



CDSS

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**DEPARTMENT OF SOCIAL SERVICES**

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GOVERNOR

June 5, 2018

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

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

Dear Ms. McHugh:

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

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

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

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

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

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

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

***ACF has authority and responsibility to collect ICWA data.***

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

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

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

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

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

"Improving AFCARS to inform ACF and other federal agencies is consistent with ACF's implementation of government-to-government principles of engagement with AI/AN tribes and respect for our trust responsibilities. (81 FR 20286; citing both the HHS and ACF Tribal Consultation Policies)

"AFCARS is designed to collect uniform, reliable information from title IV-B and title IV-E agencies on children who are under the agencies' responsibility for placement, care, or supervision. . . there is no comprehensive national data on the status of AI/AN children for whom ICWA applies at any stage in the adoption or foster care system. AFCARS data can bridge this gap." (81 FR 20284)

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

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

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

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

“ . . . implementation and interpretation of the Act has been inconsistent across States and sometimes can vary greatly even within a State. This has led to significant variation in applying ICWA statutory terms and protections . . .

“The need for consistent minimum Federal standards to protect Indian children, families, and Tribes still exists today. The special relationship between the United States and the Indian Tribes and their members upon which Congress based the statute continues in full force, as does the United States' direct interest, as trustee, in protecting Indian children . . .

“[The Final Rule] promotes nationwide uniformity and provides clarity to the minimum Federal standards established by the statute.” (81 FR 38779 and 6/14/16)

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

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

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

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

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

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

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

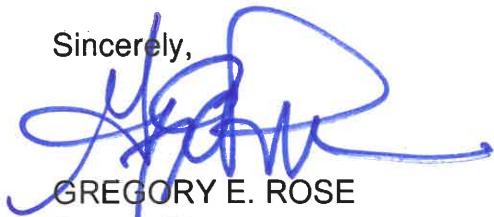
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for reporting court findings, our experience is that any burden of such reporting is outweighed by the benefit. This information is central to child welfare practice but is presently inefficiently collected in narrative or other formats that do not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

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

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

Sincerely,



GREGORY E. ROSE  
Deputy Director  
Children and Family Services Division