June 12, 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 Regulations.gov

Dear Ms. McHugh:

On behalf of The Trevor Project please accept the following comments regarding the Notice of Proposed Rulemaking at 83 Fed. Reg. 11449 ("Proposed Rule") proposing to streamline the Adoption and Foster Care Analysis and Reporting System (AFCARS) data elements and request comments regarding whether new data elements are overly burdensome. The Trevor Project requests 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.

As you know, the Trevor Project is the nation's largest provider of crisis intervention and suicide prevention services to lesbian, gay, bisexual, transgender and questioning young people ages 13-24. Every day, we save countless young lives through our phone, text and instant message crisis intervention services. As a leader and innovator in suicide prevention, The Trevor Project offers the largest safe social networking community for LGBTQ youth, best practice suicide prevention educational trainings, resources for youth and adults, and advocacy initiatives.

A. <u>The Data Elements in the Final Rule are Not Overly Burdensome and Have Already Been Streamlined through Numerous Comment Periods</u>

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. In fact, 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 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.

B. 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 LGBTQ Children and Eliminate Cost Savings

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.[1] In April

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

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 LGBTQ youth are overrepresented in the population served by the child welfare system and in the population of youth experiencing homelessness.[3] 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 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 LGBTQ 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 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, and 5.6% identified as transgender. Other studies have estimated even higher numbers of LGBTQ 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, LGBTQ youth experience worse conditions and outcomes in foster care. The federally-funded R.I.S.E. study confirmed that LGBTQ 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 LGBTQ youth reported being treated poorly by the foster care system compared to non-LGBTQ youth, and LGBTQ youth are more likely to be hospitalized for emotional reasons and have higher incidences of juvenile justice

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[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.

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 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.

The Children's Bureau should retain the voluntary sexual orientation question for foster youth over the age of 14

All of the poor outcomes documented for LGBTQ foster youth, including a greater number of foster care placements, overrepresentation in congregate care, and hospitalization for emotional reasons, carry substantial costs to state and tribal child welfare systems. Identifying LGBQ foster youth through the voluntary sexual orientation question and implementing effective interventions to reduce instability, minimize costly stays in group homes, hospitals and juvenile justice facilities and improve permanency in family home settings would provide tremendous cost savings. We therefore urge the Children's Bureau to retain the voluntary question in the Final Rule related to sexual orientation of foster youth over the age of 14 because the many benefits resulting from information related to the new data elements outweigh any labor and cost associated with implementation.
For example, the average annual cost of foster care maintenance payments under Title IV-E and administrative costs for children in foster care in FY10 was $25,782.[11] That same year, adoption subsidies for children whose parents received subsidies and administrative costs for an adopted child averaged IV-E agencies $10,302 in costs.[12] Thus, identifying an affirming, supportive family for an LGBQ child leading to adoption – which would be impossible to do if the child's sexual orientation was unknown – would lead to an annual cost savings of $15,480 per child. Further, congregate care (in which LGBQ foster youth are overrepresented) including group homes, residential treatment facilities, psychiatric institutions and emergency shelters costs state governments 3-5 times more than family foster

[9] *Ibid.*
[10] *Ibid.*
[11] Zill, E. *Better Prospects, Lower Cost: The Case for Increasing Foster Care Adoption,* Adoption Advocate (35), May 2011, National Council for Adoption
http://www.adoptioncouncil.org/images/stories/NCFA_ADOPTION_ADVOCATE_NO35.pdf
[12] *Ibid.*

care.[13] Based on average annual foster care maintenance payments per child of $19,107 in FY2010,[14] placing an LGBQ child with an affirming, supportive foster family rather having her remain in congregate care would save a minimum of $38,214 per child per year.
It should be noted that all costs are not easily quantified, such as the well-being of youth receiving affirming care, or the long-term health benefits of a youth exiting sooner to a permanent family, and the cost savings to states and tribes estimated above are simply those within the foster care system itself. For example, studies indicate that LGBTQ youth exit foster care to homelessness and are commercially sexually exploited and victimized at higher rates than their non-LGBTQ peers in care. Costs associated with these negative outcomes are significant although challenging to quantify.
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 LGBTQ[15], 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 LGBTQ youth in care, in general, and LGBTQ 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.

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

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[13] National Conference of State Legislatures, *Congregate Care, Residential Treatment and Group Home State Legislative Enactments 2009-2013,* February 2017 http://www.ncsl.org/research/human-services/congregate-care-and-group-home-state-legislative-enactments.aspx
[14] Same as 11 above.
[15] Same as 4 above.

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 parents than their different-sex counterparts.[16] National surveys tell us that nearly 2 million lesbian, gay and bisexual adults are interested in adopting children.[17] 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."[18] 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.[19] Recruitment of LGBQ families could provide a source of affirming, supportive homes for LGBTQ foster youth, reducing the costs detailed above that are associated with the placement instability and overrepresentation in congregate care that these youth experience.

D. <u>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.</u>

A forthcoming study found that "youth who are transgender and/or gender-expansive often have a difficult time in child welfare systems; violence enacted upon people who are LGBTQ is often not because they are "out" as LGBTQ, but because service providers, caretakers, and peers are policing the youth's gender behaviors."[20] 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

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[16] 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/

[17] 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/

[18] Same as 2 above.

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

[20] 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)."

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, 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).

E. 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.[21] 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 numbers of LGBTQ youth in detention, as well as differences in offense and detention patterns.[22] 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.[23] 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 "information on sexual orientation should be obtained and maintained in a manner that reflects respectful treatment, sensitivity, and confidentiality." Additionally,

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[21] 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

[22] 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).

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

the rule directed agencies to guidance and recommended practices developed by "state and county agencies, advocacy organizations and human rights organizations."

F. 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 of these data elements outlined in the Final Rule.

Sincerely,

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