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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, D.C. 20024

RE: Proposed rulemaking for streamlining the Adoption and Foster Care Analysis and Reporting System (AFCARS) data elements and removing any undue burden related to reporting AFCARS, 45 CFR 1355 (Mar. 15, 2018) [RIN 0970-AC72]

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

Dear Ms. McHugh:

On behalf of scholars from various disciplines—social work, community psychology, demography, economics, law, medicine, public health, political science, public policy, psychology, social epidemiology, among others—who have extensive experience studying the experiences and outcomes of youth in foster care and/or sexual and gender minorities (SGM) in the United States, we write to strongly request that the 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 undersigned have published extensively on issues related to youth in out-of-home care, permanency risks and outcomes, and SGM youth and adults. Many of the undersigned are scholars at or affiliated with the Williams Institute, an academic research center at UCLA School of Law dedicated to conducting rigorous and independent research on sexual orientation and gender identity. Scholars at the Williams Institute were the first to publish a study documenting the high levels of overrepresentation of LGBT foster youth in child welfare, using data collected through traditional survey research methods. The absence of administrative data at a national level make it impossible to track whether the system is making improvements in the treatment and care of this very vulnerable, but significant proportion, of the population of youth in out-of-home care. 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. For these reasons and those explained in more detail below, we strongly recommend that the current data elements in the Final Rule are maintained.

A. Removal of Data Elements Related to Foster Youth Sexual Orientation and Gender Identity and Expression ("SOGIE") Would Negatively Impact the Safety, Permanency, and Wellbeing of LGBTQ 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 lesbian, gay, bisexual, transgender, and questioning ("LGBTQ") foster children. LGBTQ youth are disproportionately overrepresented in foster care and suffer worse safety, permanency, and well-being outcomes than their non-LGBTQ peers. Data on these youth at the state level is urgently needed to improve outcomes, reduce costs, 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 LGBTQ children, and the Social Security Act requires collection of data regarding characteristics of all children in care. 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." ACF further acknowledged that LGBTQ youth are overrepresented in the population served by the child welfare system and in the population of youth experiencing homelessness. Yet, LGBTQ 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 LGBTQ youth in care and the poor outcomes they experience were confirmed in a 2013 study conducted by the Williams Institute under the Administration of Children & Families Permanency Innovations Initiative. The purpose of the study was to determine the percentage of Los Angeles County foster youth who identify as LGBTQ, 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 LGBTQ, which is 1.5 to 2 times the number of LGBTQ 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 (an indicator related to gender expression), and 5.6% were

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

²Administration 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 Wilson BDM, Kastanis AA. (2015). Sexual and gender minority disproportionality and disparities in child welfare: A population-based study. Child Youth Services Review, 58, doi:10.1016/j.childyouth.2015.08.016.

transgender. Other studies have estimated similarly high numbers of sexual minority youth using national data.6

In addition to being disproportionately represented in the system, LGBTQ youth experience worse conditions and outcomes in foster care. The federally-funded Los Angeles foster youth study showed that LGBTQ youth have a higher number of foster care placements and are more likely to be living in a group home, both risks to lower rates of permanency. Over twice as many LGBTQ youth reported being treated poorly by the foster care system compared to non-LGBTQ youth, and they were also more likely to have become homeless, with many citing lack of acceptance in foster care as the reason they experienced homelessness.8 Further, both the Los Angeles study and the study using nationally representative data showed that LGB youth were more likely to experience psychological distress than non-LGB youth. 9 States and tribes will continue to be stymied in their ability to improve outcomes and reduce costs for LGBTQ 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 LGBTQ 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 LGBTQ-identified American Indian and Alaska Native youth.

B. The Data Elements in the Final Rule are Not Overly Burdensome and Have Already Been Streamlined through Numerous Comment Periods

We recommend that the data elements in the Final Rule be retained and not further streamlined. The 2016 Final Rule represents a "streamlining" of the original proposed rule (2015 NPRM and 2016 SNPRM) and the burdens identified by commenters were addressed in the Final Rule. Over the years, states and tribal entities and other stakeholders have had numerous opportunities to provide public comments on AFCARS data elements including in 2003, 2008, 2010, 2015, and 2016. The Final Rule data elements reflect those numerous public comments, are not overly burdensome and will provide nationwide information regarding children and families whose existence and experiences have remained officially invisible. Any burden involved in implementing new data elements is outweighed by the benefit of more informed state and federal policy resulting in improved outcomes for some of the most marginalized children in the child welfare system and reduced systemic costs.

Because AFCARS has not been updated since 1993, data elements added in the Final Rule reflect significant advances in child welfare policy and practice and include statutorily required data from the Preventing Sex Trafficking and Strengthening Families Act (P.L. 110-351) and changes in foster care services and oversight in the Fostering Connections to Success and Increasing Adoptions Act

⁶ 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

⁷ Same as 4 above.

⁸ Ibid.

⁹ Ibid.

of 2008 (P.L.110-351), and the Child and Family Services Improvement and Innovation Act (P.L. 112-34). Critically, the Final Rule will also provide data to ensure implementation and oversight of the Indian Child Welfare Act (P.L. 95-608), improving outcomes for tribal youth. The burden on states of implementing new data element collection will be reduced with the current development of the new Comprehensive Child Welfare Information System (CCWIS), and many of the data elements will assist states in implementing the recently passed Family First Prevention Services Act ("Family First," P.L 115-123), as described in examples below.

C. The Data Elements in the Final Rule are Not Overly Burdensome as They Reflect a Now Longstanding History of Collecting Data in Sexual Orientation, Gender Identity and Gender Expression

The proposed data elements specific to sexual orientation, gender identity, and gender expression also represent advances in science over the last 25 years in which the feasibility and accuracy of data collection on these topics has been consistently demonstrated. Indeed, as the SMART report explained, "[s]exual orientation questions have been asked on large-scale school-based surveys of adolescents around the world since the mid-1980's." 10 For example, the Bureau of Justice Statistics' National Survey of Youth in Custody (NSYC) includes a measure of sexual orientation and has provided a wealth of important information about disproportionate incarceration and victimization of sexual minority youth in custody. 11 The CDC's National Youth Risk Behavior Risk Survey successfully includes respondents as young as 13 and has included sexual orientation measures since 2015. In 2015, more than 15,500 youth from across the country filled out the YRBS survey on their own, anonymously at school. 12 Even before that, an increasing number of jurisdictions included sexual orientation measures on their YRBSs since the mid-1990s. 13 The National Longitudinal Study of Adolescent to Adult Health (Add Health), a longitudinal study of a nationally representative sample of adolescents in grades 7-12 in the United States during the 1994-1995 school year, included sexual orientation attraction and partner gender questions in both the baseline wave and Wave II (1996), when respondents were largely below the age of 18. Analysis of Add Health data has indicated, for example, disparities in experiences of violence among adolescents reporting same-sex, both-sex, and other-sex romantic attraction. 14 The National Survey

¹⁰ SEXUAL MINORITY ASSESSMENT RESEARCH TEAM (SMART), WILLIAMS INSTITUTE, BEST PRACTICES FOR ASKING QUESTIONS ABOUT SEXUAL ORIENTATION ON SURVEYS (2009), https://williamsinstitute.law.ucla.edu/wp-content/uploads/SMART-FINAL-Nov-2009.pdf [hereinafter SMART report]; GENDER IDENTITY IN U.S. SURVEILLANCE (GENIUSS) GROUP, WILLIAMS INSTITUTE, BEST PRACTICES FOR ASKING QUESTIONS TO IDENTIFY TRANSGENDER AND OTHER GENDER MINORITY RESPONDENTS ON POPULATION-BASED SURVEYS (2014), https://williamsinstitute.law.ucla.edu/wp-content/uploads/geniuss-report-sep-2014.pdf [hereinafter GenIUSS Report].

¹¹ Bianca D.M. Wilson et al., Disproportionality and Disparities among Sexual Minority Youth in Custody, 46 J. YOUTH & ADOLESCENCE 1547 (2017); Alan J. Beck et al., Bureau of Justice Statistics, Facility-level and individual-level correlates of sexual victimization in juvenile facilities, 2012, NCJ Publication No. 249877 (2016), https://www.bjs.gov/content/pub/pdf/flilcsvif12.pdf.

¹² Anjani Chandra et al., Sexual Behavior, Sexual Attraction, and Sexual Identity in the United States: Data From the 2006–2008 National Survey of Family Growth, 36 NATIONAL HEALTH STATISTICS REPORTS 1 (Mar. 3, 2011), https://www.cdc.gov/nchs/data/nhsr/nhsr036.pdf.

¹³ Bianca D.M. Wilson et al., Williams Institute & UCLA Center for Health Policy Research, Characteristics and Mental Health of Gender Nonconforming Adolescents in California (2017),

http://healthpolicy.ucla.edu/publications/Documents/PDF/2017/gncadolescents-factsheet-dec2017.pdf.

14 Bianca D.M. Wilson et al., Williams Institute, Sexual and Gender Minority Youth in Foster Care: Assessing Disproportionality and Disparities in Los Angeles (2014), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LAFYS report final-aug-2014.pdf.

of Family Growth (NSFG), which includes respondents as young as 15, has included a sexual orientation behavior measure for many years. The California Health Interview Survey has asked youth about their gender expression since 2015. There are many more examples of surveys and studies that have successfully collected sexual orientation and gender identity data from youth, including the L.A. Foster Youth Study (which included adolescents as young as 12). Teach of the surveys and studies provides invaluable information about SGM youth that have impacted policy making and programming in a variety of settings.

And while the feasibility to do this has been demonstrated, numerous scholars and state and federal data science representatives still see a need to call for the increase in representative data of sexual and gender minorities because there is too little available. For this reason, the Federal Interagency Working Group on Improving Measurement of Sexual Orientation and Gender Identity in Federal Surveys has cogently explained that "there remains a lack of data on the characteristics and well-being" of SGM populations, and that "[i]n order to understand the diverse need of SGM populations, *more representative and better quality data need to be collected.*" Without such data, public policymakers, law enforcement agencies, and service providers—including federal agencies tasked with promoting the security and well-being of our nation's people—are hindered in their efforts to adequately serve SGM populations, including LGBT youth. This is no less the case for the child welfare system and the administrative data collected to better understand their demographics, needs, and outcomes.

D. <u>The Children's Bureau Should Retain the Voluntary Sexual Orientation Question for</u> Adoptive and Foster Parents and Guardians.

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." 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. Recruitment of LGBTQ families could provide a source of affirming and supportive homes for LGBTQ foster youth.

The LGBTQ 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

¹⁵ GARY J. GATES, GALLUP, IN US, MODE ADULTS IDENTIFYING AS LGBT (2017), http://www.gallup.com/poll/201731/lgbt-identification-rises.aspx.

¹⁶ See also SMART Report, supra note **Error! Bookmark not defined.**0, at 9.

¹⁷ See generally id. at 17-23, 26-27 (discussing privacy and other administration considerations when asking sexual orientation questions); GenIUSS Report, *supra* note **Error! Bookmark not defined.**0, at 19-26 (discussing privacy and other administration considerations when asking gender identity questions).

¹⁸ FEDERAL INTERAGENCY WORKING GROUP ON IMPROVING MEASUREMENT OF SEXUAL ORIENTATION AND GENDER IDENTITY IN FEDERAL SURVEYS, TOWARD A RESEARCH AGENDA FOR MEASURING SEXUAL ORIENTATION AND GENDER IDENTITY IN FEDERAL SURVEYS: FINDINGS, RECOMMENDATIONS, AND NEXT STEPS, 2 (2016), https://s3.amazonaws.com/sitesusa/wp-

content/uploads/sites/242/2014/04/SOGI_Research_Agenda_Final_Report_20161020.pdf

¹⁹ Same as 2 above.

²⁰ ECDF Act Facts, Family Equality Council (2017), https://www.familyequality.org/get_informed/advocacy/ecdf/ecdf-facts/

parents than their different-sex counterparts.²¹ National surveys tell us that nearly 2 million lesbian, gay and bisexual adults are interested in adopting children.²² Data resulting from the voluntary sexual orientation question for adoptive and foster parents and guardians will likely help states and tribes recruit and support LGBTQ caregivers, increasing the pool of available homes for foster children, and help identify states and agencies which can do better in recruitment of LGBTQ resource families.

E. 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.

Youth who are transgender and or gender nonconforming specifically have a difficult time in child welfare systems.^{23,24} 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, and Title IV-E agencies will benefit from adding these data elements now in conjunction with the new Comprehensive Child Welfare Information System (CCWIS).

F. 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. ²⁵ 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 LGBTQ youth in the juvenile justice system, significantly increasing the profession's understanding of the disproportionate

 $\underline{http://cssr.berkeley.edu/cwscmsreports/documents/Information \% 20 Guidelines \% 20 P4.pdf}$

²¹ 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/

²² 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/

²³ Robinson, B. A. (2018). Child Welfare Systems and LGBTQ Youth Homelessness: Gender Segregation, Instability, and Intersectionality. CHILD WELFARE, 96(2), 29-45.

²⁴ Choi, S. K., & Wilson, B. D. (2018). Gender Diversity and Child Welfare Research: Empirical Report and Implications of the Los Angeles County Foster Youth Study. CHILD WELFARE, 96(1), 79-101.

²⁵ 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),

numbers of LGBTQ youth in detention, as well as differences in offense and detention patterns.²⁶ 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.²⁷ 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."

G. Conclusion

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 and feasibility of these data elements outlined in the Final Rule.

Sincerely,

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I am lending my support to this letter my adding my name and affiliation (for identification purposes). Listed by order of time of endorsement:

²⁶ 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).

²⁷ National Standards to Prevent, Detect and Respond to Rape, 28 CFR § 115 (2012).

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