcome the opportunity to work with ACF to assist the implementation of these important reforms.

Sincerely,



Denise Brogan-Kator
Chief Policy Officer
Family Equality Council

[25] Nicholas Zill, *Better Prospects, Lower Cost: The Case for Increasing Foster Care Adoption,* NATIONAL COUNCIL FOR ADOPTION (May 2011), http://www.adoptioncouncil.org/images/stories/NCFA_ADOPTION_ADVOCATE_NO35.pdf.
[26] *Id.*
[27] 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/.
[28] NAT'L CONFERENCE OF STATE LEGISLATURES, *Congregate Care, Residential Treatment and Group Home State Legislative Enactments 2009-2013,* February 2017 http://www.ncsl.org/research/human-services/congregate-care-and-group-home-state-legislative-enactments.aspx.
[29] Zill, *supra* note 25.

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AFCARS 2018-2020

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

Document: ACF-2018-0003-0359
Megan Sennie

Submitter Information

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General Comment

Thank you for giving the public an opportunity to submit comments on the proposed changes to the AFCARS.

I work in Indian Child Welfare in rural Alaska, in a region that has over 50 Tribes. I have worked as an ICWA Advocate for 2.5 years in this region with over 20-30 Tribes. I had no idea of the state of Indian Child Welfare in the U.S. until I began my job. Alaska is one of the States with one of their primary goals to improve their relationship on working with Tribes when it comes to child welfare. Even with that primary goal, Native children are still disproportionately represented in the foster care system.

Removing 90% of data indicators related to Native children in foster care due to the burden is not a good reason to remove what may give us all, meaning those who are involved in child welfare, insight on areas where there is a need of improvement. Data collection is crucial to assessing the quality of the state of child welfare for Tribes and States. The data is used by both Tribes and States. So many children get "lost" in the system and with required data collecting we can continue to prevent this. We can use statistics to make sure children do not become another statistic.

There must be an innovative and efficient ways to reduce the "burden" of collecting data on children in foster care. Technology is constantly improving and moving forward, we can find ways to work smarter and not harder. Children often do not have any voices for themselves which leads it up to families, agencies, Tribes and other governments to be their voice. Being in foster care is traumatic to children, no matter how short or long they are in care. It is especially traumatic when children are removed from their home rural village, and moved to an entire new place when they may have never left their village before. It is traumatic to the families who may have a history of child removal, especially if it was unjustified child removal. Child Welfare cases center around court decisions, it should be good practice to document the court findings. I would not be able to do my job if I did not know where my cases were at legally.

It is not a burden but an investment into anything we can do to prevent this and to continue to work so that their time in foster care is as short as possible, or does not occur at all.

ICWA-compliance is still present and will continue to be. In my short-career working in Indian Child Welfare I have seen non-compliance such as:
-Taking months for the placement with a relative to occur
-Tribes not being notified when child welfare cases open involving their tribal children until later into the case, which happens regularly
-Cases not transferring to Tribal Jurisdiction due to the a misunderstanding of the Tribe's capacity to manage the case
-Parents and siblings not getting a visit with their children for close to a year after removal
-An approved relative placement not occurring right away due to the bond between the foster parents and child

Some of these are things that data cannot show. However, if it is reported in some way it could lead to the question of why? Such as:
Why aren't these cases not transferring to Tribal Jurisdiction?
Why are X# of children not being placed with their relatives, was there a good cause to deviate from the placement?
Why did the Tribe only get involved later in the case, is it because they were not identified as a Tribe in the beginning? Is it because there was not great enough of an effort to search of the child's affiliated Tribe? Did the Tribe get notified and not respond and why?

Please do not quiet the voice of the children who cannot speak for themselves. I understand the burden of reporting data, but I also understand its importance. I know that when we do our Title IV-E reporting, it means that the State and Federal agencies are being given numbers to give insight into what we are facing on the ground everyday. I know that it means that in the future, it may lead to more funding. I also understand the burden is not totally on the State but with data Tribes can work collaboratively with the State to reduce that burden. However we need to be able to identify what needs to be improved first.

By having more "eyes & ears" on the state of child welfare, we can all work together to continue to improve the quality of life for children which will lead to a better quality of life for them as adults. Thank you for taking the time to read this.

-Megan Sennie

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Comment On: ACF-2018-0003-0224
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National Indian Child Welfare Association (NICWA)

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Organization: National Indian Child Welfare Association

General Comment

Please accept the comments of the National Indian Child Welfare Association which are attached to this message.

Attachments

NICWA

June 18, 2019

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

Re: Comments Regarding AFCARS Notice of Proposed Rulemaking (RIN 0970–AC72)
Published April 19, 2019 in the Federal Register

Dear Ms. McHugh:

Please accept the comments of the National Indian Child Welfare Association (NICWA) regarding the notice of proposed rulemaking (NPRM) published on April 19, 2019, in the Federal Register (RIN 0970-AC72). NICWA is a private, nonprofit Indian organization headquartered in Portland, Oregon. We are dedicated to the well-being of American Indian and Alaska Native (AI/AN) children and families and carry out our mission through public policy and advocacy, research, community development, and training and technical assistance with tribal, state, federal, and private agencies. We have extensive knowledge and expertise in federal child welfare programming, including the Department of Health and Human Services programs under Title IV-B and Title IV-E of the Social Security Act. Our comments will focus on the impacts of the NPRM for AI/AN children and families.

NICWA Experience with Child Welfare Data Collection

Within a few years after the passage of the Indian Child Welfare Act in 1978 (25 USC 1901 et seq.), otherwise referred to as ICWA, tribal child welfare programs began pursuing methods to collect data on state efforts to implement ICWA. These efforts included working with state partners and sometimes the Bureau of Indian Affairs under the Department of Interior to improve both tribal and state data collection and reporting of data related to ICWA requirements. NICWA entered this work in 1987 upon the request of tribes and states in the Northwest (Oregon, Idaho, and Washington) to provide expertise on ICWA requirements, effective casework practices with AI/AN children and families, intergovernmental relationships, and understanding of how data could be used to inform practice and policy for this population. AFCARS did not exist at this time, but NICWA developed early knowledge and expertise in how state child welfare data systems captured data concerning AI/AN children and families and strategies to improve the reliability and accuracy of that data.

In the 1990's, after the establishment of the AFCARS data collection and reporting system and the passage of a federal law provision requiring the Administration for Children and Families (ACF) to ensure states were consulting with tribes on measures to comply with ICWA (42 USC 622(b)(9)), NICWA expanded our technical assistance services to include data collection methods for integrating ICWA requirements into state AFCARS systems. In addition, NICWA also developed partnerships with a number of Children's Bureau child welfare resource centers to provide technical assistance to tribes and states on child welfare practice and systems enhancements into the late 2000s, including the National Resource Center for Child Welfare Data and Technology. NICWA was also involved in supporting tribes and states in efforts to improve tribal access to state AFCARS and ICWA related data for tribal child welfare agencies (remote access).

After the passage of the Fostering Connections to Success and Increasing Adoptions Act of 2008 (P.L. 110-351) which authorized tribal governments to directly operate the Title IV-E program, NICWA began technical assistance efforts to help tribes applying to operate the Title IV-E program and newly approved Title IV-E tribes who were developing AFCARS data systems. This technical assistance required

innovative thinking to develop AFCARS data collection methods that would meet AFCARS regulatory rigor and the often limited capacity of tribes to develop and operate robust electronic data collection and reporting systems.

NICWA's data collection and reporting technical assistance have always been rooted in several fundamental principles. They are as follows:

- Support effective partnerships between tribal, state, and federal government agencies that respect the rule of law and tribal sovereignty. View tribes as essential partners and contributors in the data collection and reporting process that involves their tribal citizens.
- Add value through innovation and proven methods to enhance data collection for AI/AN children and families and improve accuracy and reliability of data collected.
- Ensure any data collected and reported is readily accessible by tribes.
- Promote the collection of data that is meaningful for AI/AN children and families and contributes to the effective public policy solutions and systems change efforts to improve outcomes for AI/AN children and families.

Appropriate Consultation with Tribal Nations

Tribal consultation is an essential element of any proposed changes to federal agency policy that impacts AI/AN children and families. Both the Department of Health and Human Services and ACF have consultation policy established through executive action that reinforces and instructs agency officials on the process for conducting appropriate consultation. In the NPRM, ACF identifies several meetings and written documents as examples of consultation with tribes on AFCARS and proposed AFCARS changes. Unfortunately, some of the identified consultation meetings regarding AFCARS were not announced as tribal consultation by ACF and did not provide tribes with opportunities to discuss their issues or concerns, such as webinars where tribes were not allowed to ask questions or when ACF officials declined to respond to tribal questions in a meeting. In addition, a significant amount of the consultation process outlined in the NPRM relies on email listserv announcements that only Title IV-B or Title IV-E tribes receive, which is not the full number of tribes with children in state child welfare custody.

Going back to 2017, numerous tribal leaders and tribal child welfare directors have expressed concerns to NICWA regarding the lack of appropriate consultation regarding proposed changes to AFCARS. In many cases this has the effect of discouraging the participation of tribal governments in the regulatory process. Case in point is the low attendance for the recent June in-person and telephone AFCARS consultation sessions for tribes. While NICWA appreciates the recent AFCARS consultation sessions for tribal nations that ACF hosted prior efforts did not meet the standard for appropriate consultation and unfortunately were an influencing factor in low participation by tribal nations in subsequent consultation efforts.

The Benefits of Collecting the 2016 ICWA Data Elements

States, tribes, federal agencies, and policymakers need better data for AI/AN children and families to understand how to effectively address persistent and long-term poor outcomes for AI/AN children and families. AFCARS data tells us that AI/AN children have long been overrepresented in state foster care systems both nationally and in many states with foster care rates climbing as high as 14 times the AI/AN child population rates in these states. AI/AN children also tend to be in foster care longer than white children and have more foster care placements too. In addition, it is widely recognized that more data and support for states and tribes is needed to improve ICWA implementation. ACF, under Title IV-B of the Social Security Act (42 USC 622(b)(9)), is required to oversee that states are consulting with tribal governments on measures taken by the state to comply with ICWA. The 2016 Final Rule ICWA data elements are needed to understand how states are working with tribes on ICWA implementation and whether their efforts are being successful in addressing specific areas of concern.

In the NPRM, ACF questions whether AFCARS is the most appropriate data collection system for capturing a number of ICWA data elements. While we understand the purpose of AFCARS and limits of a data system like AFCARS, AFCARS is still the best federal data system to capture data on AI/AN children and families in state child welfare systems, especially data related to placements of AI/AN children and associated ICWA requirements. ACF officials have suggested the Department of Interior is a better federal agency for collecting ICWA related data, but the Department of Interior does not have a relationship with states in child welfare and does not have an operational data base or resources to collect data on AI/AN children in state foster care systems. Other alternative methods for collecting ICWA related data, such as the Child and Family Services reviews, are not feasible and the structure of these reviews does not support collection of this type of ICWA related data. ACF states that research or surveys could fill this data collection void, but the history of funding this type of research has demonstrated that it can't be relied upon to provide accurate and regularly reported data.

Many tribes rely on state data to help them understand the disposition of not only individual ICWA cases involving their tribal citizens, but also larger systems issues within their state. Washington State collects a robust set of ICWA measures that help tribes understand statewide, regional, and local ICWA implementation much better. Washington uses their data to inform training of their state and tribal workforce, policy development, contractual performance of state contractors, and issues related to the judicial role in ICWA proceedings. The 2016 AFCARS data elements would provide a consistent set of data that tribes and states could use to address ICWA challenges and other child welfare practice issues. Below are several ICWA data elements in the 2016 Final Rule proposed for elimination in the NPRM that provide important information that inform case planning and systems efforts to improve outcomes. These data elements should be easily retrievable from any case file, are quantitative in nature, and should be easy to record in AFCARS.

- **Date of court determination of ICWA application**. This provides information on whether there were significant differences between when the state court and state IV-E agency confirmed application of ICWA and how this affected ICWA implementation.
- **Transfer of jurisdiction**. This provides information on whether a request for transfer of jurisdiction was requested, whether it was approved or denied, and if denied, what the basis for denial was regarding the request. ACF's NPRM alternative to this data element is based on the AFCARS data element "reason for exit," but this will not provide the necessary information to understand when transfer was requested in a case, why it did or did not happen, and how this impacted other service provisions or case planning.
- **Foster care placement preferences.** This provides information on whether foster care placement preferences were met and which placement preference was used at that time. It asks, if placement preferences were not met, was good cause found to apply and on what basis. 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 good cause was found to deviate from the placement preferences and the basis for good cause, and whether the tribe approved of the placement if it involved a congregate care setting (institution or group care setting).
- **Adoptive placement preferences.** This provides information on whether the adoptive placement preferences were met and which placement preference was used. It asks, if placement preferences were not met, was good cause found and on what basis. 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 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.** While ACF is proposing to retain a modified data element on notice from the 2016 Final Rule, it contains flaws in its modified form. The NPRM data element only tracks if notice was sent by the state IV-E agency. The NPRM data element does not provide information on whether the notice was sent within ICWA's statutory timelines and whether it was sent to both parents and the child's tribe. This is important information that informs whether the parents' and child's tribe had the ability to participate in case planning, placement decisions, and court proceedings. Analyzing

data from the proposed data element in the NPRM could lead to erroneous conclusions regarding whether ICWA requirements were met or whether the parents or tribe had an opportunity to participate in important case planning decisions and court hearings. 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 which occurs in some jurisdictions.

Many of the ICWA data elements proposed for elimination in the 2019 NPRM have the potential to help ACF support effective implementation of the Family First Prevention Services Act requirements with AI/AN children and families such as active efforts and timely notice of proceedings. ACF may be considering future data elements to address Family First Prevention Services activities in the future, but our believe is that they must include key requirements of ICWA or they will fail to represent what is most critical to understand with regards to success or failure with AI/AN children.

We also note that ACF has suggested in the NPRM that expanding AFCARS significantly at this time would deter state efforts to successfully implement the Family First Prevention Services Act. Our response to this is a number of the ICWA data elements in 2016 Final Rule, such as active efforts and timely notice to tribes of proceedings, could be beneficial to ACF as they roll out the new law. In addition, the amount state and federal funds spent over the last number of decades to support the high rates of out of home placements for AI/AN children in state systems significantly exceeds the estimated costs for implementing these additional ICWA related data elements and could result in much less trauma for the children and families involved. Each year between 9,000 to 10,000 AI/AN children are identified in state foster care. Using an average foster care monthly rate of $500 per month for 9,000 AI/AN children a year in state foster care equals $54 million each year being expended in federal and state funds. This does not include administrative and other services costs to support these foster care children. With better data and some more targeted interventions as we have seen in some state and county jurisdictions it is very possible that the number of AI/AN children in state care could decrease by 15% and possibly more. That is a savings of $8.1 million each year from the current levels of spending, which in five years would pay for the cost of implementing the ICWA data elements in the 2016 Final Rule.

Burdens for State IV-E Agencies to Collect ICWA Data Elements are Manageable

The 2016 supplemental notice of proposed rulemaking and the 2016 Final Rule addressed issues related to burdens on states. They concluded there were burdens for states, but they were warranted given the lack of basic data for AI/AN children and the benefits for policy development, technical assistance and training, and programming. While we understand the burden to states must be given, serious consideration in the implementation of the Final Rule we question some of the assumptions that ACF has used to justify the changes contained in the NPRM.

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 to every child in state custody. These are: 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)?, and 3) Does ICWA apply? These questions are necessary to determine if ICWA applies while other data elements in the 2016 Final Rule would only need to be asked if ICWA does apply. Only nine states have foster care placement rates where ICWA might apply to over 4% of the total state foster care population. In 41 states the rates of AI/AN children in state foster care are under 3% with 37 of those states having rates less than 1%.

ACF comments that ICWA's requirements are almost entirely directed at courts and therefore difficult to access for state IV-E agencies. While some of ICWA's requirements involve court determinations, most of the actions required are initiated by and based upon state IV-E agency activities. Good case management practice requires child welfare agencies to document court findings in case files, including those related to ICWA findings.

A number of states that have cited concerns about expanded AFCARS data collection and reporting related to the 2016 Final Rule noted they also believe the ICWA data elements are helpful. A key element of their concerns centers on ACF penalty structures for data that is not collected or reported properly.

States have expressed specific concern regarding data that is not under the control of the state IV-E agency. We believe that ACF should be careful in how they interpret the reasons a state might raise regarding collection and reporting of the ICWA data elements in the 2016 Final Rule and not embellish these concerns by conflating them with a general desire to not collect ICWA data. In our conversations with three states, they expressed a willingness to collect more than just the five ICWA data elements proposed in the NPRM, but they were more concerned about statements made by ACF officials with regard to penalties attached to not properly collecting and reporting any data elements in AFCARS. This suggests that the penalty structure and rules for AFCARS may be a bigger concern than the number of ICWA data elements in the 2016 Final Rule.

NICWA is also aware that a number of states have already begun integrating the 2016 Final Rule ICWA data elements in their AFCARS or Comprehensive Child Welfare Information System systems and are finding the data to be very helpful in addressing ICWA implementation challenges, policy development, and program management. Before ACF makes a final decision on a Final Rule, we recommend ACF contact tribes and states that are working with ICWA data elements from the 2016 Final Rule to learn more about the costs and their experience.

Conclusion

We appreciate ACF's desire to improve data collection for AI/AN children and programming efforts they have made in their capacity centers to improve ICWA implementation. These are significant and have already begun to help improve ICWA implementation in different parts of the United States. As ACF and other federal agencies increase their movement to be more data-driven, we encourage ACF to consider the value of retaining more of the ICWA data elements in the 2016 Final Rule. With this in mind, we offer to share our experience in working with states and tribes on data collection related to ICWA. Thank you in advance for consideration of our comments. Any questions regarding our comments may be directed to David Simmons, NICWA government affairs and advocacy director at desimmons@nicwa.org.

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AFCARS 2018-2020

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

Document: ACF-2018-0003-0361
Alliance for Children's Rights

Submitter Information

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Organization: Alliance for Children's Rights

General Comment

See attached file(s)

Attachments

Alliance for Children's Rights

ALLIANCE for CHILDREN'S RIGHTS

June 18, 2019

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

Re: **Docket Number:** ACF-2018-0003
Docket Name: AFCARS 2019 NPRM
Docket RIN: 0970-AC72
Agency Name: Children's Bureau (CB); Administration on Children, Youth, and Families (ACYF); Administration for Children and Families (ACF); Department of Health and Human Services (HHS)

Dear Ms. McHugh:

The Alliance for Children's Rights 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. While the Health and Human Services (HHS) Regulatory Reform Task Force identified the AFCARS regulation as one in which the reporting burden may impose costs that exceed benefits in response to Executive Order (E.O.) 13777, the need to adequately and appropriately identify and support the children and youth in foster care far outweigh potential cost savings.

Specifically, we offer comments on the proposals to limit data collection on 1) related to Indian children as defined in the Indian Child Welfare Act (ICWA); 2) sexual orientation for LGBTQ youth and prospective parents; 3) educational stability; 4) health assessment and transition plan.

The Alliance for Children's Rights protects the rights of impoverished, abused and neglected children and youth. By providing free legal services, advocacy, and programs that create pathways to jobs and education, the Alliance levels the playing field and ensures that children who have experienced foster care are able to fulfill their potential.

There are over 60,000 youth and children in California in the foster care system. Approximately 800 of those are Indian children as defined in ICWA. Nearly 19 percent of youth living in foster care identify as lesbian, gay, bisexual, transgender, queer, and questioning. California has approximately 7,500 youth participating in extended foster care who require the development of a transition plan.

FFPSA Prevention Services Maximized by Using Targeting Data

As states plan to move forward with the prevention services opportunities under Family First Prevention Services Act (FFPSA), correctly allocating resources and providing the appropriate evidence-based services will require a deeper understanding of the needs of all children and youth at risk of entering care.

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Particularly when states are preparing to implement additional restrictions on congregate care, it is critical that data continue to be collected specific to our most vulnerable populations to ensure they continue to receive appropriate supports and services. It is also critical to understand how FFPSA implementation impacts school stability and transition planning. Collecting this data will also aid states in implementing FFPSA as the data will be useful in targeting FFPSA prevention services programs to better meet the needs of parents and children.

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

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

Comments – ICWA Data Collection:
These regulations are important to us, our families, and state child welfare systems.
The regulations themselves—in response to the comments from stakeholders across the country—describe the importance of these changes. As stated in the December 2016 Final Rule, 81 Fed. Reg. 90524, 90527:

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

3. help address and reduce the disproportionality of AI/AN children in foster care; and
4. provide avenues for collaboration between states and tribes that are more meaningful, and outcome driven, including improved policy development, technical assistance, training, and resource allocation as a result of having reliable data available.

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

Other federal reports have demonstrated the need for quality national data to assess states' efforts in implementing ICWA. See Government Accountability Office, *Indian Child Welfare Act: Existing Information on Implementation Issues Could be Used to Target Guidance and Assistance to States*, GAO-05-290 (Apr. 4, 2005)[1].

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

Maximizing Vital Resources.
Data collection and analysis provides a basis for examining progress and outcome measures related to children and youth in foster care impacted by ICWA. The Federal government, States, local governments, tribes and child welfare advocates can gain insight into the number and types of ICWA cases and use the data to inform policy changes and implementation and maximize invaluable resources to support Indian children and their families.

Tribes, States, Federal Agencies and Policy Makers Rely on Accurate and Appropriate Data.
States, tribes, federal agencies, and policymakers need better data for Native children and families to understand how to effectively address persistent and long-term poor outcomes for Native children and families. While ACF is proposing to retain five of the ICWA data elements from the 2016 Final Rule, the 2019 NPRM eliminates many of the data elements that are needed to understand the unique issues that Native children experience related to poor outcomes in state child welfare systems.

When local ICWA data is available, tribes use it to identify discrepancies in state ICWA caseloads or to identify practice issues that need improvement. Unfortunately, many states do not collect this data. The 2016 AFCARS data elements would provide a consistent set of data that tribes and states could use to address ICWA challenges and other child welfare issues.

[1] http://www.gao.gov/products/GAO-05-290.

Many of the ICWA data elements proposed for elimination in the 2019 NPRM have the potential to help ACF support effective implementation of the Family First Prevention Services Act requirements with Native children and families such as active efforts and timely notice of proceedings.

ACF is required to oversee that states are consulting with tribal governments on measures taken by the state to comply with ICWA (42 USC(b)(9)). The 2016 Final Rule ICWA data elements are needed to understand how states are working with tribes on ICWA implementation and whether their efforts address specific areas of concern.

ACF is in the best position to capture necessary data on Native children and families in state child welfare systems and AFCARS is the only federal data system that has the ability to capture placement-related data. The Department of Interior does not have a relationship with states in child welfare and does not have an operational data base, or resources, to collect data on Native children in state foster care systems.

Alternative methods for collecting ICWA related data, such as the Child and Family Services reviews, are not feasible and the structure of these reviews does not support collection of this type of data. ACF states that research or surveys could fill this data collection void, but the history of funding this type of research has demonstrated that it can't be relied upon to provide accurate and regularly reported data. Several of the ICWA data elements in the 2016 Final Rule proposed for elimination provide important information that inform case planning and systems efforts to improve outcomes such as the following data elements. They should be easily retrievable from any case file, are quantitative data that is easy to record, and have important value.

- **Date of court determination of ICWA application**. This provides information on whether there were significant differences between when the state court and state IV-E agency confirmed application of ICWA and how this affected implementation.
- **Transfer of jurisdiction**. This provides information on whether a request for transfer of jurisdiction was requested, whether it was approved or denied, and if denied, what was the basis for denial was. ACF's alternative to this data element based on the data element "reason for exit" will not provide the necessary information to understand when transfer was requested in a case, why it did or did not happen, and how this impacted other service provision or case planning.
- **Foster care placement preferences.** This provides information on whether foster care placement preferences were met, which placement preference was used, and if placement preferences were not met was good cause found and on what basis. 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, and did the tribe approve of the placement if it involved a congregate care setting (institution or group care setting).
- **Adoptive placement preferences.** This provides information on whether the adoptive placement preferences were met, which placement preference was used, and if placement preferences were not met was good cause found and on what basis. 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.** While ACF is proposing to retain a modified data element on notice from the 2016 Final Rule, in its modified form it contains flaws. The NPRM data element only tracks whether notice was sent by the state IV-E agency. The NPRM data element does not provide information on whether the notice was sent within ICWA's statutory timelines and whether it was sent to both parents and the child's tribe. This is important information that informs whether the parents and child's tribe had the ability to participate in case planning, placement decisions, and court proceedings. Analyzing this data from the proposed data element could lead to erroneous conclusions regarding whether ICWA requirements were met or whether the parent's or tribe had an opportunity to participate in important case planning decisions and court hearings. 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 which occurs in some jurisdictions. This is data that should be easily retrievable from a case file.

Absence of Appropriate Consultation with Tribal Nations.
Tribal consultation has not occurred according to ACF principles and promotion of effective government-to-government relationships. While ACF has listed previous meetings with tribal nations as consultation in the NPRM that were not identified as consultation to tribal leaders and often did not specifically address issues of concern to tribal leaders and representatives present.

Burdens for State IV-E Agencies to Collect ICWA Data Elements are Manageable.
The 2016 supplemental notice of proposed rulemaking and the 2016 Final Rule addressed issues related to burdens on states. They concluded that there were burdens for states and were warranted given the lack of basic data for Native children and the benefits for policy development, technical assistance and training, and programming.

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 to every child in state custody. These are 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)?, and 3) Does ICWA apply? These questions are necessary to determine if ICWA applies while other data elements in the 2016 Final Rule would only need to be asked if ICWA does apply. Only nine states have foster care or other out of home placement rates where ICWA applies to over 4% of the total state foster care population. In 41 states the rates are under 3% with 37 states under 1 percent.

- While some of ICWA's requirements involve court determinations, most of the actions required are based on state IV-E agencies efforts. Good case management practice requires child welfare agencies to document court findings in case files, including those related to ICWA findings.
- We are aware, for example, that California, a state with 109 federally-recognized tribes, is already well under way with its implementation efforts, having relied on the final rule. At this stage, any modification of the data collection requirements would be a waste of finite state child welfare resources, which itself is an additional burden.

Comments – LGBTQ Data Collection

Tracking of information on LGBTQ youth in AFCARS is crucial, given that LGBTQ youth are overrepresented in out-of-home care and have been shown in studies to disproportionately be mistreated in foster care, including longer stays in care, particularly residential care, and poor outcomes, including high rates of aging out of care, homelessness, and criminal justice involvement. Without properly tracking these data it will be impossible to appropriately respond to meet the needs of this vulnerable population.

Confidentiality Concerns Unfounded.

While the administration has expressed concerns regarding the accuracy and confidentiality of sexual orientation and gender identity and expression (SOGIE) data, questions regarding sexual orientation have been included in the Youth Risk Behavior Surveillance Survey from the Centers for Disease Control and Prevention for decades, and the Prison Rape Elimination Act requires youth correction officers to collect SOGIE data as part of their screening processes. Child welfare agencies have shown that they are capable of managing confidential information about sensitive topics such as sexual abuse, mental health diagnoses, mental health, and medication. Like all data kept by the state, SOGIE data would be protected by confidentiality and should not be treated differently than other confidential data.
The most accurate measures the number and needs of LGBTQ youth in care are based off of a small number of studies, mostly conducted in large urban centers. Tracking SOGIE data in AFCARS is necessary because accurately counting the LGBTQ youth in the child welfare system is important to understand their unique needs. This is especially pertinent as studies indicate that LGBTQ youth who have faced maltreatment on account of their sexual orientation or gender identity and expression are more transient, particularly as they seek more affirming locales, so population numbers will likely not be uniform.

Development of Best Practices and Funding Resources.

The ability to compare to other jurisdictions is vitally important in assessing progress and, over time, in seeing which settings have been able to establish strong practices. For this to be effective, it's important that there is a single tool consistently tracking SOGIE data so that answers are comparable.

As Congress seeks to respond to the needs of LGBTQ youth in care, AFCARS is the tool that they will use. While there has been movement to respond to the needs of youth in care, Congress has not had accurate information to track their numbers. Additionally, funders who want seek to support programs that target LGBTQ youth need accurate data to appropriately allocate funds.

Protecting our Most Vulnerable.

The Preventing Sex Trafficking and Strengthening Families Act mandates that identification and documentation of children and youth at risk of trafficking. As studies have indicated that LGBTQ youth who run away or age out of care are at increased risk for sex trafficking, failure to collect SOGIE data ignores a population at risk.

LGBTQ youth are at a higher risk for placement changes, unnecessary congregate care, and adoption disruption as a result of their sexual orientation or gender identity and expression. While LGBTQ foster parents are suitable placements for any child, the likelihood of placement disruption is lower if LGBTQ youth are placed in their care. As the Family First Prevention Services Act pushes more children out of congregate care, the current shortage of foster and adoptive parents will grow. LGBTQ foster parents can present an ideal placement for hard to place kids.

LGBTQ youth are likely to be a significant target population for prevention services under FFPSA due to their disproportionate representation in the system. Capturing SOGIE data will allow states to better understand the needs of LGBTQ youth and, thus, to provide targeted prevention services to keep them out of foster care.

Comments – Educational stability and related data elements (1355.44(b)(16) - 1355.44(b)(16)(vii)).
Stability at school is critically important for children to develop healthy secure relationships, reduces the potential stressors that arise from being moved multiple times, and is essential to school success.

Reporting on educational stability will not create an unnecessary burden on states, as states are already required to document this information under the Fostering Connections to Success and Increasing Adoptions Act, which requires child welfare agencies to coordinate with local education agencies to ensure children remain in their school of origin, unless it is not in the best interest of the child.

The Every Student Succeeds Act (ESSA) further reinforces Fostering Connections by promoting, among other things, school stability and interagency data sharing related to students in foster care. For the first time, state departments of education are required to report on the educational performance of students in foster care in the State Education Agency (SEA) 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.

AFCARS is the most effective way to collect educational stability data because it allows for straightforward quantitative reporting of how often children change schools and the reason. No other vehicle is better suited to tracking this type of data on a national scale. 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.

Comments - Health assessment data elements (1355. 44(b)(11)(ii) and 1355.44(b)(12))
This information is important for assessing access to care for a significant portion of the foster care population at the state and national level. This is an important aspect of measuring a state's compliance with its Title IV-B Health Oversight and Coordination Plan. Health assessment dates provide a baseline understanding of the health of children entering the child welfare system. ACF needs this data to assess whether states are complying with important federal requirements under the Title IV-B program.
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 with significant trauma. Children can manifest this trauma by developing various physical, developmental, educational and mental health conditions. 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.

Further, such data maybe used to target FFPSA prevention services programs to better meet the needs of parents and children resulting in maximizing the use of critical prevention services resources.

Comments: Transition plan data elements (1355.44(f)(8) in 2016 Final Rule)
The Fostering Connections to Success and Increasing Adoptions Act, the Preventing Sex Trafficking and Strengthening Families Acts, and the Patient Protection and Affordable Care Act all require jurisdictions to complete personalized transition plans for youth at risk of aging out of foster care into adulthood. As states are already required to track transition planning in case files, the cost burden of verifying the existence of a transition plan and the date of its creation in AFCARS is extremely low.

Transition plans are critical to ensuring that youth in extended foster care are provided with the skills and tools they need to take steps necessary to successfully transition to independence.

While it is argued that this information is not necessary in AFCARS because it is covered in National Youth in Transition Database (NYTD), because of the voluntary nature of NYTD, the data set is incomplete and not representative of all youth in care.

Support Data Collection.
For the reasons stated above, the Alliance for Children's Rights supports the collection of the aforementioned data points and believe, as your agency did in publishing the Final Rule in 2016, the benefits of this data collection outweighs any burden. We agree with states and other stakeholders that the 2016 AFCARS Final Rule has the overall result of improving data reporting and will provide important national information on several critical new topics including ICWA, health needs and permanency. AFCARS is the best vehicle for collecting this data as it is establishes a common platform and consistent data collection point to ensure quality data collection and reporting. Other avenues are voluntary and therefore, may result in incomplete or otherwise ineffective data.

Comprehensive data allows all stakeholders to better understand and serve children and families. Any elimination or limiting of these data collection significantly hinders all children, families, and county agencies in compliance with existing laws and opportunities to provide prevention services.

We urge you to abandon efforts to revise the 2016 Final Rule – after multiple opportunities to comment on the rule – because the benefits far outweigh the burdens, as already reported on during consideration of the 2016 AFCARS Final Rule. We recommend you follow through on implementation of these important new data requirements and provide necessary technical assistance to state child welfare agencies to help them enhance state data collection and implementation of AFCARS.

Sincerely,

Kristin Power
Senior Policy Associate

As of: September 14, 2020
Received: June 18, 2019
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AFCARS 2018-2020

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

Document: ACF-2018-0003-0362
Port Gamble S'Klallam Tribe

Submitter Information

Name: Jeromy Sullivan
Address:
Kingston, WA,
Organization: Port Gamble S'Klallam Tribe
Government Agency Type: Tribal
Government Agency: Port Gamble S'Klallam Tribe

General Comment

See attached

Attachments

Port Gamble S'Klallam Tribe

PORT GAMBLE S'KLALLAM TRIBE
31912 Little Boston Road NE • Kingston, WA 98346

June 17, 2019

Attn: Kathleen McHugh, Director
Policy Division
Administration for Children and Families
Children's Bureau
330 C Street SW
Washington, DC 20024

Re: RIN: 0970-AC72, Notice of Proposed Rulemaking
Adoption and Foster Care Analysis and Reporting System

To Whom It May Concern:

The Port Gamble S'Klallam Tribe is submitting these comments on the Adoption and Foster Care Analysis Reporting System (AFCARS), regarding the Indian Child Welfare Act of 1978 (ICWA) related data elements.

There is no existing quantitative data source other than the AFCARS to provide any national, uniform and reliable information on American Indian/Alaska Native (AI/AN) children in state or tribal foster care systems for members of Congress and federal agencies. There is a need for comprehensive national data on ICWA implementation. Child welfare practice is shifting to focus on preventing not just AI/AN children, but all children from entering the foster care system in the first place, and many provisions of the Family First Prevention Services Act (FFPSA) embody tribal practices focusing on unnecessary removal of children from the home. The ICWA data elements were to be a step in improving child welfare practices, and for that purpose, all of the ICWA data elements included in the 2016 Final Rule should be retained.

Specific Comments Regarding Data Elements

We encourage retaining all ICWA related data elements of the 2016 Final Rule, and also propose the following:

1. Notice. Addition of date of the notice, as well as the date a petition was filed. This will provide information about whether notice was timely.

Having national data on the timeliness of notice will provide some statistical information about case management procedure. This data would provide baseline information about how many child welfare cases lack timely notice, and highlight gaps in services to AI/AN children in state

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systems, which could then be examined through information gathered in Court Improvement Projects or qualitative assessments.

2. Placement.
   a. If the child was not placed with a relative or a tribal member, if a good cause finding was made to deviate from ICWA's placement preferences.
   b. If there was a finding, what was the basis of the finding?

This will provide more information about what occurs in practice regarding placement and is consistent with the goal of FFPSA to place children in a family-like setting.

3. Transfer to Tribal Court. Proposed amendments:
   a. Was a transfer to tribal court requested?
   b. Was it granted?
   c. If denied, why?

This data will provide more information about transfers to tribal court. It is also partially related to the information about legal notice. And while we appreciate data being collected through the Court Improvement Programs, not all states or tribes are part of those projects, and data collection would be voluntary, not mandatory as it is for AFCARS compliance.

Additional Suggestions

We also take this opportunity to thank Children's Bureau for scheduling an in-person tribal consultation in early June, as well as 2 opportunities to provide comments via conference all shortly afterward. We were one of 2 tribes providing comments on June 4, 2019, the line was open for roughly 20 minutes, and we were advised only written comments would be considered. The NPRM outlines very specific expectations and subject matter for comment, directly related to compliance costs for state agencies. Speaking as a tribe with an approved title IV-E agency, our experience is a large portion of issues with ICWA are due to state agency non-compliance with a federal law, and therefore the benefits of the data collection should outweigh the burden.

Children's Bureau can also demonstrate "a commitment to obtain alternative methods that will inform aspects of ICWA" by providing more information about what alternative methods are being considered. Our questions, comments and suggestions about this follow:

1. HHS tribal consultations. There are many regional HHS tribal consultations scheduled throughout the year in various parts of country, and information could be provided to tribal leaders about proposed changes to AFCARS and what this means.
2. Qualitative Assessments. We would appreciate more information about what a "qualitative assessment that can provide context" about the practice surrounding compliance or non-compliance of ICWA would look like. If it is not a part of the current, national data collection mechanism established through the AFCARS, what mechanism

would be used to collect data from state agencies? Is a qualitative assessment currently in the process of being developed? And if so, who is working on developing it?

3. Court Improvement Projects. We appreciate the commitment to encouraging more collaboration between states and tribes. We suggest technical assistance teams working with the CIPs, at minimum, consult with tribal experts about what kinds of data to collect.
4. Technical Assistance Teams. Again, at minimum, if tribal experts are not included as part of the team, they should be consulted on work with CIPs and title IV-E agencies in general.
5. ICWA Tribal Advisory Team/Work Group (or other collaborations). ICWA is the "gold standard" of child welfare. Reports to Congress and other federal agencies tend to use statistical information, but as we all know in child welfare, it is individual stories that provide the true picture of what is happening. HHS and ACF have Tribal Advisory Teams (STAC and TAC); perhaps CB could have a time-limited group specifically for ICWA related practice issues to develop a more comprehensive view of child welfare from the AI/AN perspective. If a collaborative team designed a qualitative assessment mechanism, it could provide information to develop a more well-rounded, holistic child welfare practice focused on strengthening families.

Thank you for your time and attention to these comments.

Sincerely,

Jeromy Sullivan
Tribal Chair

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AFCARS 2018-2020

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

Document: ACF-2018-0003-0363
Cheyenne River Sioux Tribe

Submitter Information

Name: Belva Morrison
Organization: Cheyenne River Sioux Tribe
Government Agency Type: Tribal
Government Agency: Cheyenne River Sioux Tribe

General Comment

See attached

Attachments

Cheyenne River Sioux Tribe

COMMENTS REGARDING THE AUTOMATED FOSTER CARE AND ADOPTION ASSISTANCE REPORTING SYSTEM NOTICE OF PROPOSED RULEMAKING PUBLISHED APRIL 19, 2019, IN THE FEDERAL REGISTER

June 18, 2019

RIN: 0970-AC72

DOCUMENT#: 2019-07827

My name is Harold Frazier, Chairman of the Cheyenne River Sioux Tribe that has 21,000 tribal citizens. Our reservation is roughly the size of what is now Connecticut. I am also the Chairman of the Great Plains Tribal Chairmen's Association. Belva Morrison MSW is a representative of the Tribe and is authorized to send this document.

Background

Since 1993, the HHS required all state offices working with children in foster care and adoptions to use state data systems to comply with the Automated Foster Care and Adoption Reporting System or AFCARS and report on a bi-annual basis. This mandatory reporting did not include allowance for the states' reporting systems to report on Indian children who were eligible for ICWA protections.

Under the Obama administration, in December 2014 at the White House Tribal Nations conference, Attorney General Holder announced an initiative to promote compliance with the Indian Child Welfare Act (ICWA) and that included partnering with the Departments of Health and Human Services and Interior to make certain that "all tools" will be made available to make certain that states and private adoption agencies complied with the ICWA. The DOI, DOJ, and HHS discussed sharing expertise for the development of ICWA related regulations including the AFCARS.

The Children's Bureau (CB) issued a NPRM on February 9, 2015 that would not include American Indian children related to the Indian Child Welfare Act of 1978 because the Federal Administration for Children and Families claimed that it did not have the authority to collect ICWA data according to 479 of the Social Security Act. Then after "further consideration" following the 2015 NPRM, the ACF stated that they did have the authority under section 479(c) to collect ICWA related data in their reporting to AFCARS. The Final Rule to revise the AFCARS and to include ICWA data on tribal children was published on December 14, 2016 (81 FR 90524) and also implemented fiscal penalties for noncompliant AFCARS data.

In the meantime, the ACF delayed the effective date to collect ICWA data published in the final rule from October 1, 2019 to October 1, 2021.

In the 2015 NPRM the Administration for Children and Families (ACF) published a supplemental notice of proposed rulemaking because section 479 of the Social Security Act authorizes "the collection of data with respect to adoption and foster care in the United States" and decided that Indian children are children living within the United States and are intended to benefit from *both* ICWA and Titles IV-E and Title IV-B of the Act (*Federal Register*/Vol. 81, No.67/Thursday, April 9, 2016)

At this time, the ACF determined that collecting data on Indian children, including ICWA related data is within the authority of section 479 because 1) it will assess the status of children in foster care 2) assess the current state of the well-being of Indian children; and 3) to develop future policies concerning tribal – state consultation. Further, the ACF proposed that information related to court findings and court orders concerning Indian children that are contained in the state child protection and foster care agency case files should be reported in the AFCARS.

In February, 2017 President Trump signed Executive Order 13777 creating *Regulatory Reform Task Forces* to identify regulations that are outdated, unnecessary, or ineffective and streamline and/or eliminate regulations across the federal government including the Administration for Children and Families. ACF then targeted collecting ICWA related data to streamline and proposed a Notice of Public Rulemaking (NPRM), published April 19 in the Federal Register, to eliminate approximately 90% of the AFCARS data elements for American Indian children from the 2016 AFCARS Final Rule.

The proposed rule will undermine the Cheyenne River Sioux Tribe's ability to ensure that our children and families are receiving ICWA protections.

Most of our ICWA cases originate in Rapid City SD. We do not know of ICWA cases in other jurisdictions unless we receive an ICWA Notice. That leaves the tribe in the position of not knowing where our ICWA protected children live and leaves us to rely on other jurisdictions to tell us where our children are via the ICWA Notice. We cannot trust this process. Nor can we trust the vagaries of state courts.

If we have so many children in the custody of the State child welfare systems we are left to guess why our children are not succeeding in that child welfare system because we do not have the hard evidence that state case workers are doing their job. Collecting ICWA data and reporting in AFCARS under penalty would go a long way to help solve both the tribe and states child welfare problems of mistrust and the tribe's dependence on states.

The proposed rule will exacerbate the already tenuous relationship between the State of South Dakota and our tribal ICWA program regarding collaboration, cooperation, and consultation

The ACF has directed the SD State DSS to "provide a final update, developed after consultation with tribes, on the specific measures taken by the state to comply with ICWA since submission" of their 5 year plans (2015-2019) and in their 2020 – 2024 plans the states must "provide a description, developed after consultation with tribes of the specific measures taken by the state to comply with ICWA" (422(b)(9) of the Act. Compliance for States will be difficult unless the state and the Cheyenne River Sioux Tribe are at the table reviewing the same data. Further, mutual cooperation, successful collaboration, and consultation are questionable for both the state and tribe - especially against the backdrop of recent high profile court cases in South Dakota.

The Oglala and Rosebud Sioux tribes took the lead for three parents in a 2013 class-action lawsuit challenging the practices of the South Dakota 7th Circuit Court, the Pennington County State's Attorney office and the South Dakota Department of Social Services that is a case dealing with significant issues regarding the 14th Amendment of due process for parents. Rapid City is in Pennington County where the Cheyenne River Sioux Tribe has the most *known* children caught up in the State DSS. The South Dakota case appears as if it will eventually end up at the Supreme Court. (*Oglala Sioux v. Fleming Petition for Writ of Certiorari)* A Cheyenne River Sioux Tribal citizen prevailed in a State Supreme Court Case but only after trips to that state that created hardship on the family and extensive work on the part of the tribal member's attorneys that included more work due to that state's petition for cert. to the US. Supreme Court. (*Adoption B.B. v. R.K.B.* 417 P3d 1 (Utah 2017)

Collecting ICWA data for AFCARS with penalty to not report will avoid much of the mistrust between front line state DSS workers who are on the scene of removing our children from their homes and the tribal ICWA managers who are not there but are still expected to take the DSS worker's version of the facts. And court cases like those mentioned above can be avoided altogether if State DSS workers know that ICWA actions and data need be documented in the State data system. Only then, can legitimate and meaningful consultation and coordination between states and tribes begin. I might add here that despite state and federal level action or inaction regarding our children there is mutual cooperation between our ICWA office and the local DSS office in Eagle Butte, SD.

The proposed rule will close the tribe's ability to collect case level data because the tribe is currently not eligible for Title IV-E money to establish a data capture system.

The Cheyenne River Sioux Tribe receives Title IV-B and ICWA monies. The Title IV-B money will be used for prevention purposes (Family First Act) and the BIA ICWA grant is capped at the 1994 level with the exception of obtaining slight increases when available. Together these two programs under the umbrella of the Child and Family Services cannot purchase an "off the shelf" or a COT data capture system. The tribal program relies on the state, county, and other sources for data; however, even these sources cannot provide case – level data that will assist our child welfare program and the tribal council's questions' as to the state of affairs concerning the welfare our own children and families.

The long term implications for tribes and states if the proposed rule becomes final.

Both states and tribes will continue as we have been for the last 40 years since ICWA was passed. Tribes will continue to be deceived and undermined through and by different guises such as "streamlining" federal regulations and we will continue to find ourselves as adversaries involved in litigation concerning the ICWA instead of partners on behalf of children while federal policymakers continue to misunderstand that the Cheyenne River Sioux Tribe holds our children as sacred. The Cheyenne River Sioux Tribe stands with those tribes who have already submitted written comments to previous Notices of Proposed Rulemaking commenting that all ICWA data should be reported as stated in the Final Rule and also stands with those tribes that have provided oral testimony on June 3, 2019 in Albuquerque NM arguing against the passage of this NPRM published on April 19, 2019.

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Document: ACF-2018-0003-0364
Cook Inlet Tribal Council

Submitter Information

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Anchorage, AK,
Organization: Cook Inlet Tribal Council
Government Agency Type: Tribal
Government Agency: Cook Inlet Tribal Council

General Comment

See attached

Attachments

Cook Inlet Tribal Council

COOK INLET TRIBAL COUNCIL
People. Partnership. Potential.

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June 18, 2019

Kathleen McHugh
Division of Policy
Children's Bureau
Administration of Children, Youth and Families
Office of the Administration for Children and Families
Department of Health and Human Services
1250 Maryland Avenue SW, 8th floor
Washington, DC 20024

Submitted Via Email: CBComments@acf.hhs.gov

RE: Notice of Public Rulemaking—Proposed AFCARS data elements related to the Indian Child Welfare Act of 1978

Dear Ms. McHugh:

As President and CEO of Cook Inlet Tribal Council (CITC), an Alaska Native Tribal organization which serves as the primary education and workforce development center for Native people in Anchorage, Alaska, I am privileged to offer the following comments with regard to the 2019 Adoption and Foster Care Analysis Reporting System (AFCARS) Notice of Proposed Rulemaking.

CITC has been designated its tribal authority through Cook Inlet Region Inc., organized through the Alaska Native Claims Settlement Act and recognized under Section 4(b) of the Indian Self-Determination and Education Assistance Act (PL 93-638, 25 U.S.C. 450b). CITC builds human capacity by partnering with individual Alaska Native people to establish and achieve both educational and employment goals that result in lasting, positive change for our people, their families, and their communities.

Demographics and Expanding Service Population

CITC's programs serve the Cook Inlet region with an American Indian and Alaska Native (AI/AN) population of more than 50,000, or roughly 40% of the total Native American population in Alaska. In Anchorage alone, the Native population is more than 35,000. Directly and indirectly, CITC's programs have statewide impact. As the Department is well aware, Alaska's child welfare statistics demonstrate woeful disproportionality in the number of AI/AN children in out-of-home placement. Nationally, Native children constitute less than 20% of the population but make up approximately 60% of the out-of-home care population. In Anchorage, this disparity is even more significant; Native children

comprise around 10% of the population but remain disproportionately represented in out-of-home care at rates of 50-60%.

Background

American Indian and Alaska Native children have a unique legal status as citizens of Tribal governments with federal laws, like ICWA, that provide important safeguards to help them maintain their Tribal and family relationships. In 2016, the Department proposed to collect additional data related to ICWA through AFCARS. CITC was pleased to see this recommendation- considering that it would allow Tribes, states, and federal agencies to develop a more detailed understanding of the trends in out-of-home placement and barriers to permanency for AI/AN children. In 2005, the GAO report on the implementation of ICWA indicated that one of the most important missing elements was the collection of data to measure state performance and support technical assistance efforts targeting AI/AN children. Noting this fact, CITC also saw that additional data elements could have a positive impact on states ability to comply with ICWA.

AFCARS Comments

CITC urgently opposes the result that this NPRM has proposed to cut approximately 90% of the 2016 AFCARS data elements with relation to ICWA. The lack of Tribal consultation that took place with regard to this evisceration of essential data collection is particularly concerning because of the dramatic impact this proposal will have on Native communities. While CITC appreciates the Department's efforts to keep some critical data elements related to ICWA, this NPRM fails to recognize the benefit that the added original ICWA elements provide to states and the federal government as well as Native children, Tribes, and Tribal organizations. In addition, the burdens for State IV-E agencies to collect ICWA data elements are manageable and are mostly in place already. In order to better address the persistent poor outcomes for Native children in out-of-home care and provide additional oversight to ensure that states are complying with ICWA, CITC strongly urges the inclusion of important AFCARS data elements with relation to ICWA. Particularly:

Regarding **2016 Data Elements** CITC requests that the Department:

- Keep data elements related to the date of court determination of ICWA application, in order to understand when the court versus the agency began applying ICWA and contacting the child's Tribe,
- Retain data elements which detail the proceeding of agencies after a request for transfer of jurisdiction was filed. For example, was the case transferred to tribal jurisdiction or was the request denied? If denied, what was the basis for denial?
- Maintain elements that note whether foster care placement preferences were met, and specify which preference (including whether good cause was met). This allows agencies to understand if ICWA requirements were met and the basis for finding good cause,
- Preserve data elements which note if ICWA notice was sent within the statutory timeline.

In reference to **the burden imposed on State IV-E agencies collecting ICWA data**, CITC notes:

- If State IV-E agencies are practicing good case management they will have access to court hearings through their own case files,
- States that have already begun including ICWA data elements from the 2016 rule are finding additional data to be helpful in addressing ICWA implementation.

Regarding the use of AFCARS for data collection:

- AFCARS is the only federal data system which has the ability to capture placement-related data, and ACF is in the best position to capture these data.
- Alternative methods for the collection of ICWA related data are not feasible; the structure of Child and Family Services reviews are not conducive to ICWA data collection.
- ICWA is the only major federal child welfare law without regular data collection, which minimizes the ability of both Tribal and state entities to improve outcomes for Native children and families.
- The Court Improvement Program being encouraged to work with grantees to enhance efforts to collect ICWA key indicators, while potentially beneficial, in and of itself does not provide sufficient accountability measures for states in their collection of ICWA related data.

Conclusion

CITC thanks DHHS for its inclusion of Tribal organizations in this NPRM. Although CITC commends the Department for retaining 10% of the ICWA related data elements from the 2016 NPRM, CITC urges the Department to include the above described additional elements that would benefit Native children and families, and the states and federal government to ensure compliance with ICWA and better outcomes for children and families. Although it has been over 40 years since the implementation of ICWA, our children still struggle due to a lack of data compilation and inconsistent implementation of ICWA by state governments. Collecting and compiling data related to ICWA is the best way to combat these issues head-on. On behalf of the children and families CITC serves, we are prepared to work with DHHS to ensure that we reduce the disproportionate rates of Native youth in out-of-home care. Our children deserve no less.

Please feel free to contact me at goneill@citci.org or 907-793-3401 with any questions or if I can be of further assistance. Thank you for considering our feedback.

Sincerely,

Gloria O'Neill
President and CEO

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AFCARS 2018-2020

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

Document: ACF-2018-0003-0365
National Congress of American Indians

Submitter Information

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General Comment

See attached

Attachments

National Congress of American Indians

NATIONAL CONGRESS OF AMERICAN INDIANS

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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; Adoption and Foster Care Analysis and Reporting System; Notice of Proposed Rulemaking (4/19/2019); Administration of Children and Families

Dear Ms. McHugh:

On behalf of the National Congress of American Indians, the oldest and largest organization advocating the interests of American Indian and Alaska Native tribal nations and their citizens, we 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 elements specific to ICWA were incorporated into AFCARS as detailed in the Final Rule published on December 14, 2016 (2016 Final Rule). Through the NPRM the Administration for Children and Families (ACF) proposes to eliminate ninety percent of the ICWA data elements adopted in the 2016 Final Rule. Out of the five ICWA AFCARS data elements ACF proposes to retain, all have been modified. NCAI opposes the elimination or modification of any of the ICWA data elements for the following reasons.

I. General Comments:

a. The absence of appropriate government-to-government consultation with tribal nations.

Tribal consultation is an essential element of any proposed changes to federal agency policy that impacts Indian children and families. The Department of Health and Human Services (DHHS) has a tribal consultation policy established through executive action, which outlines the process for conducting appropriate consultation. Yet ACF failed to consult with tribal nations consistent with the DHHS tribal consultation policy. In 2019 ACF hosted three tribal consultations regarding the AFCARS NPRM. The first tribal consultation was held in person in Albuquerque, NM, on June 3, 2019, from 10:00 a.m.-12:00 p.m. MT. ACF held the second tribal consultation via phone on June 4, 2019, and the third via phone on June 6, 2019.

The DHHS tribal consultation policy requires that "[w]ritten communication shall be issues within 30 calendar days of an identified critical event. . . .The HHS frequently uses a "Dear Tribal Leader Letter" (DTLL) format to notify individual Indian Tribes of consultation activities" (U.S. Department of Health and Human Services Tribal Consultation Policy, Tribal Consultation Process, A, 1, pg 8). Additionally, the DHHS Tribal Consultation Policy requires that official notice shall be issued "[w]ithin 30 calendar days, and upon the determination the consultation mechanism, proper notice of the critical event and the consultation mechanism utilized shall be communicated to affected/potentially affected Indian Tribe(s) using all appropriate methods including mailing, broadcast e-mail, FR, and other outlets" (*Id*. at 2, pg 8).

It is clear that tribal consultations regarding the elimination of ninety percent of the ICWA data elements in the NPRM would qualify as a critical event as the changes would have a sizeable impact on Indian children and tribal nations. However, ACF for its June 3, 2019, consultation sent out its DTLL on May 7, 2019, missing the required thirty day window. Moreover, ACF created a webpage on the DHHS website for tribal leaders and interested parties to register for the June 3, 2019, tribal consultation, however, this webpage was created on May 24, 2019, just eleven days before the critical event. The same AFC webpage failed to mention the June 4, 2019, and June 6, 2019, tribal consultations. ACF did not create a separate webpage for the two additional tribal consultations making it impossible for tribal leaders who did not receive a DTLL to participate. Moreover, ACF did not notify tribal leaders about any of the three tribal consultations through the federal register, which is recognized in the DHHS Tribal Consultation Policy as the "most formal HHS form of notice used for consultation." (*Id*.) The lack of proper notification to tribal leaders likely led to the low attendance of all three tribal consultations.

In addition to the 2019 tribal consultations the ACF in the NPRM notes that tribal nations were consulted with during 2017 and 2018. However, during these years there were limited tribal consultations and in a number of cases tribal nations were not notified that the ACF discussions related to AFCARS were considered tribal consultations. At these consultations ACF officials primarily shared general information about AFCARS or the Advanced Notice of Proposed Rulemaking rather than specific issues that tribal leaders were interested in addressing.

b. The benefits of collecting the 2016 Final Rule ICWA data elements.

States, tribal nations, federal agencies, and policymakers require accurate data to understand how they can best address the persistent and long-term negative outcomes for Indian children in state child welfare systems and their families. Current AFCARS data shows that Indian children have long been overrepresented in state foster care systems. In some states the foster care rates for Indian children have risen over fourteen times higher than their population in the state. Indian children also tend to be in foster care longer than white children and have more foster care placements. In addition, it is widely recognized that more data and support for states and tribal nations is needed to improve ICWA implementation. ACF under Title IV-B of the Social Security Act (42 USC 622(b)(9)) is required to oversee that states consult with tribal nations on state measures to comply with ICWA. The 2016 Final Rule ICWA data elements are needed to understand how states are working with tribal nations on ICWA implementation and whether their efforts are successful in addressing specific areas of concern.

Many tribal nations rely on state data to help them understand the disposition of not only their tribal member's individual ICWA cases, but also larger systems issues within their state. A great example

can be seen in the State of Washington, which collects a robust set of ICWA data points that help tribal nations understand statewide, regional, and local ICWA implementation. Washington uses their data to inform training of their state and tribal workforce, policy development, contractual performance of state contractors, and issues related to the judicial role in ICWA proceedings.

The 2016 AFCARS data elements would provide a consistent set of data that tribal nations and states could use to address ICWA challenges and other child welfare practice issues. Below are several ICWA data elements in the 2016 Final Rule proposed for elimination or modification in the NPRM that will provide important information, which would inform case planning and systems efforts to improve outcomes. These data elements should be easily retrievable from any Title IV-E agency case file, are quantitative in nature, and should be easy to record in AFCARS.

- **Date of court determination of ICWA application**. This data element would provide information on whether there were significant differences between when the state court and state IV-E agency confirmed application of ICWA and how this affected ICWA implementation.

- **Transfer of jurisdiction**. This data element would provide information on whether a request for transfer of jurisdiction was made, whether it was approved or denied, and if denied, what the basis for denial was. ACF's NPRM modification to this data element is based on the AFCARS data element "reason for exit", but the modification would not provide the necessary information to understand when transfer was requested, why it did or did not happen, and how this impacted other service provision or case planning.

- **Foster care placement preferences**. This data element would provide information on whether foster care placement preferences were met, which placement preference was used, and if placement preferences were not met was good cause found to apply and on what basis. While the NPRM modification proposes to identify whether a placement involves a relative or someone that is a member of a tribal nation it does not provide information on 1) whether a tribal placement preference was used that could be different than ICWA's, 2) whether good cause was found to deviate from the placement preferences, 3) the basis for good cause, and 4) did the tribal nation approve of the placement if it involved a congregate care setting (institution or group care setting). These additional components included in the 2016 Final Rule provide a more complete picture of ICWA compliance and would aid ACF in meeting their statutory requirements.

- **Adoptive placement preferences**. This data element would provide information on whether the adoptive placement preferences were met, which placement preference was used, and if placement preferences were not met was good cause found and on what basis. While the NPRM modification proposes to identify whether a placement involves a relative or someone that is a member of a tribal nation, it does not provide information on 1) whether a tribal placement preference was used, which could be different than ICWA's preference, 2) whether good cause was found to deviate from the placement

preferences, and 3) the basis for good cause. Once again these more robust data elements would paint a more complete picture for ACF, Title IV-E agencies, and policy makers.

- **ICWA notice on foster care placement and termination of parental rights to tribal nation and parents**. While ACF is proposing to retain a modified data element on notice from the 2016 Final Rule, in its modified form it contains flaws. The NPRM data element only tracks if notice was sent by the state IV-E agency. The NPRM data element does not provide information on whether the notice was sent within ICWA's statutory timelines and whether it was sent to both parents and the child's tribal nation. This is important information that determines whether the parents and child's tribal nation had the ability to participate in case planning, placement decisions, and court proceedings. Analyzing data from the proposed data element in the NPRM could lead to erroneous conclusions regarding whether ICWA requirements were met or whether the parents or tribal nation had an opportunity to participate in important case planning decisions and court hearings. The modified NPRM notice data element also does not track if the notice was sent by the state court instead of the state IV-E agency, which occurs in some jurisdictions.

c. The burdens for state IV-E agencies to collect ICWA data elements are manageable.

ACF in the 2016 Final Rule addressed issues related to burdens on states and concluded there were burdens for states, but they were warranted given the lack of basic data for Indian children and the benefits for policy development, technical assistance and training, and programming. While NCAI understands that state burden must be given serious consideration we also question some of the assumptions that have caused ACF to reverse its course on implementing the 2016 Final Rule.

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 to every child in state custody. These are 1) was an 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), and 3) does ICWA apply? These questions are necessary to determine if ICWA applies while other data elements in the 2016 Final Rule would only need to be asked if ICWA does apply. Only nine states have foster care placement rates where ICWA might apply to over four percent of the total state foster care population. Conversely, in four states ICWA might apply to under three percent of their foster care population with the remaining thirty seven states having to report on less than one percent of their foster care population. These numbers highlight how small the burden is on states related to the collection of the 2016 Final Rule ICWA data elements.

ACF comments that ICWA's requirements are almost entirely directed at courts and therefore difficult to access for state IV-E agencies. While some of ICWA's requirements involve court determinations, most of the actions required are initiated by and based upon state IV-E agency activities. Good case management practice requires child welfare agencies to document court findings in case files, including those related to ICWA findings.

A number of states that have cited concerns about expanded AFCARS data collection and reporting related to the 2016 Final Rule noted they also believe the ICWA data elements are helpful. A key element of their concerns center on ACF penalty structures for data that is not collected or reported properly. States have expressed specific concern regarding data that is not under the control of the state IV-E agencies. ACF should be careful in how they interpret the reasons a state might raise regarding collection and reporting of the ICWA data elements in the 2016 Final Rule and not embellish these concerns by conflating them with a general desire to not collect ICWA data. Three states have expressed to a tribal organization a willingness to collect more than just the five ICWA data elements proposed in the NPRM, but were more concerned about statements made by ACF officials with regard to penalties attached to not properly collecting and reporting any data elements in AFCARS. This suggests that the penalty structure and rules for AFCARS may be a bigger concern than the number of ICWA data elements in the 2016 Final Rule.

Additionally, a number of states have already begun integrating the 2016 Final Rule ICWA data elements in their AFCARS or Comprehensive Child Welfare Information System systems and are finding the data to be very helpful in addressing ICWA implementation challenges, policy development, and program management. Before ACF makes a final decision on a new Final Rule NCAI recommends that ACF contact tribal nations and states that are working with ICWA data elements from the 2016 Final Rule to learn more about their real world costs and their experience.

d. The NPRM is arbitrary and capricious.

This NPRM arbitrarily focuses on projected burdens on state Title IV-E agencies without considering the benefits. As required by law, the 2016 Final Rule conducted a careful analysis of the benefits and burdens, and appropriately amended the proposed rule to achieve a balanced Final Rule.

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

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

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

Finally, Family First Prevention Services Act does not amend ICWA, and so does not operate as a sufficient rationale to modify ICWA data elements.

II. **The Following are NCAI's Responses to the Questions for Comment Provided in the NPRM**:

1. Whether the information is readily available or collected as part of the title IV-E agency's casework.

While some of the 2016 Final Rule ICWA data elements involve court determinations, the actions required are based on the efforts of state IV-E agencies, such as notice to tribal nations, identification of the child and parent's tribal membership, recruitment and licensing of the placement resource, coordination of services and case planning, and participation in court proceedings. Good case management practice requires that child welfare agencies who participate in court hearings as a legal party document the findings of the court in their case file, including those related to ICWA findings. This means that much of the ICWA data elements required by the 2016 Final Rule should be readily available or are already collected as part of a Title IV-E agency's casework.

2. Recordkeeping hours spent annually to adjust existing ways to comply with AFCARS requirements, gather and enter information into the electronic case management system, and training and administrative tasks associated with training personnel on the AFCARS requirements (e.g., reviewing instructions, developing training and manuals).

No response.

3. Reporting hours spent annually extracting the information for AFCARS reporting and transmitting the information proposed in this NPRM to ACF.

Title IV-E agencies would only need to answer three questions for the majority of children in their system. These questions are 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), and 3) does ICWA apply? Acquiring the answers to these three questions should not take any extended amount of time. Once the three questions are answered and if the child does not fall under ICWA then none of the other ICWA data elements must be completed under the 2016 Final Rule. This means for the vast majority of cases only three ICWA questions need to be answered resulting in a very small amount of time spent on reporting ICWA data elements. The short time for reporting for the majority of all cases makes it reasonable to leave all of the 2016 Final Rule ICWA data elements intact.

4. Timeframes required to complete the work.

Please refer to our response to question 3 above.

5. Specifically how reporting the data elements in this NPRM will enhance their work with children and families.

The little to no national information is currently available regarding ICWA compliance and Indian children in Title IV-E agencies, which makes it hard for those agencies to access and address issues in their home states. The collection of data points related to ICWA and Indian children aggregated at the national level would help Title IV-E agencies identify national trends and amend their internal policies and procedures to produce better outcomes for Indian children.

6. Specific reasons as to why AFCARS is the most effective vehicle for collection of the data proposed in this NPRM and why no other current method is feasible to collect the information.

ACF officials have suggested that maybe the Department of Interior is a better federal agency for collecting ICWA related data, however, the Department of Interior does not have a relationship with state child welfare agencies and does not have an operational data base or resources to collect data on Indian children in state foster care systems. ACF has both the established relationships and the AFCARS system in place today to meet these needs. Other alternative methods for collecting ICWA related data, such as the Child and Family Services reviews, are not feasible and the structure of these reviews does not support collection of type of data gathered in the AFCARS. ACF states that research or surveys could fill this data collection void, but the history of funding this type of research has demonstrated that it can't be relied upon to provide accurate and regularly reported data. While there are some limitations to the system it is clear that AFCARS is the best federal data system to capture data on Indian children and families in state child welfare systems, especially data related to placements of Indian children and associated ICWA requirements.

7. Any work done to coordinate with title IV-E agencies in collecting and reporting data for AFCARS and how AFCARS data, which is aggregated at the national level, would help their specific work with title IV-E agencies, children, and families.

Please refer to our response for question 5 above.

III. **Conclusion**:

For the aforementioned reasons, we strongly support the retention of all of the ICWA-related data points and believe, as your agency did in publishing the Final Rule in 2016, the proven benefits of this data collection outweighs the burden on states. Further, ICWA is widely considered the "gold standard" of child welfare, and a refinement of family reunification objectives mandated by nearly every state. Any deletion or modification of the 2016 Final Rule ICWA data points significantly impacts tribal children, families, and county agencies trying to comply. In the interest of protecting our children and families, we respectfully submit these comments.

Sincerely,

Ahniwake Rose,
NCAI Deputy Director

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Comment On: ACF-2018-0003-0224
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National Council of Urban Indian Health

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General Comment

See attached

Attachments

National Council of Urban Indian Health

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: CBComments@acf.hhs.gov

Re: Comments of the National Council of Urban Indian Health on Adoption and Foster Care Analysis and Report System Notice of Proposed Rulemaking; *RIN: 0970-AC72*

Dear Ms. McHugh:

On behalf of the National Council of Urban Indian Health (NCUIH) and the Urban Indian Organizations (UIOs)[1] we represent, we hereby submit the following 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.

Background:

NCUIH is the only national representative of Urban Indian Organizations receiving grants under Title V of the Indian Health Care Improvement Act (UIOs) and the American Indians and Alaska Natives (AI/ANs) they serve. Founded in 1998, NCUIH is a 501(c)(3) organization created to support the development of quality, accessible, and culturally sensitive health care programs for AI/ANs living in urban communities. NCUIH fulfills its mission by serving as a resource center providing advocacy, education, training, and leadership for Urban Indian health care providers. NCUIH strives to improve the health of the more than 70% percent of the AI/AN population living in urban settings, supported by quality, accessible health care centers and governed by leaders in the Indian community.

[1] NCUIH represents 42 urban Indian organizations providing health care services pursuant to a grant or contract with the Indian Health Service under title V of the Indian Health Care Improvement Act (25 U.S.C. 1651 et seq.).

924 Pennsylvania Ave. SE Washington, DC 20003 Phone: (202) 544-0344 Fax: (202) 544-9394 www.ncuih.org

Tribes, tribal organizations, and AI/AN advocates[2] 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 adapted after reviewing comments submitted by these entities and others on an 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 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, 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, only affirming its role as the "gold standard" of child welfare practice.

The ICWA data points in AFCARS were 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 on the April 2018 Advanced Notice of Proposed Rulemaking, the California Department

[2] As stated in the 2019 comments of First Kids 1st, critical data on AI/AN children is still lacking even though it has been almost 25 years since the establishment of the AFCARS data collection system and 40 years since the enactment of ICWA. The First Kids 1st initiative is a national collaborative effort of the National Congress of American Indians, National Indian Health Board, National Indian Child Welfare Association, and National Indian Education Association.

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." Research in Los Angeles County has found that sexual and gender minority youth in the county are over-represented in congregate care settings.[3] By removing the question on gender identity from AFCARS, jurisdictions and tribal governments are left without the ability to see where gender minority children are being placed and address their needs through appropriate programming.

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 full data would allow local agencies to systematically identify the needs of Urban AI/AN children within their system and enable national experts to determine needs across jurisdictions. Non-profit service organizations require and depend on this information to fully tailor their services and hold their partners accountable. These capacities are critical to be able to fully serve Urban AI/AN children – many of which are members (or eligible for membership) in tribes that are located a great distance from the city in which they first became involved in a child welfare case. In these circumstances, urban child welfare workers and courts must work with both local community partners and across jurisdictions. The continual administrative data collection that is provided by the 2016 AFCARS questions allow systems to identify needs and staff trainings on a continual basis. This ensures quality through quantitative record keeping, beyond the limited scope of whether or not ICWA applies and identification of their placement. Family reunification for AI/AN children is low compared to other groups and highly subject to local variation in ICWA procedures on the nuances of these points.[4] The use of data is particularly crucial to achieving parity on reunification and a variety of other needs. It can illuminate the path to permanency for ICWA-eligible children.

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. If this NPRM ultimately results in the revision of any data points, we strongly

[3] Wilson, B. D., Cooper, K., Kastanis, A., & Nezhad, S. (2014). Sexual and gender minority youth in foster care: Assessing disproportionality and disparities in Los Angeles.

[4] Landers, A. L., & Danes, S. M. (2016). Forgotten children: A critical review of the reunification of American Indian children in the child welfare system. Children and Youth Services Review, 71, 137–147. doi:10.1016/j.childyouth.2016.10.043

encourage a review of those data points 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.

In addition, the proposed reduction in questions remove a minimal amount of burden. Good case management practice already includes the documentation of court findings in case files, and the full 2016 questions only add work in the few cases where ICWA applies. Instead, by relying solely on court improvement projects (CIP), self-initiated agency or non-profit projects, and extra surveys – the proposed "alternative" in the NPRM places a heavier burden on motivated jurisdictions by requiring them to take on extra work. These projects would have to run parallel to AFCARS reporting simply to ensure that routine quality improvement is available to cover all children.

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

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

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, ensures 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 and should not be removed as proposed.

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. Thus, 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. In other words, the multiple delays to implementation were either contrived or due to perceived rather than actual barriers.

All of ICWA data points included in the 2016 Final Rule should be retained. The data points that were included in the 2016 Final Rule have already shown positive impacts, despite not yet achieving full implementation in AFCARS. Court monitoring programs in urban settings have been able to improve outcomes associated with ICWA compliance. For instance, the Minneapolis American Indian Center has a court monitoring program to document ICWA compliance and estimates that about 1/3 of child welfare cases were not compliant in Hennepin County in 1993. However, after over

20 years of monitoring and continual engagement, over 95% of cases were compliant.[5] Compliance protects children while upholding the law. In the long-term this may save money by avoiding unduly long stays in foster care and avoiding the steep legal fees associated with non-compliance.

Examples of this data capacity are historically rare, generally supported by externally-funded and temporary projects, and limited to small samples in a select number of motivated jurisdictions.[6] What does exist shows an often piecemeal implementation of ICWA within jurisdictions: high identification of AI/AN children matched with low rates of referral to in-home services, qualified expert witnesses, available in some types of hearings but not others, tribal notification prior to TPR but not placement, and many other issues.[7] These issues can be addressed with time, but require continual monitoring. Isolated and voluntary CIP and one-off surveys do not provide the ability to formulate actionable priorities in the locations where this is most needed. Therefore, for jurisdictions that still have yet to implement the changes necessary to conform with regulations that have been in effect for over two years, those states should provide their data through AFCARS, not an alternative.

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.

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[5] Westat (2014). Understanding Urban Indians' Interactions with ACF Programs and Services: Literature Review OPRE Report 2014-41, Washington, DC: Office of Planning, Research and Evaluation, Administration for Children and Families, U.S. Department of Health and Human Services.

[6] Casey Family Programs (2015) A Research and Practice Brief: Measuring Compliance with the Indian Child Welfare Act.

[7] *Id.*

The regulations the NPRM seeks to eliminate 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—explain the critical nature 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 similarly demonstrated the need for quality national data to assess states' efforts in implementing ICWA. *See e.g.,* 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. It is therefore not prudent to rescind these regulations.

AI/AN advocates have relied on the Final Rule.

AI/AN advocates 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, AI/AN advocates, including tribes, largely ceased advocacy efforts to mandate data collection, instead refocusing resources toward working collaboratively with their governmental partners to implement the expected data elements. AI/AN advocates that 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, consistent with ACF's determination in its promulgation of the Final Rule in 2016, the benefits of this data collection far outweigh any potential burdens.

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 AI/AN 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 AI/AN children and families, we respectfully submit these comments.

Sincerely,

Francys Crevier
Executive Director

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Adoption and Foster Care Analysis and Reporting System

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GLBTQ Legal Advocates & Defenders (GLAD)

Submitter Information

Name: Patience Crozier
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Boston, MA,
Organization: GLBTQ Legal Advocates & Defenders (GLAD)

General Comment

See attached

Attachments

GLAD

LEGAL ADVOCATES & DEFENDERS
for the LGBTQ Community

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: Proposed rulemaking to remove sexual orientation data elements from the Adoption and Foster Care Analysis and Reporting System (AFCARS) (April 19, 2019) [RIN 0970-AC72].

Dear Ms. McHugh:

On behalf of GLBTQ Legal Advocates & Defenders (GLAD), please accept the following Comment regarding the Notice of Proposed Rulemaking at 84 Fed. Reg. 16572 ("NPRM") seeking to cut, among other things, data collection on sexual orientation for LGBTQ youth in the Adoption and Foster Care Analysis and Reporting System (AFCARS). **GLAD submits this Comment to express strong support for the retention of data collection elements involving sexual orientation.**

Founded in 1978, GLAD promotes justice and equality on the basis of sexual orientation, gender identity and expression, and HIV status in New England and nationally. GLAD's work has long centered on the rights of children and families, which are core to the stability and well-being of our communities. From ensuring that LGBTQ people can serve as foster parents and adopt on equal terms to securing children to their LGBTQ parents to working to empower and protect LGBTQ youth in child welfare systems, GLAD has a deep commitment to ensuring that public systems understand and meet the needs of LGBTQ children and families.

Data collection is critical to understanding and meeting the needs of children, particularly LGBTQ children, and the sexual orientation data elements must remain to ensure that LGBTQ children and their needs are visible.

Open and accessible data collection is critical. Data collection enables informed policy and cost savings, among other benefits.[1] Data collection is particularly important in the realm of child welfare where data are central to understanding children and families and to improving services and outcomes to best meet their needs. A core objective for all children in the custody of state and tribal welfare systems is safety, permanency, and well-being.[2] To this end, the Administration for Children and Families (ACF) requires the collection of data on children, using that data to inform services to meet those outcomes.[3]

Data collection on sexual orientation, as required by the 2016 AFCARS Final Rule, is a natural fit where the goals of data collection are understanding the needs of children and ensuring those needs are met. Every child has a sexual orientation, and normal and healthy human sexuality has many variations.[4] In fact, a key developmental task of adolescence is the development of personal identity, including sexual orientation.[5] It is simply common sense to collect data on a component of identity that is central to the development and experience of all children.

Data collection on sexual orientation is not only common-sense but is imperative to understanding the needs of LGBTQ children who are disproportionately represented in

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[1] See Impact, DATA.GOV, https://www.data.gov/impact/ (last visited June 14, 2019).
[2] Adoption and Safe Families Act, 42 U.S.C. § 1305, *et. seq.* (1997); see also Notice of Proposed Rulemaking, 84 Fed. Reg. 76 (proposed April 19, 2019) (to be codified at 45 C.F.R. pt. 1355).
[3] Notice of Proposed Rulemaking, 84 Fed. Reg. 76 at 16572.
[4] See American Psychological Association, Resolution on Appropriate Affirmative Responses to Sexual Orientation Distress and Change Efforts (2009), available at www.APA.org/About/Policy/Sexual-Orientation.pdf. Likewise, every child has a gender. Gender is understood on a continuum or spectrum, and transgender identity falls in that healthy spectrum of gender identities. See Stanley Vance, Diane Ehrensaft, & Stephen Rosenthal, Psychological and Medical Care of Gender Nonconforming Youth, 134 Pediatrics 1185 (2014). Although the AFCARS data elements do not currently include gender identity, such data collection is also critical to understanding the needs and experiences of transgender youth in the child welfare system.
[5] See Deborah Christie & Russell Viner, Adolescent Development, BMJ, 2005 Feb 5; 330(7486): 301–304 available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC548185/

child welfare systems.[6] LGBTQ children end up in out-of-home care at higher rates than non-LGBTQ youth due to, among other things, family rejection.[7] And, once in the child welfare system, they experience higher rates of discrimination and bias.[8] It is critically important to collect data on LGBTQ youth to better understand national trends and to develop policies and practices that both reduce their involvement in child welfare settings and improve their experience and outcomes once they are in the child welfare system.

Massachusetts provides one example of the need for federal data collection requirements for sexual orientation. According to the Massachusetts Youth Risk Behavior Survey, 15.2% of Massachusetts youth identify as LGBTQ.[9] This is a significant percentage of the youth population in Massachusetts. Further, the Massachusetts Department of Children and Families (MA DCF) found, in their 2017 Annual Progress and Services Report that "LGBTQ and transgender youth" are the population with the greatest risk for maltreatment in the system.[10] Despite the prevalence of LGBTQ youth and their vulnerability in state care, there is no comprehensive data published by DCF on LGBTQ youth in care. MA DCF mandates, as memorialized in their 2013 Diversity Plan, the tracking of affirming homes, but this mandate appears not to have been implemented. [11] MA DCF also began, in 2017, to collect data on sexual orientation and gender identity but the data fields had flaws.[12] Even in a state like Massachusetts, which has robust state law protections for LGBTQ youth and a youth commission created by statute designed to ensure support for LGBTQ youth throughout state government, the state child welfare agency has no comprehensive data on the

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[6] Studies point to an overrepresentation of LGBTQ youth in child welfare systems, with one study finding that 19% of youth in care identified as LGBTQ when LGBTQ youth represent only 4-10% of the general population. See https://youth.gov/youth-topics/lgbtq-youth/child-welfare.

[7] Jennifer Levi & Catherine Connors, Transgender Youth, Medical Professionals and the Law: What You Should Know, Adolescent Med.: St. of the Art Rev., Spring 2018, at 141.

[8] See id.

[9] See Summary of LGBTQ Data in 2020 Annual Report available at https://www.mass.gov/files/documents/2019/04/04/MA-Commission-on-LGBTQ-Youth-2020-Fact-Sheet.pdf

[10] Annual Progress and Services Report for FY 2017 at page 238.

[11] Massachusetts Commission on Lesbian, Gay, Bisexual, Transgender, Queer, and Questioning Youth. (2019). Massachusetts Commission on LGBTQ Youth: 2020 Report and Recommendations at 63. Retrieved from https://www.mass.gov/annual-recommendations.

[12] See id at 64.

experience of LGBTQ youth. While advocates and community members have anecdotal evidence of the issues LGBTQ youth in care face, because of a dearth of data, we lack what we need to comprehensively understand and systemically address their needs. Retaining sexual orientation as a required data element in AFCARS reporting is critical to supporting state efforts on data collection and ensuring resources are available to consistently and accurately collect data and train workers.

Collecting data on sexual orientation allows LGBTQ youth to be seen and counted. A host of leading institutions strongly stand behind data collection on LGBTQ youth in the child welfare system, including the American Bar Association, the American Academy of Pediatrics, and the Williams Institute.[13] Eliminating the collection of sexual orientation data would render LGBTQ youth and the disparities they face invisible, and that is unacceptable. To the extent that states need technical assistance on how to collect data and how to keep data confidential, then ACF should address those needs. Simply eliminating the data elements is not the answer and threatens to render LGBTQ youth second-class citizens in the child welfare system.

Conclusion

GLAD urges ACF to maintain the sexual orientation data collection elements unchanged. Comprehensive data collection – including data collection of sexual orientation and gender identity – is recognized best practice by the child welfare profession and beyond.[14] This data collection is already happening, with success, in other

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[13] See AMERICAN BAR ASSOCIATION, Comment on Proposed Rule to Streamline AFCARS Data Collection (April 19, 2019), https://www.regulations.gov/document?D=ACF-2018-0003-0191 ("The ABA strongly supports retaining all LGBTQ-related data elements…"); see also AMERICAN ACADEMY OF PEDIATRICS, Comment on Proposed Rule (April 19, 2019), https://www.regulations.gov/ document?D=ACF-2018-0003-0260 ("[q]uality child welfare data collection is crucial…." and "… effective and robust data collection tools are increasingly necessary"); see also THE WILLIAMS INSTITUTE, Comment on Proposed Rule (April 19, 2019), https://www.regulations.gov/document?D=ACF-2018-0003-0175 ("… we write to strongly request that [ACF, ACYF, and CB] maintain the current data elements in the [AFCARS Final Rule], including those related to sexual orientation, gender identity, and gender expression.").

[14] See 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

systems, including the juvenile justice system.[15] Not only is data collection critical to developing individualized case plans tailored to the needs of individual youth, but data collection is critical to understanding trends and needs nationally to inform policies and practices that will address and reduce disparities in services and outcomes. The 2016 AFCARS data elements relating to sexual orientation must be maintained.

Sincerely yours,

Patience Crozier, Esq.

[15] See National Standards to Prevent, Detect and Respond to Rape, 28 C.F.R. § 115 (2012).

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Voice For Adoption

Submitter Information

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Address:
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General Comment

See attached

Attachments

Voice For Adoption

Voice for Adoption

SPEAKING OUT FOR OUR NATION'S WAITING CHILDREN

June 18, 2019

Kathleen McHugh
U.S. Department of Health and Human Services
Administration for Children and Families
Director, Policy Division
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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:

On April 19, 2019, the US Department of Health and Human Services (HHS), Administration for Children Youth and Families (ACF), issued a Notice of Proposed Rule (NPRM) to amend the NPRM of the 2016 Adoption and Foster Care Analysis Reporting System (AFCARS) Final Rule (Final Rule). This is the Voice for Adoption's response.

VFA strongly suggests the Administration of Children and Families implement much needed data collection and move forward with the inclusion of certain data elements to be collected that will provide long overdue improvements in data and information. Needed data elements include first time data on the Indian Child Welfare Act (ICWA), education, and health care, with additional information on foster care placements, adoptions and guardianships.

It has been over 25 years since the inception of the AFCARS and this will be the first revision. It has taken over a quarter century to revise and hopefully implement these important AFCARS regulations; this revision must be looked at as both a critical and rare opportunity, that might not come around for another quarter of a century. This new AFCARS data offers an opportunity to inform how policies enacted in recent years regarding foster care placements, human trafficking, health care status, ICWA and most importantly implementation of the Family First Prevention Services Act is changing the outcomes of families and children. We strongly support maintaining the 2016 proposed enhancements to AFCARS—particularly as noted below—rather than scaling them back as currently proposed.

Longitudinale Data

While AFCARS point-in-time data is useful for the field, having more longitudinal data will certainly allow for a better understanding of a child's experience in care and provide invaluable

information for use in decision-making regarding policy and practice in child welfare. Longitudinal data tends to provide both clarity and quality when examining what a child's experience is in care and can be used to shed light on where new policies and practices may be needed. This change will enhance efforts to achieve improved outcomes for children and families.

Indian Child Welfare Act

Currently, there is little useful data collected at either the state or federal level related to American Indian and Alaska Native (AI/AN) children who are under the custody of state child welfare authorities. Native children are overrepresented in many state foster care systems—in some places by as much as 10 times the general population. The federal protections that ICWA provides these children and their families have the potential to help reduce disproportionality and achieve permanency. The federal protections that ICWA provides these children and their families have the potential to help reduce disproportionality and achieve permanency for more of these children.

We have had no national data collection specific to ICWA in the 35+ years since its enactment so these data elements are long overdue. The revised AFCARS rules will provide access to more detailed, case-level data at the federal level. By examining such data, we can improve technical assistance to states, allocate federal program resources more effectively, and help evaluate the extent to which states are working with tribes to successfully implement ICWA. This data collection will provide clarity about the implementation of ICWA and is necessary for quality enforcement of the law.

Sexual Orientation and Gender Identity

Several studies have shown that lesbian, gay, bisexual, transgender, and questioning (LGBTQ) children and youth are over-represented in foster care—in part due to their family's rejection of them. We also know that these children and youth may face bias in foster care and lack placements where their safety and dignity is assured. To address these core issues, it is critically important that we collect data on the sexual orientation of children and youth in care and determine how their outcomes differ from other children. (We recommend that data on gender identity be collected as well.)

The new Family First Prevention Services Act seeks to reduce and eliminate group home care. Too often the children and youth in these placements have had multiple placements. In some of these cases it is because of their LGBTQ identification. Data that indicates sexual orientation will begin to tell us the profile of the youth in care. We can use this data to better expand and inform our adoption strategies.

This data has great utility. It can be used to explore whether certain states' policies or practices are shaping the experiences LGBTQ youth are having and identify areas of attention for the federal government. It also provides clarity on these young people's experiences and how different state procedures may affect them.

In addition to the data on youth, we believe it is equally important to continue the 2016 data elements on foster and adoptive parents. An adult seeking to become an adoptive or foster parent has the skills to decide whether to respond to questions regarding sexual orientation. As an organization of adoption agencies, we know of the recent controversies to restrict recruitment practices based on LBGT families. We also know of the need to increase the qualified pool of parents. AFCARS represents the best national database of child welfare information carried out by all the states and regular AFCARS reports on the makeup of the adoptive families and where the shortages in each state will have a practical and important effect on future policies to expand the pool of adoptive families.

Other

We also believe that states and the federal government can benefit from collecting and analyzing data on health, behavioral or mental health conditions; prior adoptions; sibling placements; environment at removal and child and family circumstances at removal; foster family home type and other living arrangements; and location of living arrangements. Through this, we can determine if certain states are succeeding in ensuring safety, permanency, and well-being for children and how their successes can be replicated in other communities. Although we know that data collection has significant costs, the costs of not knowing what is happening in our child welfare systems is far greater. We are spending billions of dollars to care for and protect children and can learn much about what is working and where further policy and practice changes are needed.

Conclusion

Voice for Adoption appreciates the opportunity to submit these comments on the revisions of the 2016 AFCARS final rule. As we stated in the beginning, we feel this is a critical opportunity to amend the AFCARS data elements for the first time in 26 years. We want to make sure we take every opportunity to adjust this data in a way that will provide critical information that can better inform both policy and practice. We ask that HHS support fully implementation of the 2016 rule, rather than scaling back data collection as proposed.

Sincerely,

Schylar Baber, MPA
Executive Director, Voice for Adoption

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Youth Move National

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General Comment

See attached

Attachments

Youth Move National

YOUTH MOVE NATIONAL

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
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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 LGBTQ2S2S youth and prospective parents in the Adoption and Foster Care Analysis and Reporting System (AFCARS).

The collection of LGBTQ2S 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 LGBTQ2S 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 LGBTQ2S youth and prospective parents at continued risk of harassment and discrimination. We urge you to rescind the NPRM and proceed with the AFCARS 2016 Final Rule as promulgated.

We are a youth driven national membership organization representing youth and young adults with lived experience navigating and receiving services in the mental health, substance abuse, juvenile justice, and child welfare systems. Our name describes what we do, 'motivating others through voices of experience.' Our network speaks from lived experience in the system in order to improve the system for future youth and young adults.

Issues of importance to child welfare services and issues of importance to LGBTQ2S youth are important to Youth MOVE National as we represent a diverse network that includes a multitude of youth with both of these life experiences. Through our policy work, called What Helps What Harms, we heard from our network that it is "imperative that we recognize the uniqueness of youth culture and the various sub-cultures that youth identify with and represent. Chapters identified the need for more awareness, education, and support to assist providers in the field

on topics including, but not limited to, youth culture, race, and LGBTQ2S. Youth identified when providers lack the competence in understanding one's culture it can leave a young person feeling misunderstood, stigmatized and judged, resulting in disengagement."

Our organizational rally cry has been 'nothing about us without us' from our inception 10 years ago. A core concept in this rally is the authentic idenditifcation and acceptance of who we are, as young people with lived experience in services, and many of us LGBTQ2S youth.

We are concerned about the lack of federal data specific to LGBTQ2S youth in foster care and to further eliminate or narrow the data that is available would bring further disadvantage to these youth. This population of young people face disproportionate hardship and the collective of data specific to their experiences is the foundation on which we can build improved and effective responses to reduce these disparities.

Youth MOVE National is apart of pilot projects that are currently administering effective and safe data collection around sexual orientation and gender identiy and expression. The concerns expressed otherwise, which are not supported by empirical evidence, cause more harm than good. Seeking out this information, via organized data collection, VALIDATES, rather than minimizes the youth receiving care. There are many examples of broad data collection of SOGI information that can be referenced for process, training, and safety in data collection, across the social work field, in education and in juvenile justice settings.

Young people across our network have suffered from the shortage of foster homes. In order to build more effective supports for youth, especially those who identify as LGBTQ2S, identification of LGBTQ2S adults who are interested in creating families through foster care and adoption should be prioritized. We request that the sexual orientation question for adoptive and foster parents and guardians be retained.

The Children's Bureau should collect gender identity and sexual orientation data in the same stream of other data collection to ensure effiency in the system, while also bringing this valuable data to light. This data can be used to develop a streamlined service array that does not leave LGBTQ2S youth to fall through the cracks. This data will also be valuable in the development of new programs developed with Family First funding.

We strongly oppose the elimination of the collection of sexual orientation information for youth and adults. Without the data in the 2016 AFCARS Final Rule there is not national data on LGBT foster youth or prospective parents. We welcome the opportunity to work with ACF to assist the implementation of these important reforms.

Sincerely,

Youth MOVE National

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National Center for Youth Law

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General Comment

See attached

Attachments

National Center for Youth Law

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June 18, 2019

Kathleen McHugh
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330 C Street SW, Washington, DC 20024

Re: Response to Request for Public Comments on Proposed Deletion of the Juvenile Justice, Educational Stability, and Transition Planning Elements of the Adoption and Foster Care Analysis and Reporting System (AFCARS) (RIN 0970-AC72)

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 Center for Youth Law (NCYL) submits these comments expressing strong support of the **juvenile justice involvement, educational stability** and **transition planning** data elements of the AFCARS Final Rule issued in 2016.

NCYL is a non-profit organization with offices in Oakland, CA, Phoenix, AZ and Washington, DC. NCYL staff have worked for more than four decades to improve the lives of disadvantaged children and youth. NCYL leads campaigns, weaving together research, public awareness, policy development, technical assistance and litigation to ensure governmental systems provide the support these children and youth need to thrive.

Juvenile Justice Involvement Data Element (current 45 C.F.R. § 1355.44(f)(5)).

The data element relating to juvenile justice involvement should be retained in AFCARS because it is a basic and critical data element that ultimately allows for child welfare agencies to effectively serve "dual status" youth, who are involved in both out-of-home care and the juvenile justice system.

Over the past decade, ACF has acknowledged the critical importance of collecting this data element while it continually took steps to reduce the burden of collecting the data. There is nothing in the materials received in the ANPRM that draws this conclusion into question.

ACF first acknowledged the importance of adding a juvenile justice data element in its 2008 NPRM. It explained that it "believe[d], as do many stakeholders who provided comments and consultation to us,

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that it is important to understand more about young people in out-of-home care who are involved with the juvenile justice system." 73 Fed. Reg. 2081, 2108 (Jan. 11, 2008). ACF reported that it had "heard through a variety of sources, including the CFSRs, that it is important to clarify the characteristics of the reporting population so that we can analyze potential differences in the experiences of children involved in the juvenile justice system versus those who are not." *Id*. "Additionally," ACF explained, "States indicate that they have experienced a marked increase in the number of juvenile justice-involved children in their child welfare systems. This new data element will allow us to establish those numbers and determine whether or not juvenile justice-involved children have different experiences than other children in out-of-home care." *Id*. at 2108-2109. ACF concluded that this data element "will assist States and the Federal government to understand the experiences of children who are dually involved in out-of-home care and juvenile justice, which in turn, will help States in their program improvement efforts to better serve such children." *Id*. at 2109.

At the time, ACF "considered whether to require States to provide more detail about a child's juvenile justice involvement, such as whether the youth was on probation, through several new elements." *Id*. But, cognizant of burden, it "settled on this one data element which will tell us what we believe is the most critical concern, which is whether the youth who is in out-of-home care is involved with the juvenile justice system because he/she committed or is alleged to have committed a juvenile offense." *Id*.

In its 2015 NPRM, summarizing the comments it received to the 2008 NPRM, ACF stated that "commenters did support collecting information on children in foster care who also are involved with the juvenile justice system." 80 Fed. Reg. 7131, 7135 (Feb. 9, 2015). More specifically, ACF "received many supportive comments to the 2008 NPRM to require reporting information on a child's juvenile justice involvement." *Id*. at 7175. ACF likewise concluded that this data was "important to understand more about children in foster care who are also involved in the juvenile justice system" and would permit ACF "to analyze the overlap between the juvenile justice and child welfare systems." *Id*.

Commenters in 2008, however "expressed concern in reporting alleged offenses and delinquencies stating that it could provide misleading data." *Id*. In response to this concern, ACF proposed "to require that the title IV-E agency report the child's involvement with the juvenile justice system only if a judge or court found the child to be a status offender or delinquent." *Id*.

In the preamble accompanying the 2016 final regulations, ACF again narrowed the data element in response to comments. Four states had concerns about their child welfare agency staff distinguishing between those "adjudicated delinquent" and "status offenders." 81 Fed. Reg. 90,524, 90,555 (Dec. 14, 2016). ACF explained that it was "persuaded by the commenters" and that it "revised the data element to require title IV-E agencies to report yes/no whether or not a court found the child to be a status offender or adjudicated delinquent, no longer requiring the agency to distinguish between the two." *Id*.

Having repeatedly decided that the data element would result in the collection of important data, ACF is obliged to acknowledge it is changing its position and must give a reasoned explanation for doing so. *See FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515-16 (2009). The NPRM fails to do so. ACF now claims that the juvenile justice involvement data element (as well as five others) should be removed "because the information is too detailed or qualitative for a national data set, it may be inaccurately reported and therefore would be difficult to portray in a meaningful way and it does not have a specific

purpose for title IV-B/IV-E statute and program monitoring, Congressional reporting, or budgeting." 84 Fed. Reg. 16,572, 16,576 (April 19, 2019). But none of those generic rationales hold true for the juvenile justice involvement data element.

Although many of the 36 states filing comments in response to the 2018 ANPRM objected to particular data elements, 86% of those states did not identify or specifically object to the juvenile justice involvement data element. Of those states that did, one (Illinois) described the effort and expense of adding the juvenile justice data element as "moderate" and did not opposed its remaining in AFCARS because it a saw sufficient likelihood that it would "improve casework, add deeper understanding to a problem and contribute to improve service and outcome.".[1] One state (Oklahoma) objected to the addition of the data element even as it acknowledged that the state "has the ability to capture a delinquent adjudication" in its data system.[2] Two other states (Missouri and Wisconsin) made conclusory assertions that the juvenile justice involvement data element would be burdensome to them on the basis of added costs and staff time. By contrast, California noted that its "experience" with data elements that require "reporting court findings," such as juvenile justice involvement, was that "any burden of such reporting is outweighed by the benefit."[3]

There is nothing in the comments received that supports the rationales articulated in the NPRM for removing this element. Nothing in the comments indicates that the juvenile justice involvement data element is too detailed or qualitative (it is a single yes/no question based on judge or court order). Nothing in the comments indicates that the juvenile justice involvement date element may be inaccurately reported.

Additionally, the juvenile justice involvement data element has a specific purpose for statute and program monitoring and budgeting. Dual status youth are young people who have had involvement in both the child welfare and juvenile justice systems. Research suggests that as many as 50% of youth referred to juvenile courts have had dual system involvement.[4] Without proactive support and interventions by the state, which provides care and supervision to these youth, dual status youth face tragic outcomes with respect to their education,[5] mental health[6] and employment.[7] Based on this research and the realities that child welfare and probation professionals see on the ground, local jurisdictions have crafted thoughtful partnerships over the years to ensure the agencies share information, collect data and coordinate services such that these young people receive adequate support that steer them away from negative outcomes such as homelessness, school drop-out, unemployment, or adult criminal justice involvement.

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[1] https://www.regulations.gov/document?D=ACF-2018-0003-0197
[2] https://www.regulations.gov/document?D=ACF-2018-0003-0074
[3] https://www.regulations.gov/document?D=ACF-2018-0003-0016
[4] Thomas, D. (Ed.). (2015). When Systems Collaborate: How Three Jurisdictions Improved Their Handling of Dual Status Cases. Pittsburgh, PA: National Center for Juvenile Justice. *Available at* http://www.ncjj.org/pdf/Juvenile%20Justice%20Geography,%20Policy,%20Practice%20and%20Statistics%202015/WhenSystemsCollaborateJJGPSCaseStudyFinal042015.pdf.
[5] Helemba, G. et al. (2004). Arizona Dual Jurisdiction Study: Final Report. *Available at* http://www.ncjj.org/pdf/azdual_juri.pdf.
[6] Herz, D. C., & Ryan, J. P. (2008). Exploring the characteristics and outcomes of 241.1 youths in Los Angeles County. San Francisco, CA: California Courts, The Administrative Office of the Courts.
[7] California Child Welfare Co-Investment Partnership. (Winter 2016). Crossover Youth: A Shared Responsibility. *Available at* http://co-invest.exedor.us/wp-content/uploads/insights_volume10-1.pdf.

Congress already requires states to share data between the juvenile justice and child welfare systems, thus reducing any burden this element might impose. The Juvenile Justice and Delinquency Prevention Program requires each state to have a system in place "to ensure that if a juvenile is before a court in the juvenile justice system, public child welfare records (including child protective services records) relating to such juvenile that are on file in the geographical area under the jurisdiction of such court will be made known to such court, so as to provide for-- … data in child abuse or neglect reports relating to juveniles entering the juvenile justice system with a prior reported history of arrest, court intake, probation and parole, juvenile detention, and corrections."[8]
In addition, in recognition of the difficult challenges that dual status youth face, and realizing that more national data must exist to help inform adequate services for this vulnerable population, lawmakers have recently called for state agencies to engage in greater data collection and cooperation regarding dual status youth. The CONNECT Act (S. 1465) – bipartisan legislation reintroduced in May 2019 by Senators Chuck Grassley and Gary Peters – would require the Department of Health and Human Services to administer grants to local and state child welfare and probation agencies in order to serve this population more effectively. Maintaining the AFCARS juvenile justice involvement data element is directly in line with the rationale behind this bipartisan bill.

Removal of the juvenile justice involvement data element from AFCARS would be a step backward relative to the local, state and national trends toward collecting more standardized data about dual status youth, who are a uniquely vulnerable group of children, such that these youth are identified and provided much-needed services. We urge you to retain the data element in AFCARS.

Educational Stability Data Element (current 45 C.F.R. § 1355.44(b)(16)).

As NCYL has already stated in its comment in response to the Spring 2018 ANPRM regarding AFCARS,[9] it is imperative that the reporting system include a comprehensive list of elements relating to education. The data element relating to educational stability should be retained as it is critical to measure effective implementation of federal child welfare and education law.

For example:

- 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. Since 2008, many state and county agencies have improved their policies and practices to support school stability.

- The *Every Student Succeeds Act* (ESSA) further reinforces Fostering Connections by promoting, among other things, school stability and interagency data sharing related to students in foster care. For the first time, state departments of education are required to report on the educational performance of students in foster care in the SEA Report Card. These two data collection sources

[8] 34 U.S.C. § 11133(a)(26).
[9] https://www.regulations.gov/document?D=ACF-2018-0003-0182

– 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.

Without AFCARS including this crucial data point related to education stability, it will be nearly impossible to measure progress and trends or gauge effectiveness of policies and practices established under Fostering Connections and ESSA. 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.

Little national data about the education of children in foster care currently exists to fill the gap, were AFCARS to exclude the educational stability data element. AFCARS is the most effective way to collect educational stability data because it allows for straightforward, quantitative reporting of how often children change schools and the reason. No other vehicle is better suited to tracking this type of data on a national scale. 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.

Although educational information was not part of AFCARS before the 2016 Final Rule, educational information about school stability is already being collected by states under Fostering Connections and should not create an unnecessary burden for child welfare professionals. Documenting whether and why children have moved school placements is required by the Fostering Connections Act as part of the child's case plan. As such, reporting should not create an additional burden, and will allow for better analysis of the school stability-related challenges students in foster care face. Although qualitative review or case study regarding school stability is important, it does not preclude the need for quantitative data. Research on the outcomes of students in foster care overwhelmingly shows increased attention to their educational issues is critical – and that students with high school mobility face many additional educational challenges.

Importantly, the updated requirements in the 2016 Final Rule represent a shift away from "point-in-time" data toward a more longitudinal data approach that will help agencies address children and families' needs more effectively. 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. Any claims of cost burdens by states are overstated, as all states will expend these costs to update their systems regardless. AFCARS allows these updates to have a finite number of data elements that are universal across states and are necessary to identify trends and continue improving our child welfare system responses.

The education data elements included in the AFCARS 2016 Final Rule have already been open for extensive public comment and debate. The Final Rule was the end result of identifying a finite number of basic education data elements that will yield critical national level data. The new data collection requirements were thoughtfully considered and seek to ensure child welfare agencies are gathering data on key 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 outcomes.

Transition Planning Data Elements (current 45 C.F.R. §§ 1355.44(f)(8), (9)).

Finally, AFCARS should retain the data elements related to transition planning. Omitting these elements will harm transition age youth in the child welfare system who already face multiple challenges.

The transition planning requirement has been in federal law since 2008 when *Fostering Connections* was adopted. This key component of child welfare law ensures that youth are supported in their transition to adulthood, beginning with planning at age 14 and continuing, alongside permanency planning, until the youth leaves the system. *See* 42 U.S.C. § 675(1)(D). Recent data reveals that states continue to struggle to meet the needs of transition age youth. During the last decade, we have made few gains in improving permanency outcomes for older youth.[10] Moreover, large numbers of youth are not receiving the transition services mandated by law. For example, nationally, only 23% of transition age youth in foster care received transition services related to employment and vocational training, and financial assistance.[11] Only 36% received assistance with budget and financial management, and 22% received mentoring services.[12] The adult outcomes for youth leaving foster care in comparison to their peers continue to show that we are not supporting them as we should to make a successful transition.

Including the 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 also serves as a key catalyst for improving the provision of services to youth in accordance with legal requirements. It is argued that this information is not necessary to be included in AFCARS because it is covered in NYTD. While NYTD is a rich source of data, it has various limitations. Not only is NYTD a voluntary survey that young people complete, it only covers a portion of the transition age youth child welfare population. While NYTD does ask young people very important questions about service receipt and outcomes, it does not ask about transition planning and the planning process.

Moreover, contrary to the NPRM, these data elements are not "too detailed or qualitative for a national data set." Rather, the Rule proposes to collect very basic information that verifies that a transition plan has been developed consistent with the case planning requirements as set forth in federal law. This is an important accountability measure that is a decade overdue and will provide valuable information at the state and national level related to meeting the needs of older youth who desperately desire and are entitled to transition planning services.

Importantly, the cost of collecting this data is minimal as transition planning is a pre-existing requirement that is part of case planning processes. By contrast, the financial cost to individuals and communities of failing to prepare youth for adulthood is substantial. The Annie E. Casey Foundation reports that "closing the gaps in education, housing, early parenting and juvenile justice outcomes [between youth in the foster care system and their peers] would reduce costs to society by $4.1 billion for each new group of young people aging out of foster care."[13] Any minimal cost associated with collecting this data is far outweighed by the benefit to young people and society in general as collecting

[10] Rosenberg, R. et al. (2019). Older Youth Need Support Transitioning from Foster Care to Adulthood. *Available at* https://www.childtrends.org/publications/fact-sheet-older-youth-need-support-transitioning-from-foster-care-to-adulthood.
[11] *Id.*
[12] Annie E. Casey Foundation (October 2018). Youth Transitioning Out of Foster Care: Received John H. Chafee Foster Care Independence Program Services in the United States. *Available at* https://datacenter.kidscount.org/data/tables/10219-youth-transitioning-out-of-foster-care-received-john-h-chafee-foster-care-independence-program-services?loc=1&loct=1#detailed/1/any/false/1447/6294,6295,6296,6297,6298,6299,6300,6301,6302,6303,6304/19772,19773
[13] Annie E. Casey Foundation (2019). Future Savings: The Economic Potential of Successful Transitions from Foster Care to Adulthood. *Available at* https://www.aecf.org/m/resourcedoc/aecf-futuresavings-2019.pdf#page=5.

such data will inform and improve how we serve and support transition age youth. Accordingly, we strongly support retaining the transition plan data element is a core accountability measure that will help states improve the educational and life outcomes of older youth in foster care.

Conclusion

NCYL supports the inclusion of the juvenile justice involvement, education stability and transition planning data elements in AFCARS as set out in the 2016 Final Rule. We encourage you to maintain these data elements, which are critical to monitoring implementation of federal law, addressing current areas of weakness in data collection and reporting, and ensuring the safety, permanency, and well-being of all children in foster care.

Thank you,

Jesse Hahnel
Executive Director
National Center for Youth Law

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General Comment

See attached

Attachments

UCLA Williams Institute

UCLA School of Law Williams Institute

The Williams Institute
On Sexual Orientation and Gender Identity
Law and Public Policy

June 18, 2019

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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). We are writing to urge the U.S. Department of Health and Human Services, Administration for Children and Families ("ACF"), Administration on Children Youth and Families ("ACYF"), Children's Bureau ("Children's Bureau") to maintain the current data elements in the December 14, 2016 AFCARS Final Rule ("Final Rule"), including those related to sexual orientation, gender identity, and gender expression.

The undersigned are academics who have published extensively on sexual orientation and gender identity including on issues related to youth in out-of-home care. We represent various disciplines—social work, community psychology, demography, economics, law, medicine, public health, political science, public policy, psychology, and social epidemiology. Many of the undersigned are scholars at or affiliated with the Williams Institute, an academic research center at UCLA School of Law dedicated to conducting rigorous and independent research on sexual orientation and gender identity. Scholars at the Williams Institute were the first to publish a study documenting the high levels of overrepresentation of LGBT foster youth in child welfare, using data collected through traditional survey research methods. Here, we are joined by many of our colleagues from other universities who have directly studied the experiences of youth in out-of-home care.

We have detailed research on LGBTQ youth in out-of-home care in previous comments that we have submitted on this issue. The gist is this - what we have learned from our scientific research in this area is that LGBTQ (also known as sexual and gender minority) youth:

- are overrepresented in the system of child welfare, in that there are two times as many LGBTQ youth in foster care as in the general population[1–4];
- are experiencing disparities and negative outcomes, including higher rates of homelessness and being moved around more to different placements [1,5–7];
- show higher rates of psychological distress [1,3,6];
- are more likely to be victimized by their peers in school [6]; and
- report that they are treated less well in the child welfare system [1]

The evidence of LGBTQ youth disproportionality and disparities in the child welfare system is known and undisputed. Yet, this information comes from specific researcher-initiated studies. No nationwide longitudinal data exist that allow child welfare administrations to assess outcomes for LGBTQ youth overtime and across localities. Given this, it is critical that the federal government have a structure in place for tracking whether it has improved in fulfilling its promise to support the wellbeing of children and youth in its care. We cannot track improvements in or problems with home removals, placements and permanency outcomes among sexual and gender minority youth nationwide without knowing who they are.

A. 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 are too sensitive.

The child welfare profession has acknowledged the importance of collecting SOGIE information about children, along with other critical information about a 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.[1] More and more state and local child welfare and juvenile justice agencies, as well as 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. In a preliminary study conducted at the Williams Institute designed to assess the feasibility of asking sexual orientation and gender identity questions for youth in foster care in Los Angeles, foster youth were asked how they felt about being surveyed with questions about their sexual orientation and gender identity. Overall, youth indicated they had no problems answering these questions [10]. In particular, one 15 year old

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

girl living in a residential facility for youth in out-of-home care who identified as bisexual said very poignantly to the first signatory that she didn't care if we asked her about her sexuality, "just don't ask me about why I got put in foster care." In other words, child welfare workers are used to asking and youth consistently feel they have to answer questions that are often seen as more personal than one's sexual and gender identity labels. And yet, we expect that the system is trained to ask this variety of sensitive questions in order to meet the service needs of the youth in their care.

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.

B. Detailed SOGIE data are needed to implement existing policies, including the Family First Prevention Services Act, and AFCARS is the best means for the collection of this data.

We recommend that the data elements in the Final Rule be retained and not further streamlined. The 2016 Final Rule represents a "streamlining" of the original proposed rule (2015 NPRM and 2016 SNPRM) and the burdens identified by commenters were addressed in the Final Rule. Over the years, 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 taking a data-driven approach to informing state and federal policy resulting in improved outcomes for some of the most marginalized children in the child welfare system and reduced systemic costs.

Because AFCARS has not been updated since 1993, data elements added in the Final Rule reflect significant advances in child welfare policy and practice and include statutorily required data from the *Preventing Sex Trafficking and Strengthening Families Act* (P.L. 110-351) and changes in foster care services and oversight in the *Fostering Connections to Success and Increasing Adoptions Act of 2008* (P.L.110-351), and the *Child and Family Services Improvement and Innovation Act* (P.L. 112-34). Critically, the Final Rule will also provide data to ensure implementation and oversight of the *Indian Child Welfare Act* (P.L. 95-608), improving outcomes for tribal youth. The burden on states of implementing new data element collection will be reduced with the current development of the new Comprehensive Child Welfare Information System (CCWIS), and many of the data elements will assist states in implementing the recently passed *Family First Prevention Services Act* (FFPSA).

In particular, to implement the FFPSA, states will need to properly allocate resources and provide the appropriate evidence-based services, which therefore require a deeper understanding of the needs of youth at risk of entering care. LGBTQ youth are one of these vulnerable groups and are likely to be a significant target population in response to this new federal policy due to their disproportionate representation in the system. Capturing SOGIE data will allow states to better understand the needs of LGBTQ youth and, thus, to provide targeted prevention services to keep them out of foster care. Though AFCARS is not the only way to identify the sexual orientation and gender identity of foster youth, it is the most efficient and comprehensive approach to do so. Although there is of course a cost associated with training and collecting the information, this cost is nothing like the cost associated with launching an endless series of individual studies in every child welfare jurisdiction over time. For reference, the cost of

the Los Angeles Foster Youth Study was approximately $350,000 – this was a rigorous randomized study that is generalizable to the foster youth population, and yet only sampled a little less than 800 youth within one 3-month interval one time in one county in the country. Repeating this approach for all child welfare administrations, and then building in a longitudinal study design to assess for changes among individual youth in the system would far exceed any estimate of the cost associated with the Final Rule and be far less effective.

C. The Data Elements in the Final Rule Reflect a Now Longstanding History of Collecting Data in Sexual Orientation, Gender Identity and Gender Expression

The proposed data elements specific to sexual orientation, gender identity, and gender expression also represent advances in science over the last 25 years in which the feasibility and accuracy of data collection on these topics have been consistently demonstrated. Indeed, as the SMART report explained, "[s]exual orientation questions have been asked on large-scale school-based surveys of adolescents around the world since the mid-1980s." [11] For example, the Bureau of Justice Statistics' National Survey of Youth in Custody (NSYC) includes a measure of sexual orientation and has provided a wealth of important information about disproportionate incarceration and victimization of sexual minority youth in custody [12]. The CDC's National Youth Risk Behavior Risk Survey successfully includes respondents as young as 13 and has included sexual orientation measures since 2015. In 2015, more than 15,500 youth from across the country filled out the YRBS survey on their own, anonymously at school [13]. Even before that, an increasing number of jurisdictions included sexual orientation measures on their YRBSs since the mid-1990s[14]. The National Longitudinal Study of Adolescent to Adult Health (Add Health), a longitudinal study of a nationally representative sample of adolescents in grades 7-12 in the United States during the 1994-1995 school year, included sexual orientation attraction and partner gender questions in both the baseline wave and Wave II (1996), when respondents were largely below the age of 18. Analysis of Add Health data has indicated, for example, disparities in experiences of violence among adolescents reporting same-sex, both-sex, and other-sex romantic attraction. The National Survey of Family Growth (NSFG), which includes respondents as young as 15, has included a sexual orientation behavior measure for many years [15]. The California Health Interview Survey has asked youth about their gender expression since 2015 [14]. There are now also examples of surveys and studies that have successfully collected sexual orientation and gender identity data from youth in the child welfare system including the L.A. Foster Youth Study (which included adolescents as young as 12) and the National Survey of Child and Adolescent Wellbeing. Each of the surveys and studies provides invaluable information about sexual and gender minority youth that have impacted policy making and programming in a variety of settings.

And while the feasibility to do this has been demonstrated, there is still too little representative data about sexual and gender minorities available, and numerous scholars and state and federal data science representatives have called to increase the data. For this reason, the Federal Interagency Working Group on Improving Measurement of Sexual Orientation and Gender Identity in Federal Surveys has cogently explained that "there remains a lack of data on the characteristics and well-being" of SGM populations, and that "[i]n order to understand the diverse need of SGM populations, *more representative and better quality data need to be collected*." [16]. Without such data, public policymakers, law enforcement agencies, and service providers—including federal agencies tasked with promoting the security and well-being of our nation's people—are hindered in their efforts to adequately serve SGM populations, including LGBT youth. This is no less the case for the child welfare system and the administrative data collected to better understand children's demographics, needs, and outcomes.

The currently proposed removal of the SOGIE data elements suggests that a problem with asking these questions is that some youth may not disclose their sexual and gender minority identities. This is, of course, possible. But the potential for an underestimate of LGBTQ youth due to concerns about discrimination and stigma only underscores the significance of collecting these data. While some youth may not disclose, many will (approximately 20% of foster youth reported being LGBTQ across multiple studies) and understanding their experiences and outcomes in out-of-home care could be used to improve conditions that make it possible for other youth to disclose their SGM status when asked. Data collection is not perfect – we have seen how the methods used by child welfare administrations to collect the racial and ethnic identities of youth and their families do not match the way youth describe their own racial identities when asked directly [2,10]. And yet, knowing this does not prevent the tracking of race and ethnicity of youth in out-of-home care nor its use as the primary data element upon which the field makes claims about how well it is addressing racial disparities in foster care.

D. The Children's Bureau Should Retain the Voluntary Sexual Orientation Question for Adoptive and Foster Parents and Guardians.

In its April 2011 guidance, ACF confirmed that "LGBT parents should be considered among the available options for states and jurisdictions to provide timely and safe placement of children in need of foster or adoptive homes." Almost forty years of research has overwhelmingly concluded that children raised by same-sex couples are just as healthy, socially adjusted, and psychologically fit as children with heterosexual parents [17]. Recruitment of LGBTQ families could provide a source of affirming and supportive homes for LGBTQ foster youth.

The LGBTQ community is a significant untapped resource in the effort to find permanent families for all children and youth in foster care. Data from the 2016 American Community Survey showed that one in five same-sex couples (21.4%) are raising adopted children compared to just 3% of different-sex couples, and 2.9% of same-sex couples have foster children compared to 0.4% of different-sex couples [18]. Data resulting from the voluntary sexual orientation question for adoptive and foster parents and guardians will likely help states and tribes recruit and support LGBTQ caregivers, increasing the pool of available homes for foster children, and help identify states and agencies which can do better in the recruitment of LGBTQ resource families.

E. The Children's Bureau Should Add Voluntary Gender Identity Questions for Foster Youth Over the Age of 14 and Foster and Adoptive Parents and Guardians Because this Information is Important and it is Efficient to Collect this Information Along with Current Data Elements.

Youth who are transgender and or gender nonconforming specifically have a difficult time in child welfare systems [5,19,20]. 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 adding these data elements now in conjunction with the new Comprehensive Child Welfare Information System (CCWIS).

F. *Conclusion*

In the Final Rule, the Children's Bureau summarized its well-supported rationale for collecting information regarding the sexual orientation of youth. The Final Rule stated that "[i]nformation on sexual orientation should be obtained and maintained in a manner that reflects respectful treatment, sensitivity, and confidentiality." Additionally, the rule directed agencies to guidance and recommended practices developed by "state and county agencies, advocacy organizations and human rights organizations." It is concerning that the proposal to abandon these data elements offers no alternative solution for meeting this already identified need. Revising AFCARS to include these data elements along with providing resources to train administrators in the system to collect the information is the only comprehensive and accurate method to do this in a way that allows the government to know when initiatives designed to improve prevention, care and permanency services for this population are actually working.

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

Sincerely,

Bianca D.M. Wilson, Ph.D., Rabbi Barbara Zacky Senior Scholar of Public Policy, UCLA Williams Institute

The following have also signed on to the letter as written:

Jocelyn Samuels, JD, Executive Director, UCLA Williams Institute

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American Psychological Association

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General Comment

See attached

Attachments

American Psychological Association

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June 18, 2019

Jerry Milner, D.S.W.
Associate Commissioner, Children's Bureau
Administration for Children and Families
330 C St SW,
Washington, DC 20201

Dear Dr. Milner:

The American Psychological Association (APA) appreciates the opportunity to provide comments regarding the Children's Bureau's proposed changes to the Adoption and Foster Care Analysis and Reporting System (AFCARS).

APA is the leading scientific and professional organization representing psychology in the United States, with more than 118,000 researchers, educators, clinicians, consultants, and students as its members. APA's mission is to advance the creation, communication, and application of psychological knowledge to benefit society and improve people's lives. Psychologists provide care to countless children and families, including those in foster care and other out of home care placements. AFCARS data is a vital tool to assess and identify systemic challenges within the child welfare system.

As an organization representing psychological scientists, with expertise in child development, APA values AFCARS as a federal data set to capture trends in child welfare and enable the development of policy improvements to better serve children, families, and communities. APA supports the advancement of evidence-based public policies. We are therefore sympathetic to the Children's Bureaus need to balance the concerns of title IV-E reporting agencies with the benefit of more comprehensive national statistics and trends within foster care and adoption populations, in order to produce accurate and reliable information.

Prior to the final rule approved in 2016, AFCARS had not been updated since 1993. The 2016 final rule reflected more than two decades of advances in child welfare practices and systems. The NPRM issued in April of 2019 would eliminate several vital data elements, many of which relate to especially vulnerable populations of children, including sexual and gender minority (SGM) youth and American Indian/Alaska Native children. National data reflecting the aggregate experiences of these populations within the child welfare system is essential to addressing disparities and improving outcomes. APA urges the Children's Bureau to include the approved data elements related to AI/AN children and SGM children the AFCARS final rule.

We offer the following recommendations regarding priority data elements in AFCARS.

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Data Elements on Sexual and Gender Minority Youth and Parents are Essential
Accurate and reliable sexual orientation and gender identity data collection is essential to enable measurement of the health and well-being of sexual and gender minorities (SGM) across the lifespan and in a wide variety of settings. In 2011, the National Academy of Medicine recommended sexual orientation and agender identity (SOGI) data be included in all data collections administered by Department of Health and Human Services, a recommendation that would apply to children in the child welfare system, as well as foster parents and adoptive parents.[i] APA has a strong history of advocating for the inclusion of SOGI data in all federal data sets, and in 2016, APA adopted a resolution in support of federal SOGI data collection.[ii]

Recent studies, including the Los Angeles Foster Youth Survey, as funded by the Administration of Children and Family's own Permanency Innovations Initiative, have found a disproportionality of sexual and gender minority youth in foster care relative to estimates of the general population, and concerning disparities in experiences and outcomes.[iii] SGM youth in the foster system are more likely to face discrimination in care settings, experience a higher number of temporary placements, have poorer physical and mental health outcomes, and are at higher risk for homelessness.[iv] AFCARS is an important means of expanding our understanding of the experiences of SGM youth in child welfare settings and developing interventions to improve outcomes.

Retain data element on removal circumstance related to a child's sexual and gender minority status
APA was pleased to see that the proposed rule would retain the data element on instances when the reasons for removal of a child from their family home includes conflict related to the child's sexual orientation, gender identity, or gender expression. APA supports the continued inclusion of this element. Once implemented, this data element will provide critical information about the prevalence of children entering foster care whose sexual orientation or gender identity was a source of family conflict and who may benefit from additional support to cope with related emotional distress or trauma. Unfortunately, in order to best serve sexual and gender minority youth in the child welfare system, this element alone will not be sufficient. The presence of a family conflict related to a child's real or perceived SGM status does not provide an accurate picture of how youth identify themselves.

Reinstate data element on youth sexual orientation and expand to include self-reported gender identity
APA strongly recommends that the Children's Bureau include a voluntary self-report data element on the sexual orientation of adolescent youth in the new AFCARS final rule. Further, we urge the Children's Bureau to expand upon the data element approved in the 2016 final rule to include youth-reported gender identity as well.

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According to the NPRM released in April, some states have expressed concerns about safely collecting sexual orientation data from youth. However, case workers already collect data about information that is highly personal, such as sexual abuse backgrounds, mental health diagnoses and medications. Sexual orientation and gender identity (SOGI) questions should not be handled any differently from the sort of sensitive information case workers have been collecting and managing for decades. Best practices for SOGI survey questions have been established by the Sexual Minority Assessment Research Team (SMART), as well as the San Francisco Department of Public Health.[v] [vi] Even more specifically, 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, including personal privacy, within child welfare systems.[vii]

Without including youth SOGI data in AFCARS, there is no current vehicle to produce a national data set specific to SGM youth in foster care or who have been adopted through title IV-E services. Even without this data, researchers have overcome barriers to discover what we currently know about this at-risk population of youth, and the discrimination and barriers they face. The troubling findings of over-representation in the Child Welfare System speak to the urgent need for a national data set to more comprehensively evaluate how SGM youth fair across the child welfare system and inform evidence-based policy and practices to improve long term outcomes.

Reinstate data elements regarding sexual and gender minority foster and adoptive parents

The proposed rules would remove data elements related to sexual orientation and gender identity of foster and adoptive parents. APA recommends that these data elements be retained as written in the November 2016 final rule. It has long been a goal of the Children's Bureau to find safe, supportive, and permanent homes for children in foster care. Unfortunately, this can be especially difficult for SGM youth as they face additional barriers to long term placements and permanency.[viii] Recent studies have found that SGM youth are more likely to experience challenges, such as harassment or bullying, in congregate care settings and to move through multiple placements. SGM youth are more likely face discrimination and ultimately to age out of the system without a permanent placement.[ix]

The self-identified sexual orientation of prospective foster and adoptive parents can play an important role in matching children to affirming placements and permanent homes. Accepting, affirming placements are especially important for children who have previously experienced rejection from their families related to their sexual orientation or gender identity, especially given that research shows that children raised by same-sex couples are indistinguishable in their psychological adjustment[x], emotional[xi] and physical health[xii,xiii], and social functioning[xiv] to children of heterosexual partners.

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.[xv] Yet, SGM adults who wish to be foster parents or to adopt children often face discrimination, exacerbated by unclear state adoption laws, or legislation that enables agencies to prohibit sexual and gender minorities from adopting children [xvi] AFCARS must include SOGI data on prospective and current foster and adoptive parents to enable state child welfare systems to analyze trends, target efforts to address discrimination, and tailor their recruitment to better meet the needs of the children they serve. A national data set capturing information about prospective SGM 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.

Include All Data Elements Related to Indian Child Welfare

Many of the data elements that the Children's Bureau proposes to eliminate measure compliance with Indian Child Welfare Act and the service and care provided to American Indian and Alaskan Native children in the child welfare system. Though the Indian Child Welfare Act (ICWA) was first enacted 4 decades ago, Native American children remain over-represented within child welfare systems nationally.[xvii] Additionally, there are vast differences between states' compliance with ICWA provisions, due in part to an inconsistency of measures and definitions.[xviii] The measures approved in the 2016 AFCARS final rule, would have established standard, more comprehensive, national data on ICWA compliance.

The proposed removal of many of these elements, in fact before they have ever been implemented, is troubling, especially as this national data is not collected in a mandatory and comprehensive way by any other system.[xix]In the absence of adequate federal support and guidance over the past 40 years, overrepresentation and outcome disparities persist, as do critical ICWA non-compliance issues, such as failures to identify AI/AN children early in child welfare proceedings, to provide early and proper notification of child welfare proceedings to tribes and family members, and to establish that "active efforts" were made to prevent removal. Though reporting burden is the expressed reasoning for removing much of the ICWA related data elements from AFCARS, both the benefits of including them and the historical and cultural contexts which necessitate them, must be given significant weight.

The reforms embodied in the 1978 Act, were necessitated by a long history of federal and state actions which forced the displacement of AI/AN children away from their homes and families, their tribes and communities. Prior to ICWA's enactment research found that 25%–35% of all Native children were being removed and 85% of those children were placed outside of their families and communities[xx]. Though ICWA made significant improvements to preserve families and tribal connections, whenever possible, and to prioritize culturally appropriate family environments, both in foster care and adoption

placements, progress has been hampered by inconsistent compliance and strained resources.[xxi]

The ICWA data elements in AFCARS serve as vital tool to strengthen the accountability of state and tribal child welfare systems, to illuminate key areas of improvement, and to ensure that AI/AN children and families are being identified and well served. As such, APA supports the inclusion of all ICWA-related data elements from the 2016 rule, but we will highlight a few of paramount importance.

Reinstate the list of activities for identifying an "Indian Child" as defined by ICWA

The new proposed rule would simply ask whether the title IV-E agency made inquiries as to whether the child is an Indian child as defined by ICWA and removes the list of family members that the agency may have contacted to inquire. This change is significant, as the Children's Bureau recognized in the 2016 issue brief, *Racial Disproportionality and Disparity in Child Welfare,* title IV-E agencies continue to struggle with "identifying Native American Children early in the process.[xxii]" The brief further suggests a source of this misidentification may be staff error as, "a caseworker may assume a child is not American Indian.[xxiii]" Due to the immense harm caused by separating children needlessly from their tribal communities, a more robust process is in order to maintain essential familial and cultural connections. APA urges ACF to maintain the list of inquiries to identify children for whom ICWA applies.

Reinstate detailed reporting on the removal of children and involuntary termination or modification of parental rights under ICWA

The 2016 AFCARS final rule requested information about the circumstances and actions taken prior to the removal of children, for whom ICWA applies, from their homes and during related court proceedings. APA opposes the elimination of this data from AFCARS along with similar information as it relates to the involuntary termination or modification of parental rights under ICWA. In particular, the elements regarding the testimony of Qualified Expert Witness (QEWs), both during foster care placement hearings and during hearings on parental rights, must be included. Similarly, the data element around active efforts to prevent temporary and permanent removals of AI/AN children must be retained.

Testimony of Qualified Expert Witness

Qualified Expert Witnesses (QEWs) are an essential part of the court proceedings to determine if an AI/AN child should be removed from their home and to determine if parental rights should be involuntarily modified or terminated. The role of the QEW is to serve as an expert on the culture, beliefs, and practices of a tribe and to testify as to whether what was reported is a cultural misunderstanding or should be considered maltreatment.[xxiv] Data on the prevalence of cases that are decided without a QEW are invaluable to any national assessment of ICWA compliance.

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Determination that "active efforts" were made

Prior to placing a child in foster care and prior to terminating parental rights, ICWA requires that "active efforts" are made to prevent the separation of an American Indian family.[xxv] This higher standard of intervention to prevent child removals is necessitated by the historical trauma experienced by members of AI/AN tribes and the documented benefit of preserving family and cultural connections for the wellbeing AI/AN children and families.[xxvi]

More detailed information about the efforts that were undertaken can be adequately captured by the list of actions that apply or do not apply to the case, including the services provided to preserve the family. This list, as included in the 2016 final rule, would enable a national picture of how the "active efforts" standards are commonly implemented. Similarly, the court determination of whether activities met the standard of "active efforts" should be retained in AFCARS, as this data is not collected comprehensively by a mandatory federal data set.

APA has a long-standing commitment to advancing federal policies which support the healthy social, emotional, and cognitive development of all children. The Adoption and Foster Care Analysis Reporting System is the most complete mandatory federal data set which captures the experiences of children served by title IV-E agencies, in out of home placements, and through adoption services. We urge the Children's Bureau to reconsider the elimination of data elements which relate to particularly vulnerable populations of children, including sexual and gender minority youth and American Indian/Alaska Native children within the child welfare system.

Psychology has much to contribute to the ongoing conversation on the need for comprehensive, case-level, federal data on all children in foster care and those who have been adopted with title IV-E agency services. If you have any questions or need additional information, please contact Cynthia Whitney (cmalley@apa.org) or 202-336-6182, in our Government Relations Office.

Sincerely,

Katherine B. McGuire
Chief Advocacy Officer

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[i] Institute of Medicine (2011). The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding. Washington, DC.

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AFCARS 2018-2020

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Indiana Department of Child Services

Submitter Information

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Organization: Indiana Department of Child Services
Government Agency Type: State
Government Agency: Indiana Department of Child Services

General Comment

See Attached

Attachments

Indiana

RIN Number 0970-AC72

Kestian, Heather H <Heather.Kestian@dcs.IN.gov>
Tue 6/18/2019 10:30 PM

To: ACF CBComments <CBComments@acf.hhs.gov>
Cc: Stigdon, Terry <Terry.Stigdon@dcs.IN.gov>; Miller, Eric A (DCS) <Eric.Miller@dcs.IN.gov>; Blackmore, Charlene (ACF) <Charlene.Blackmore@acf.hhs.gov>

To Whom It May Concern,
Indiana respectfully submits the following comments for consideration within the context of proposed changes to the Adoption and Foster Care Analysis and Reporting System (AFCARS) requirements. This is in response to RIN Number 0970-AC72.

On August 21, 2018, ACF published a final rule in the Federal Register to delay implementation of the December 2016 AFCARS final rule until October 1, 2020. Recently, ACF published another set of proposed changes to AFCARS elements and will not specify an effective date until the final rule is published. Indiana would like to suggest that the implementation date for all of the approved new measures be on the same date as the CCWIS implementation date, which has been approved by ACF for each individual jurisdiction. Given that Indiana has declared that we will have a CCWIS system in place by 2022, Indiana respectfully requests consideration of the cost burden. Approximate cost expected is $776,550 for Indiana to plan for changes in two separate systems. Indiana will not be able to be compliant if the implementation date is set as 10/1/2020. Additionally, given the high number of jurisdictions that are either creating or transitioning to CCWIS, Indiana believes it is reasonable to extend the date of compliance with AFCARS 2.0 to correspond with the CCWIS compliance plan for each state, as part of each jurisdiction's approved annual Advanced Planning Document (APD). Currently, Indiana's approved APD has an effective date of 6/30/2022. Indiana respectfully requests that jurisdictions not have to duplicate efforts or be responsible for financing changes in two systems. *See generally*: https://www.acf.hhs.gov/cb/resource/ccwis-status

Indiana notes that of the 183 elements that are proposed to be required, 39 elements can be extracted but will require changes and/or definition transformations in the DCS System of Record, 14 elements require changes to be made to define ICWA data elements in the DCS System of Record, and 27 of these elements require changes to define data elements in the DCS System of Record. This will result in increased cost of technology enhancements as well as the cost to train employees on the changes in mandatory data element entries into the System of Record. The table below explains this in detail:

	AFCARS (current)	**AFCARS 2.0 (New)**	**Comments**
Current Elements (FOSTER + Adopt)	103	103	Current AFCARS (Foster and Adoption) Elements, we can extract AFCARS 2.0 with no changes in MaGIK/KT application.
New Element & Provision in MaGIK		39	New AFCARS 2.0 (Foster and Adoption) Elements, these elements can be extracted but will require changes and/or definition transformations in MaGIK/KT application.

New Element & ICWA		14	Number of elements that must be extracted from AFCARS 2.0 with changes needed to define ICWA data elements in MaGIK/KT application.
New Element & No Provision in MaGIK		27	New AFCARS 2.0 (Foster and Adoption) Elements, these elements require changes to define data elements in MaGIK/KT application.
Total	**103**	**183**	

INDICATORS TO MAINTAIN IN AFCARS

Indiana would like clarification as to the reasons to remove information related to juvenile justice involvement. Indiana believes this is important information to track and give context to the number and frequency of dual system or cross-over involved youth across the country.

Additionally, Indiana suggests maintaining information related to educational stability. If the child welfare system is interested in knowing about educational outcomes on a national scale for foster youth, it is critical to maintain a core set of data elements related to educational stability and attainment. Educational improvements and success in the life of a child in foster care can positively impact permanency, wellbeing, and future success in the realm of economic status, emotional and social welfare, and wellness. Indiana highly recommends the continuation of tracking information on education as it pertains to foster youth.

Lastly, Indiana recommends keeping at least one data point on youth who are transition age and require jurisdictions to report on whether a youth who is age 14 and older has had a transition plan in accordance with the jurisdiction's policy. Transition age youth in foster care have a higher risk of poor outcomes. Effective case planning should include transition planning in an effort to support independent living skills for transition age youth.

Respec. ully Submi ed,
State of Indiana Department of Child Services

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Youth Law Center

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General Comment

See attached

Attachments

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June 18, 2019

Submitted Electronically - CBComments@acf.hhs.gov
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 Proposed Regulation for the Adoption and Foster Care Analysis and Reporting System (AFCARS), 84 FR 16572, RIN 0970-AC72

Dear Ms. McHugh

Pursuant to the notice published in the Federal Register on April 19, 2019 (FR Document 2019-07827), Youth Law Center (YLC) submits these comments on the proposed rule amending the Adoption and Foster Care Analysis and Reporting System (AFCARS). YLC, a national organization that advocates to transform foster and juvenile justice systems across the country so that children can thrive, has worked to improve the lives of children and families involved in the juvenile court system for more than four decades. We oppose several of the proposed changes to the data elements in the 2016 Final Rule.

The inclusion of the data elements in the 2016 Final Rule is necessary to facilitate program improvement, ensure accountability, and permit agencies to build on the knowledge gleaned from information collected a complete national data set to better serve children and families. The data elements in the Final Rule have been thoroughly reviewed and revised over several public notice and comment periods and the proposed modifications are not justified. The Department of Health and Human Services (HHS) has changed its position on the importance of the collection of the information in several of the data areas included in the 2016 Final Rule without justifiable reasons. The Notice of Proposed Rule Making (NPRM) notes the cost burden of the Final Rule, but fails to consider the mitigating factors to those costs or acknowledge the benefits of inclusion of the data elements. Any claims of cost burdens by states are overstated, as all states must update their information systems to

meet existing mandates to adequately meet the needs of children and families regardless of the specific requirements in the Final Rule. All states will continue to update their data systems to meet the increasing demands of serving children and families and to stay current with the latest technology. These AFCARS updates provide a finite number of data elements that are universal across states, necessary to identify trends, and essential to continue to improve child welfare systems and effectively meet the needs of children and families.

The long overdue Final Rule which is the first update of AFCARS since 1993 will help to ensure child welfare agencies are gathering data on critical child and family-related outcomes necessary to track safety, permanency, and well-being. The Final Rule will provide accurate and consistent data across states on key outcomes, bring child welfare data collection in line with statutory changes enacted since 1993, and shift data collection toward a more longitudinal approach which will help evaluate the needs of children and families' more effectively. Many significant changes in child welfare policy and practice have occurred since the last AFCARS update in 1993 including: the Preventing Sex Trafficking and Strengthening Families Act of 2014 (P.L. 113-183) (Preventing Sex Trafficking); the Child and Family Services Improvement and Innovation Act 2011 (P.L. 112-34); and the Fostering Connections to Success and Increasing Adoptions Act of 2008 (P.L.110-351) (Fostering Connections). Additionally, the Final Rule will assist with implementation and oversight of both long established federal law like the Indian Child Welfare Act of 1978 (P.L. 95-608) (ICWA), improving outcomes for tribal youth, and recently passed laws like the Family First Prevention Services Act of 2018 (P.L 115-123) (Family First), reducing institutional care and supporting care in families, by requiring the collection of basic data at the core of child welfare practice essential to providing effective services to children and families.

Given the emphasis placed in federal child welfare policy to support children in families (most recently with Family First), AFCARS is the most appropriate vehicle to provide comprehensive national tracking of longitudinal data necessary to understand the needs of children and families and to evaluate the implementation of federal child welfare mandates. While other federal and national data sets capture pieces of the status and outcomes of children and families involved in child welfare, AFCARS is the one national tracking mechanism available to provide a complete quantitative data set on child welfare interventions and outcomes necessary to evaluate needs and provide program oversight and accountability.

Therefore, the Youth Law Center urges HHS to maintain the data elements in the Final Rule and consider the importance of the information in six areas detailed below.

Juvenile Justice System Involvement (Section 1355.44(f)(5))

YLC opposes eliminating the permanency planning data element that will identify youth dually involved in the child welfare and juvenile justice systems. The identification of dually involved youth is basic, straightforward (a simple "yes" or "no" response), not too qualitative for a national data set, and serves important purposes for program monitoring and oversight. Research indicates that youth dually involved in the child welfare and juvenile justice systems experience poor young adult outcomes (e.g. unemployment, homelessness, incarceration, mental health conditions, and lower educational attainment) at almost twice the rate of youth involved in only one system, yet there are no national data sets that capture dually involved youth. The identification of this very vulnerable population is critical to tracking outcomes, addressing their needs, and evaluating the impact of the Family First (P.L 115-123) mandates to reduce institutional foster care without increasing juvenile justice placements. Although the proposal retains the Final Rule data element on permanency exits to a juvenile justice facility, the proposal to eliminate the identification of dually involved youth would also eliminate the ability to track their outcomes, including dually involved youth placed through juvenile justice in a juvenile justice facility while the permanency plan in child welfare remains the same. Without a data element to identify dually involved youth, AFCARS will not be able to capture outcomes for this vulnerable population of youth in the child welfare system. A national data set is the best way to examine whether the needs of this vulnerable population of youth are being met, monitor the impact of programs and policies to support foster youth in families, and determine whether foster care systems are trading one form of congregate care for another. Therefore, YLC strongly opposes the elimination of the juvenile justice system involvement data element.

Transition Planning (Section 1355.44(f)(8))

YLC opposes the elimination of the data elements related to transition planning which are needed to evaluate the implementation of federal mandates to improve outcomes for transition age foster youth. Several federal laws (Fostering Connections, Preventing Sex Trafficking, and the Affordable Care Act) require jurisdictions to develop transition plans for youth aging out of foster care. Since 2008, Fostering Connections has required transition planning and supports to improve young adult outcomes for youth leaving the foster care system to adulthood. See 42 U.S.C.A.§ 675 (1)(D). Recent research continues to indicate that large numbers of transition age youth are not receiving or benefitting from the transition services mandated by law and these youth continue to have poor young adult outcomes, including homelessness and unemployment at rates far higher than their non-system involved peers. AFCARS is

the one national tracking system available to collect data on foster youth outcomes and child welfare interventions. States are already required to track transition planning. Verifying the existence of a transition plan and the date of its creation in AFCARS is not burdensome, too detailed or qualitative for a national data set, or likely to be inaccurately reported. YLC supports the inclusion of the transition planning data elements to appropriately track and respond to the needs of transition age youth who face the prospect of poor young adult outcomes as they age out of the system.

ICWA related data elements
(Sections 1355.44(b)(5) -1344(b)(6)(i) and (b)(6)(iii); 1355.44(b((7); 1355.44(b)(8)(i) - (iii); 1355.44(c)(6) – (6) iii); 1355.44(c)(7); 1355.44(d)(3) - (d) (3)(iii); 1355.44(d)(5); 1355.44(e)(8) – (8)(v); 1355.44(e)(9-(e) (11); 1355.44(e)(13); 1355.44(f)(10) – (f)(10)(xiii); 1355.44(h)(20) – (h) (23))

YLC opposes elimination of the ICWA related data elements. The 2016 Final Rule reflects the basic ICWA related information needed for effective child welfare practice and oversight. ICWA was first enacted in 1978, yet AFCARS will require for the first time information about children to whom the act applies as well as mandated ICWA related child welfare program requirements. States and tribal entities will only be required to report the ICWA-related data elements when ICWA applies in a child's case, greatly reducing any burden associated with being required to collect and report these elements. Eliminating the collection of demographic information regarding American Indian and Alaska Native youth not only negatively impacts the ability to effectively meet the needs of this population in a given jurisdiction, but also impedes the ability to effectively monitor ICWA compliance and to identify trends to improve child welfare services to American Indian and Alaska Native youth and families nationally.

Education data elements (Sections 1355.44(b)(16) - 1355.44(b)(16)(vii))

Maintaining the AFCARS data on educational stability, school enrollment, educational level, educational achievement, and special education is essential to monitoring states' compliance with Fostering Connections and, most importantly, to ensuring the well-being of children in foster care. The limited education data in AFCARS is necessary to inform and improve state practice and policy and enable states to measure and track the educational progress of children in care. Although educational information was not part of AFCARS prior to the Final Rule, several of these data elements are already being collected by states pursuant to the requirements of Fostering Connections and should not create an unnecessary burden for child welfare professionals. Where these data elements are not already being collected, data sharing between child welfare and education entities can minimize the burden of collecting this data. The educational data elements included in the Final Rule are unambiguous and straightforward – qualitative review or case study is not required for accurate reporting. Furthermore, research available on the educational performance of students in foster care overwhelmingly

indicates that increased attention to educational issues is critical. The data elements on school enrollment, educational level, educational achievement, and special education included in the Final Rule should be retained.

SOGIE data elements (Sections 1355.44(b)(2)(ii), 1355.44(e) (19), 1355.44(e)(25), 1355.44(h)(8) & 1355.44(h)(15))

The Youth Law Center supports maintaining the data elements in the Final Rule related to sexual orientation, gender identity, and gender expression (SOGIE) in order to improve foster youth outcomes, identify and fund needed resources, and reduce disparities experienced by lesbian, gay, bisexual, transgender, and questioning ("LGBTQ") youth in the foster care system. The Final Rule requires the collection of data on removals related to family conflict involving SOGIE issues, and includes voluntary questions on sexual orientation for foster youth over the age of 14, foster parents, adoptive parents, and guardians. Federal child welfare law requires the collection of data regarding characteristics of all children in care (42 U.S.C. 679) and safety, permanency, and wellbeing are the main objectives for every child, including LGBTQ children, in the custody of a child welfare system. LGBTQ foster youth will be inadequately served until child welfare systems have more information about their lives and outcomes, to better respond to and more effectively address their individual needs. While the inclusion of SOGIE related data will require additional efforts and costs, the collection of this data and associated costs are manageable and likely to lead to overall cost savings. Tremendous cost savings could be achieved through improved data collection related to SOGIE and the implementation of effective interventions to prevent removals, reduce instability, improve permanency in family home settings, and minimize costly stays in group care, hospitals and juvenile justice facilities.

Health Assessment Data Element (Sections 1355.44(b) (11) (ii) and (b) (12))

YLC opposes the elimination of the data elements capturing the date and timeliness of the health assessment of a foster youth. Timely health assessments are necessary to ensure that the health care needs of youth are identified so that they receive the appropriate services to protect their safety and ensure their wellbeing given the complex trauma and adverse childhood experiences that system involved youth endure. The collection of this data is not only necessary for monitoring program compliance for Title IV-B (e.g., Health Oversight and Coordination Plan) and IV-E (e.g., case plan), but will assist in evaluating Family First supported child welfare system interventions aimed at keeping youth in families and not institutional settings. The inclusion of these data elements is not burdensome or too detailed. The data is simple, straightforward, easily accessible, and readily reportable for AFCARS.

Conclusion

For the reasons outlined above, we urge the Department of Health and Human Services to retain all of the data elements in the 2016 Final Rule, including the data elements related to juvenile justice involvement, transition planning, ICWA, education, SOGIE, and health assessments. We appreciate the opportunity to comment on the benefits of these data elements outlined in the Final Rule.

Sincerely,

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