

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, D.C. 20024

RE: Proposed rulemaking for Adoption and Foster Care Analysis and Reporting System (AFCARS) data elements, 45 CFR 1355 (Mar. 15, 2018) [RIN 0970-AC72]

Submitted via email to CBComments@acf.hhs.gov.

Dear Ms. McHugh:

On behalf of the Movement Advancement Project, I am writing to request that 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”) 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 data elements in the Final Rule previously went through a thorough notice and comment period, during which comments on the burden of data elements were addressed and the data elements adjusted as described in the Final Rule.

MAP is an independent think tank that provides rigorous research, insight, and analysis to help speed equality for lesbian, gay, bisexual, and transgender (LGBT) people. MAP’s policy research informs the public and policymakers about the legal and policy needs of LGBT people, LGBT youth, and their families, including those youth and families who would be directly impacted by the proposed changes to the AFCARS.

A. Removal of Data Elements Related to Foster Youth Sexual Orientation and Gender Identity and Expression (“SOGIE”) Would Negatively Impact the Safety, Permanency, and Well-being of LGBT Children

HHS 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 LGBT foster children. LGBT youth are disproportionately overrepresented in foster care and suffer worse safety, permanency, and well-being outcomes than their non-LGBT peers. Data on these youth at the state level is urgently needed to improve outcomes and reduce disparities; data at the national level is necessary

to inform federal law, policy and funding determinations, to identify best practices for replication and, critically, to enhance the Administration on Children and Families' efforts to prevent removal and allow to children to remain safely at home with their families.

The core objectives of safety, permanency, and well-being apply to all children in the custody of state and tribal child welfare systems, including LGBT children, and the Social Security Act requires collection of data regarding characteristics of all children in care.¹ In April 2011, 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."² ACF further acknowledged that LGBT youth are overrepresented in the population served by the child welfare system and in the population of youth experiencing homelessness.³ Yet, LGBT youth will be inadequately served until states and tribes have more information about these youth and their experiences and outcomes, and how institutions can better respond to their individual needs.

Disproportionate representation of LGBT youth in care and the poor outcomes they experience were confirmed in a 2013 study conducted in connection with the R.I.S.E. Project, a five-year, \$13.3 million demonstration grant funded by ACYF to create a model program to support LGBT youth in the foster care system.⁴ The purpose of the study was to determine the percentage of Los Angeles County foster youth who identify as LGBT, and whether their experiences in foster care were different from those of their peers. The study found that 19 percent of youth ages 12-21 in foster care self-identify as LGBT, which is 1.5 to 2 times the number of LGBT youth estimated to be living outside of foster care. 13.6 percent of participants identified as lesbian, gay, bisexual or questioning ("LGBQ"); eleven percent of the participants identified as gender-nonconforming, and 5.6% identified as transgender. Other studies have estimated even higher numbers of LGBT youth in foster care, including a forthcoming study which estimates that 22.8% of youth in out of home care identify as LGBQ.⁵ Using the estimates from the studies cited above, the number of foster youth in the United States over the age of 14 who identify as having a sexual orientation other than "straight" are 14,300 to 24,000.⁶ 57% of the foster youth over 14 who identify as LGBQ, or between 8,100 and 11,300 youth, are youth of color.⁷

In addition to being disproportionately represented in the system, LGBT youth experience worse conditions and outcomes in foster care. The federally-funded R.I.S.E. study confirmed that LGBT youth have a higher number of foster care placements and are more likely to be living in a group home.⁸ Over twice as many LGBT youth reported being treated poorly by the foster care system compared to non-LGBT youth, and LGBT youth are more likely to be hospitalized for emotional

¹ https://www.ssa.gov/OP_Home/ssact/title04/0479.htm

² 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>

³ *Ibid.*

⁴ Bianca D.M. Wilson, Khush Cooper, Angel Kastanis, Sheila Nezhad, *New Report: Sexual and Gender Minority Youth in Foster Care*, WILLIAMS INST. (Aug. 2014), https://www.acf.hhs.gov/sites/default/files/cb/pii_rise_lafys_report.pdf

⁵ See for example Center for the Study of Social Policies, *Out of the Shadows: Supporting LGBTQ Youth in Child Welfare through Cross-System Collaboration*, 2016 <https://www.cssp.org/pages/body/Out-of-the-shadows-current-landscape.pdf>

⁶ AFCARS data shows that 105,182 foster youth in 2016 were 14 or older; these estimates utilize the 13.6 % and 22.8% numbers for LGBQ foster youth from the studies cited under (4) and (5) above.

⁷ Same as 5 above.

⁸ Same as 4 above.

reasons and have higher incidences of juvenile justice involvement.⁹ They were also more likely to have become homeless, with many citing lack of acceptance in foster care as the reason they experienced homelessness.¹⁰ States and tribes will continue to be stymied in their ability to improve outcomes for LGBT foster youth until sexual orientation and gender identity data is available. Collecting this data nationally will allow the Children's Bureau, states and tribes to identify successes and best practices in improving outcomes for LGBT foster youth and to replicate them to address disparities.

We also oppose eliminating data elements relating to the Indian Child Welfare Act ("ICWA"). 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 LGBT-identified American Indian and Alaska Native youth.

The Children's Bureau should retain the data element related to the reason for removal of a child from a family home due to "family conflict related to child's sexual orientation, gender identity, or gender expression."

Data regarding the degree to which family conflict impacts removal can drive needed funding for family acceptance work leading to family preservation, a priority of the current ACF administration. Helping a child remain with their family of origin through targeted supportive services related to this source of family conflict will provide enormous cost savings for states and tribes. Utilizing the FY10 foster care maintenance payments costs described above, cost savings would amount to \$19,107 per child per year for each child not placed in a foster home; the annual savings would be 3-5 times greater for each child not placed in congregate care.

Given that an estimated 19% of foster youth identify as LGBT¹¹, this data element will be crucial to successfully implementing Family First prevention funding aimed at keeping children with their families of origin rather than entering foster care. Removing this data point would harm the ability of states and tribes to further efforts to reduce the over-representation of LGBT youth in care, in general, and LGBT youth of color, in particular. In addition, research indicates that reducing the severity of family rejection based on SOGIE results in a reduction in suicidal ideation and self-harm, depression, substance use and sexually transmitted infections. All of these negative public health outcomes are costly not only to children personally, but to the child welfare system and our communities as a whole. This data element related to family rejection will help drive effective case planning and services resulting in better outcomes for youth and families and cost savings to states and tribes.

B. The Children's Bureau Should Retain the Voluntary Sexual Orientation Question for Adoptive and Foster Parents and Guardians.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ Same as 4 above.

The LGBT community is a significant untapped resource in the effort to find permanent families for all children and youth in foster care. Gay and lesbian foster parents are raising six percent of foster children in the United States, and same-sex couples are six times more likely to be serving as foster parents than their different-sex counterparts.¹² National surveys tell us that nearly 2 million lesbian, gay and bisexual adults are interested in adopting children.¹³ Data resulting from the voluntary sexual orientation question for adoptive and foster parents and guardians will help states and tribes recruit and support LGBQ caregivers, increasing the pool of available homes for foster children, and help identify states and agencies which can do better in recruitment of LGBQ resource families.

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.”¹⁴ 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.¹⁵ Recruitment of LGBQ families could provide a source of affirming, supportive homes for LGBT foster youth, reducing the costs detailed above that are associated with the placement instability and overrepresentation in congregate care that these youth experience.

C. 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.

A forthcoming 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 LGBT is often not because they are “out” as LGBT, 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. 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,

¹² Gary Gates, LGBT Parenting in the United States, The Williams Institute, UCLA School of Law, February 2013, <http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/lgbt-parenting-in-the-united-states/>

¹³ The Williams Institute & 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/>

¹⁴ Same as 2 above.

¹⁵ *ECDF Act Facts*, Family Equality Council (2017), https://www.familyequality.org/get_informed/advocacy/ecdf/ecdf-facts/

¹⁶ Robinson, Brandon Andrew. Forthcoming. “Child Welfare Systems and LGBTQ Youth Homelessness: Gender Segregation, Instability, and Intersectionality.” *Child Welfare*. 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).”

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).

- D. The sexual orientation and gender identity and expression data elements of foster youth can be administered safely, and the Children's Bureau should provide training and resources to states and tribes to do so.

The child welfare profession has acknowledged the importance of collecting sexual orientation and gender identity ("SOGI") 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 SOGI information in child welfare systems.¹⁷ The guidelines address the need to collect SOGI 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 SOGI information on youth. Sexual orientation questions have been included on school-based surveys of adolescents since the mid-1980s through versions of the Youth Risk Behavior Survey (as noted in Children's Bureau comments to the Final Rule) and SOGI information is collected by many health care providers. Researchers have surveyed LGBT youth in the juvenile justice system, significantly increasing the profession's understanding of the disproportionate numbers of LGBT youth in detention, as well as differences in offense and detention patterns.¹⁸ The regulations promulgated under the Prison Rape Elimination Act ("PREA") require youth and adult correctional officers to collect SOGI information as part of the initial screening process to identify residents and inmates who may be vulnerable to sexual assault while incarcerated.¹⁹ Increasing numbers of state and local child welfare and juvenile justice agencies, as well as providers serving youth experiencing homelessness, have developed policies requiring the collection of SOGI data as part of the initial intake and assessment.

In the Final Rule, the Children's Bureau summarized its well supported rationale for collecting information regarding the sexual orientation of youth 14 years old and older. 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."

E. Conclusion

¹⁷ 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>

¹⁸ 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).

¹⁹ National Standards to Prevent, Detect and Respond to Rape, 28 CFR § 115 (2012).

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 of these data elements outlined in the Final Rule.

Sincerely,

A handwritten signature in blue ink, appearing to read "Naomi", with a stylized flourish at the end.

Naomi Goldberg, MPP
Director of Policy and Research