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June 13, 2018

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

Re: RIN: 0970-AC72

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

Dear Ms. McHugh,

Thank you for providing an opportunity to share comments regarding the Adoption and Foster Care Analysis Reporting System (AFCARS). Pursuant to the Notice published in the Federal Register on March 15, 2018 (83 Fed. Reg. 11450), the American Bar Association (ABA), a voluntary professional membership organization with more than 400,000 members, submits these comments to express continued support for the AFCARS Final Rule published in the Federal Register on December 14, 2016.

The Department of Health and Human Services (HHS) released the Final Rule after many years of work and no fewer than three public comment periods, which included several opportunities for state child welfare agencies and the public to comment on the burdens and benefits of implementing the AFCARS regulation. When responding to those comments, HHS concluded the need for updated data collection in the child welfare system outweighs the burdens anticipated to implement those new data categories in AFCARS reporting. Specifically, HHS incorporated cost and burden estimates into its “careful consideration of input received from states and tribes” and concluded that in light of the anticipated benefits, the “Final Rule does not represent an unnecessary diversion of resources” for state and tribal child welfare agencies. 81 Fed. Reg. 90524, 90566 (December 14, 2016). We agree with the Department’s original assessment in 2016 and continue to support timely implementation of the AFCARS Final Rule in full.

Background

In an abrupt shift from its 2016 conclusion, on March 15, 2018, HHS issued an Advanced Notice of Proposed Rulemaking (ANPRM) identifying the AFCARS Final Rule as a regulation “in which the reporting burden may impose costs that exceed benefits.” 83 Fed. Reg. 11450, 11449. HHS acknowledged in the ANPRM that although state and tribal agencies previously

commented on the burden and cost when given several opportunities to do so, ultimately the Department had received “too few estimates.” As a result, HHS now seeks a new round of comments focused on the burdens associated with AFCARS data collection.

Administrative Procedure Act Requirements

The decision to repeal or revise a Final Rule is subject to notice and comment rulemaking under the Administrative Procedure Act. *Clean Air Council v. Pruitt*, 862 F.3d 1, 14 (D.C. Cir. 2017) (explaining that although agencies have broad discretion to reconsider a final rule after it has been issued, the agency must nevertheless meet procedural requirements). This ensures that an agency cannot “undo all that it accomplished through its rulemaking without giving all parties an opportunity to comment on the wisdom of repeal.” *Consumer Energy Council of Am. v. Fed. Energy Regulatory Comm’n*, 673 F.2d 425, 446 (D.C. Cir. 1982). There are two key rules that emerge under APA case law as important touch points for the present ANPRM.

Agencies cannot ignore prior factual findings. This means that when an agency seeks to repeal portions of a policy, its revised factual findings cannot contradict prior factual findings without a clear justification for doing so. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009); see also *State of California v. United States Bureau of Land Management*, 277 F.Supp. 3d 1106 (N.D. Cal. 2017) (“New presidential administrations are entitled to change policy positions, but to meet the requirements of the APA they must give reasoned explanations for those changes and ‘address prior factual findings’”) (original citations omitted). As applied to the AFCARS Final Rule, HHS previously concluded the costs associated with implementing the new data elements were not overly burdensome. Indeed, HHS did make certain changes to the Rule based on burden comments and decided with respect to others, such as ICWA data, that the benefits outweighed the burdens and should be retained. 81 Fed. Reg. 90524. The Department relied on input from 218 commenters, including 59 state and tribal entities, to reach these conclusions. To reassess this finding, the Department must explain the basis for disregarding the facts and circumstances underlying its 2016 conclusions.

Agencies must always balance the anticipated costs with the anticipated benefits of implementing a Rule. This means that an agency cannot look only at the potential costs of implementing a Final Rule when considering repeal or revision. *State v. United States Bureau of Land Management*, 277 F.Supp. 3d 1106 (N.D. Cal. 2017) (finding that that Bureau of Land Management’s actions were arbitrary and capricious when it postponed a Rule’s compliance dates based on burdens and failed to consider the Rule’s benefits). In addition to examining both costs and benefits, the agency must also consider immediate and longer-term impact. For example, in some instances immediate costs may be high but fade over time while benefits are slow to accrue but develop several years after new systems are in place. Significantly, agencies cannot find new costs in the mere fact that compliance deadlines are looming because those costs were “completely foreseeable” when the Rule was issued. *Id.* (rejecting “changed circumstances” argument based on an upcoming compliance deadline). As applied to the AFCARS Final Rule, although the ANPRM focuses almost exclusively on the burden associated with implementing the Final Rule, HHS has a simultaneous obligation to continue examining the benefits of the Rule and will need to look at long-term impact of those national benefits.

The Benefits of the AFCARS Final Rule Continue to Outweigh the Potential Burdens

Three overarching categories of benefits will accrue from implementing the AFCARS Final Rule. First, the Rule marks a significant shift away from point-in-time data regarding children in foster care to more longitudinal information about children's and families' circumstances leading to entering and exiting the child welfare system. Such data provides a much deeper level of understanding on how to prevent entry into the system and how to ensure safe and permanent exits from the system occur in a timely manner. At a time when numbers of children in foster care are steadily increasing across the country, this kind of longitudinal data is essential to help understand patterns from both a local and national level.

Second, the Final Rule critically addresses and incorporates data collection that will demonstrate on a national level how states have implemented federal laws in the child welfare field over the last two and a half decades because AFCARS data requirements have not been amended since 1993. In this respect, the Final Rule provides invaluable data to allow Congress and others to understand the impact of the following federal statutes and regulations that bear on child welfare:

- Adoption and Safe Families Act (1997)
- Fostering Connections To Success and Increasing Adoptions Act (2008)
- Preventing Sex Trafficking and Strengthening Families Act (2014)
- Every Student Succeeds Act (2015)
- Indian Child Welfare Act Regulations (2016)

Each of these federal laws and regulations addressed important substantive issues in the child welfare field such as trafficking, educational stability, child health, guardianship, and sibling engagement. Without data that tracks these substantive issues, it is very challenging to fully understand how Congress's laws have been implemented across the country.

Finally, the Final Rule is extremely beneficial in that it is long overdue and fills key gaps in existing data in the child welfare field. For example, AFCARS currently includes no information about a child's education and schooling, even though this is one of the most consequential elements of a child's well-being while in foster care. The ABA strongly supports the 2016 AFCARS Final Rule as a whole, including new data elements that address such areas as children's health assessments, developmental delays, education, youth pregnancy, prior guardianships and adoption, siblings, ICWA-related information, termination of parental rights, family circumstances at removal, access to medical and mental health services, sex trafficking, immigration detention and deportation, sexual orientation, living arrangement and provider information, juvenile justice, and LGBTQ-related information of youth and caregivers. With respect to filling key gaps, we write below to highlight some of the benefits of several provisions that have a direct connection to the work we conduct in this field.

New Data Elements Regarding the Indian Child Welfare Act (ICWA)

The 2016 Final Rule included, for the first time, data elements for states related to Native American children who are in foster care or have been adopted. There is no other federal data collection of information about Native American children in the child welfare system, and HHS has the authority to collect this information under Section 479 of the Social Security Act. Some of these new elements track both how states are implementing ICWA requirements and how they

are identifying Native American children and their families' tribal affiliations. These data elements are instrumental in tracking the well-being of Native American children and are instrumental in gaining a better understanding of issues such as disproportionality in removals of Native American children from their homes.

When reviewing comments submitted in 2016, HHS specifically evaluated many of the same burden concerns that states are raising today. For example, HHS looked at states' descriptions of the costs associated with collecting and reporting ICWA-related data in AFCARS. The agency concluded, however, that the ICWA data elements should not be changed because the benefits of that data outweigh those projected burdens. HHS explained that without this data "it is unclear how well state title IV-E agencies implement ICWA's requirements" and that with greater data collection it will be easier to address confusion about how to apply ICWA, including in states with large Native American populations. 81 Fed. Reg. 90524, 90528. The ABA continues to support HHS's original assessment and strongly affirms the importance of including ICWA data elements in the Final Rule.

New Data Elements Regarding LGBTQ Youth and Families

Studies and anecdotal evidence suggests LGBTQ-identified children and youth are overrepresented in the child welfare population, and their specific needs are best served when child welfare agencies have information about which children are in this category. Currently, however, there is no clear way to capture that information. New data elements in the Final Rule address this problem by including: a voluntary question regarding a child's sexual orientation for children 14 and older (Section 355.44(B)(2)(II)); a voluntary question regarding the sexual orientation of foster and adoptive parents and legal guardians (Section 1355.44(E)(18) & (E)(24)); and, in the case of a child's removal from a home, whether that removal was due to family conflict related to a child's sexual orientation, gender identity, or gender expression (Section 1355.44(d)(xxx)). The ABA strongly supports retaining all LGBTQ-related data elements included in the 2016 Final Rule.

New Data Elements Regarding Education

Educational data is essential to ensuring that the educational needs of children in foster care are being met as required by federal law in the Fostering Connections to Success and Increasing Adoptions Act (Fostering Connections). The ABA enthusiastically supports retaining the four education-related data elements included in the 2016 Final Rule. Their inclusion marks tremendous progress and will surely lead to improved data that can be used to inform and improve states' practices and policies and enable them to measure and track the educational progress of children in foster care.

Although educational information was not reported prior to the 2016 Final Rule, several of these data elements are already being collected 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 straight-forward. Furthermore, research available on the educational performance of students in foster care overwhelmingly indicates that increased

attention to educational issues is critical. The following data elements are included in the 2016 Final Rule and should be retained:

1. **School Enrollment:** We support the inclusion of basic information to track a child's enrollment in school. This data requirement also aligns AFCARS with the requirements of Fostering Connections. The issue of variations in the definitions of "elementary," "secondary," "post-secondary education or training," "college," "not school-aged," and "not enrolled" across states and jurisdictions is minimal, as the data element is based on the statutory requirement in Section 471(a)(30) of the Social Security Act.
2. **Educational Level:** Requiring states to report on the highest educational level achieved as of the last day of the reporting period will allow for better tracking of educational trends. This element provides additional detail beyond the school enrollment data point and, in concert with school enrollment, is key to determining details about drop-out and retention rates.
3. **Educational Stability:** The data element relating to educational stability should be retained as it is consistent with and supported by both federal child welfare and education law. Fostering Connections mandates educational stability. Child welfare agencies must take steps to place children close to the schools they have been attending and to plan for and collaborate with education agencies to ensure that children remain in the same school when their living situation changes unless a school change is in the child's best interest. Since the adoption of Fostering Connections in 2008, many state and county agencies have changed policy and practice to encourage school stability, which has been further supported by the Every Student Succeeds Act (ESSA), but without data it is difficult to measure progress and trends. Collecting this data will allow longitudinal information about children to be tracked and maintained over time. Qualitative review or case study regarding school stability, while important, does not preclude the need for quantitative data in this critical area. This data will be integral to determining the overall school stability of children during their entire stay in care.
4. **Special Education:** We support the need for this data element. Studies indicate that anywhere from 35% to 47% of children and youth in foster care receive special education services at some point in their schooling (compared to the national average of under 13% of school-aged children). But we currently have no reliable national data on the exact number of students in care who qualify for services under the Individuals with Disabilities Education Act (IDEA). This data element would fill this critical gap. This data is important to both child welfare and education agencies and it would focus state and local agencies' attention on effectively delivering services to these children. Furthermore, there will be little variability across states and jurisdictions, as the definitions for Individualized Education Programs and Individual Family Service Plans are outlined within the IDEA.

Collecting more comprehensive information on a child's educational experiences in a state's foster care system will allow us to better serve all children in foster care. We continue to enthusiastically support the inclusion of these four critical education data elements.

The Burdens of the AFCARS Final Rule Do Not Outweigh These Benefits

With tremendous respect for the states that will need to implement the data elements in the Final Rule, we write here to express our support for HHS's original conclusion that the benefits of these new data elements outweigh the potential burdens. No changed circumstances appear to justify revisiting that original conclusion. *Clean Air Council v. Pruitt*, 862 F.3d 1, 14 (D.C. Cir. 2017). There are several reasons we hold this view.

First, updates to data collection systems are inevitable because AFCARS has not been updated in 25 years. As a result, costs associated with a revision and re-training for staff will occur regardless of whether this Final Rule moves forward or another one takes its place. In this respect, it appears that concerns about the timeliness of the updates are at risk of being conflated with the general costs. The recent *Bureau of Land Management* decision is instructive. There the court expressly rejected costs associated with the looming implementation deadline of a new rule because those costs were foreseeable when the rule originally issued and had not changed over time. *State v. United States Bureau of Land Management*, 277 F.Supp. 3d 1106 (N.D. Cal. 2017). Similarly, although several states have submitted comments noting the nearing deadline of AFCARS compliance, the burdens associated with updates to data fields will occur at some point and are not resolved by merely delaying, yet again, the AFCARS Final Rule.

Second, as discussed above, some states across the country are already collecting data that has now been incorporated into AFCARS. (See ANPRM submission from the State of Nebraska.) This means the burden of gathering information is minimal. For example, as the State of California noted in its recent response to the ANPRM, "irrespective of corresponding AFCARS data elements, states are obligated to modify their data system as well as to modify policies and procedures" to incorporate new ICWA data elements. (ANPRM Comment submitted by State of California Department of Social Services, June 5, 2018.) Similarly, states throughout the country are already 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, with an emphasis on interoperability between child welfare agencies, courts and schools. This interoperability of systems can occur even if requirements regarding data elements are in flux, and may alleviate child welfare agencies' burden of collecting education information. In this respect, the burden of collection or training is minimal because states are already collecting new data elements provided for in AFCARS and entering that information into their state systems. What AFCARS collection provides is an opportunity to understand that data and information in a nationally aggregated way that allows for comparison across states, an invaluable benefit for both states and the federal government.

Finally, when provided with multiple opportunities to comment on the AFCARS Rule, states did not originally submit sufficient information about the costs and burdens for the federal authorities to find a substantial burden. To revisit that question now, after states had ample time to share views on that previously, raises questions. Indeed, the current ANPRM suggests that the states that did not originally provide input should share it now, but the initial submissions indicate that many states submitting comments today have already expressed precisely the same concerns in prior opportunities to comment. As explained above, the looming deadline of the AFCARS data implementation is not enough of a changed circumstance upon which to repeal the rule. Nor is data viewed in a vacuum from that provided several years ago. See *Open Communities Alliance v. Carson*, 286 F.Supp. 3d 148, 160 (D.D.C. 2017) (explaining that

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agency action is “arbitrary and capricious” when its decisions run counter to the evidence before the agency).

The Department must look at both the short and long-term implications of this balance between benefits and costs. We continue to agree with HHS’s original assessment that when viewed as a long-term impact and when considered in the aggregate, the benefits of this Final Rule – including longitudinal data, addressing 25 years of seminal child welfare legislation, and filling key gaps in existing data – far outweigh the projected burdens, which are largely inevitable, short-term and were foreseen but not commented on previously.

Conclusion

Updates to data collection requirements included in the Final Rule are long-awaited and are the result of robust and thoughtful discussion over many years. These requirements were included after numerous rounds of public comments, and many of these comments responding to the ANPRM were previously addressed by HHS in the Final Rule. The Final Rule was tailored to address current areas of weakness in data collection and reporting and must be retained to ensure the safety, permanency, and well-being of children in foster care. The Final Rule brings child welfare data collection in line with statutory changes and requirements enacted since 1993. These changes are long overdue and will support agencies to provide accurate and consistent data across states on key outcome areas. There are no changed circumstances that appear to alter the original assessment that benefits of this information outweigh the burdens associated with collecting it. The ABA continues to support the new data requirements as they are set out in the Final Rule.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas M. Susman", with a long horizontal flourish extending to the right.

Thomas M. Susman