ALLIANCE for CHILDREN'S RIGHTS

June 12, 2018

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

Via email at: *CBComments@acf.hhs.gov*

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

Dear Ms. McHugh:

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

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.

General Comments:

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

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

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

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

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

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

> Overall, tribes, organizations, states, and private citizens supported our mission to collect additional information related to Indian children as defined in ICWA. Moreover, some states, tribes, national organizations, and federal agencies have stated that ICWA is the ''gold standard'' of child welfare practice and its implementation and associated data collection will likely help to inform efforts to improve outcomes for all children and families in state child welfare systems.
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> 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:
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> 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.
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> 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 rely on the final rule.
Tribes have long sought data points regarding the implementation of ICWA. This has included advocacy on local, state, and federal levels. With the promulgation of the final rule in December of 2016, tribes largely ceased advocacy efforts to mandate data collection, instead refocusing tribal resources toward working collaboratively with their governmental partners to implement the data elements listed in the final rule. To this end, some tribes have worked to develop and update agreements to reflect the data elements in the final rule and the 2016 BIA ICWA Regulations, since a goal of both is to increase uniformity.

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

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

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

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

Responses to the Questions for Comment provided in the ANPRM:

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

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

No response.

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

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

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

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

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

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

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

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

Support ICWA-related data collection.
For the reasons stated above, the Alliance for Children's Rights supports each of the ICWA-related data points and believe, as your agency did in publishing the Final Rule in 2016, the benefits of this data collection outweighs any burden.

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

Sincerely,

Kristin Power
Senior Policy Associate