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

Dear Ms. McHugh:

The law firm of Montana Legal Justice, PLLC submits these comments regarding the Advance Notice of Proposed Rulemaking published in the *Federal Register* on March 15, 2018 (Volume 83, No. 51, page 11449). Our comments pertain to data elements specific to American Indian and Alaska Native (AI/AN) children contained within the 2016 Adoption and Foster Care Analysis Reporting System (AFCARS) Final Rule published on December 14, 2016. The data elements we are commenting on address a number of relevant federal law requirements pertaining to the Indian Child Welfare Act (ICWA). We oppose any streamlining, modification, or elimination of these critical AFCARS data elements for AI/AN children.

It has been almost 25 years since the establishment of the AFCARS data collection system and 40 years since the enactment of ICWA. AI/AN children are still waiting to have basic data collected that describes their conditions, how relevant federal law under Title IV-B, Title IV-E, and ICWA is being implemented with respect to AI/AN children, and the identification of critical data that can inform local and national interventions to eliminate well-documented and long term foster care disproportionality and service disparities that AI/AN children face. Each year that data is not collected is another year AI/AN children will not see significant improvements to their well-being and policymakers and other government officials will not have the data they need to make smart, effective changes that can address these very serious, long-

term problems; this is an untenable situation. We also note that nothing has changed since the publication of the 2016 Final Rule that would change the need for this critical data for AI/AN children. Instead, Congress has made it clear with the passage of the Family First Prevention Services Act (Division E of the Bipartisan Budget Agreement Act of H.R. 1892) that they intend for Title IV-E to be expanded to focus on additional services and efforts, not just a narrow band of placement activities.

General Comments

The 2016 Final Rule is within ACF's Statutory Authority and Mission. Section 479 of the Social Security Act mandates the Department of Health and Human Services (DHHS) collect national, uniform, and reliable information on children in state foster care and adoptive care. The statutory language is expansive and suggests a broad collection of data for children under state care who are in foster care or adoption that includes their demographics, characteristics, and status while in care. Section 1102 of the act instructs the Secretary of DHHS to develop regulations necessary to carry out the functions for which DHHS is responsible under the act.

In addition, Section 422 of the Social Security Act requires DHHS to collect descriptions from states of a state's efforts to consult with tribes on the specific measures taken by a state to comply with ICWA. This provision has been in federal law since 1994 and DHHS has responded by asking states to provide this information, along with additional information related to ICWA implementation in state Annual Progress and Services Reports. DHHS also has a long history of collecting information, although limited, on ICWA implementation through their Child and Family Services Review process with states. These reports and reviews are authorized under the broad discretionary authority provided to DHHS under Titles IV-B and IV-E of the Social Security Act to collect data from states and review their progress against different federal child welfare requirements.

The Final Rule, which ACF developed under the statute, ensures the collection of necessary and comprehensive national data on the status of American Indian/Alaska Native (AI/AN) children to 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 the Social Security Act. In addition, there is no statutory requirement that all data elements must be specifically tied to Title IV-E or Title IV-B requirements only.

ACF provided ample notice and opportunities to comment on the 2016 Final Rule. On April 2, 2015, ACF issued a Supplemental Notice of Proposed Rulemaking (SNPRM) proposing changes to AFCARS data elements. A year later on April 7, 2016, ACF published another SNPRM proposing the addition of new AFCARS data elements related specifically to data concerning American Indian and Alaska Native (AI/AN) children and families. The proposed data was related to federal law requirements specific to ICWA and placements of AI/AN children. The Final Rule was published eight months later on December 14, 2016, and included the ICWA data elements.

The 2016 Final Rule was the product of a thorough and well-reasoned process that included opportunities for states, tribes, and other interested parties to comment. Issues related to the

benefits for AI/AN children and families and burdens upon states to collect and report the data were thoroughly addressed in the Final Rule. While there was almost unanimous support provided to including the new data elements for AI/ANs, there was also very little concern expressed by states submitting comments specific to the addition of new data elements for AI/AN children and families. The few state comments that were received that expressed concern with the ICWA data elements were generally vague and expressed general concern regarding the burden of collecting new data of any type. Furthermore, as evidenced in the 2016 Final Rule discussion, ACF engaged in several discussions with states (6) regarding their perspectives on the proposed changes and as a result streamlined many of the data elements proposed in the SNPRM. The very thorough and well-thought out regulatory process used in developing the 2016 Final Rule evidences that no additional collection of information is necessary.

The data in the 2016 Final Rule is vital to the federal government, Congress, states, and tribes to effectively address the needs of AI/AN children and families. 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 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.

Another practical implication for not implementing the data elements for AI/AN children in the Final Rule is it sends a message to states and tribes that the federal government does not consider data collection on this population a priority issue, which also disincentivize state and tribal efforts to address these issues at the federal and local level. As an example of how insufficient data collection can frustrate efforts to improve outcomes for AI/AN children, in the 2005 General Accountability Office (GAO) report on ICWA implementation (GAO-05-290) GAO indicated that they were hindered in their task to fully research and understand the questions submitted by a group of bi-partisan members of Congress because of insufficient data available from both state and federal data collection systems. At the local level, while states and tribes are increasingly partnering to improve ICWA implementation and improve outcomes for AI/AN children, data collection is a consistent concern and hampers efforts by states and tribes to demonstrate the need for additional policies and resources with state legislators. Since the publication of the Final Rule in December of 2016 a number of states have already begun work with tribes in their state on data system improvements and begun discussions of how the data would be supported and shared among state and tribal governments. Unfortunately, this Advanced Notice of Proposed Rule Making (ANPRM) has caused these efforts to be called into question and further delay the ability to seek real, meaningful answers to issues that frustrate AI/AN children's well-being on a daily basis.

The regulations themselves, in response to the comments from tribes and states, describe the importance of the 2016 Final Rule 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.

In light of these comments and the recent passage of the Family First Prevention Services Act by Congress in February of 2018 (Division E of the Bipartisan Budget Agreement Act, H.R. 1892) where Congress is clearly expanding the purposes of the Title IV-E program to include not only placement activities, but also prevention services to families, we see even more relevance and need for the data elements for AI/AN children and families included in the 2016 Final Rule.

Some of the expected benefits from implementing the full set of data elements for AI/AN children contained in the 2016 Final Rule include, but are not limited to, the following:

1. provide data on core ICWA requirements such as ''active efforts'' to prevent removals of AI/AN children and success in securing appropriate placements, especially kinship care placements, that have been demonstrated to improve AI/AN children's connection to their family, culture, and tribal supports they need to succeed;

2. facilitate access to culturally appropriate services to AI/AN children and families to avoid out-of-home placement, keep children safe, and avoid unnecessary trauma to AI/AN children;

3. identify effective strategies to securing extended family and other tribal families who can serve as resources to AI/AN children and help address the shortage of AI/AN family placements for AI/AN children;

4. identify when tribes are being engaged to help support AI/AN children and families and trends related to how that engagement impacts outcomes for this population; and

5. 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.

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 SNPRM 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 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 significant changes justifying ACF's proposal to reexamine the 2016 Final Rule. ACF seems to rely upon the President's Executive Order (13777) for all federal agencies to identify regulations that are perceived as burdensome or unnecessary, but this 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 of 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. 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.

We believe that the new data elements provided in the 2016 Final Rule that address health assessments, educational achievement, siblings, mental health services, sex trafficking, sexual orientation, permanency planning, adoption, guardianship, and housing are important for AI/AN children and youth as well. Burdens to collecting this data for tribes and states are relatively small considering the benefits to improving outcomes for AI/AN children and families, especially given many of the data elements are correlated to some of the most vulnerable populations in child welfare systems and identification of risks associated to their well-being.

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 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 2016 Final Rule requests title IV-E states provide the number of children in foster care who are considered Indian children as defined in ICWA. This is data that is currently not collected or reported in any national child welfare data system and is the key to understanding other important issues that are unique to AI/AN children and federal law requirements under ICWA.

The current data in AFCARS only identifies AI/AN children through self-identification, which provides inaccurate and unreliable data. Relevant data measures in ICWA related to placement, engagement with the child's tribe, and efforts to avoid placement are not collected leaving federal agency, states, Congress, and tribes with little information to address pernicious issues impacting this population like foster care disproportionality. The 2016 Final Rule only requires states to collect the data elements in the 2016 Final Rule for AI/AN children that are ICWA eligible. Regardless of whether AFCARS data is collected all states are required by law to examine whether a child is ICWA eligible, so this effort is already required outside of AFCARS requirements. The 2016 Final Rule data specific to AI/AN children is not required to be collected for other non-Indian children so while there will be additional data collection for AI/AN children that are ICWA eligible, given the small number of AI/AN children in the vast majority of states this will not require a significant burden.

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.

All of the data elements for AI/AN children in the 2016 Final Rule are appropriate for a national data system like AFCARS. The activities related to the data are required by federal law, such as ICWA, and should be documented in any child welfare case file. The vast majority of the data would come from state agency activities with a few data elements coming in the form of state court orders, which should also be included in any well documented case file. To assume that some data may not be retrievable if it comes from judicial determinations is essentially saying that case files do not need to contain court orders, which would be out of alignment with nationally recognized standards in child welfare case management. In addition, not having this information in a case file poses risk that court orders are not being properly implemented and places children in jeopardy of not receiving the benefits of court oversight in child welfare.

Capturing AI/AN data through case file reviews or other qualitative methods would not provide the data that Congress, states, and tribes need on an ongoing basis to make necessary changes in policy, practice, and resource allocation to address the serious problems that have been impacting AI/AN children for over two decades. Existing qualitative methods, like case file reviews under the Child and Family Services Reviews, have demonstrated the limitations of this data for informing Congress on how best to address critical concerns for AI/AN children. Case file reviews in many states include only a handful of cases involving AI/AN children and the data retrieved does not lend itself to adequately informing local efforts to address serious concerns related to outcomes for this population, much less issues of national concern. AFCARS is much better suited to collecting the type of data required for AI/AN children and efforts to shift data collection to other less comprehensive data systems with less regular data collection and reporting will have a negligible effect on improving data for this population.

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 the current variability in state data collection and reporting will continue as evidenced by only a few states collecting any data specific to AI/AN children, and the current AFCARS data questions that use self-identification as a determinant of whether a child is AI/AN, rather than the appropriate questions related to their citizenship in a tribal government. Even with appropriate questions related to whether an AI/AN child or their family are eligible for ICWA protections, linkages to other AFCARS data cannot be assumed to be sufficiently correlated for informing policymakers and child welfare agencies without the other data elements for AI/AN children in the 2016 Final Rule also being implemented. ACF as much as any stakeholder should have a strong interest in improving the availability of accurate and reliable data for this population, which they have dedicated significant amounts of their resources to in the form of technical assistance and training.

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 is critical. The Title IV-B plan requirement for states that requires that states consult with tribal governments on their plans to implement ICWA has so far relied primarily on anecdotal information that is not collected or tracked uniformly by ACF leading to uneven responses to concerns about poor outcomes for AI/AN children in different states. The data elements contained in the 2016 Final Rule are linked in terms of being able to provide a complete picture of how AI/AN children are doing, and by eliminating or streamlining some of these data elements ACF would be compromising the integrity of the data to confidently inform policymakers and other stakeholders as to the important data trends and explanations for these trends.

In addition, as was stated earlier in our general comments, ICWA has been viewed as the "gold standard" in child welfare practice by leading national child welfare organizations and now with the passage of the Family First Prevention Services Act we can see there is increased support and interest in capturing more information on how states and tribes can improve outcomes for children and families beyond just improving the placement experience. The 2016 Final Rule data elements specific to AI/AN children are aligned with these acknowledgements and will be significantly helpful to all stakeholders involved in improving services and outcomes for AI/AN children.

Conclusion

The experience of having little to no data collected for AI/AN children through AFCARS over the last two decades has resulted in not meaningful improvements in the safety and well-being for AI/AN children and could be argued as having contributed to the worsening conditions for this population. We know of no other federal child welfare law that does not have some form of basic data collection and certainly not one that is 40 years old as ICWA is. The AFCARS data elements for AI/AN children in the 2016 Final Rule have incredible potential to improve outcomes for this population, but only if the data elements are not heavily modified or eliminated. While there are burdens for states to collect this data, for the past 40 years it has primarily AI/AN children, their families, and tribal communities that have born the burden while little to no reliable data has been collected and the crisis of foster care disproportionality has worsened. The time has come to move forward with this critically important data collection for AI/AN children and families and end the delays for not collecting the data that is necessary to support and promote healing for this population.

Sincerely,

Shannon Hathaway
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