



# TRIBAL LAW AND POLICY INSTITUTE

*Serving Native Communities Since 1996*

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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

Via electronic correspondence at: [CBComments@acf.hhs.gov](mailto:CBComments@acf.hhs.gov)

Re: RIN: 0970-AC47

Dear Director McHugh,

I am writing to you on behalf of the Tribal Law and Policy Institute (TLPI), a Native American owned and operated non-profit organized to promote the enhancement of justice in Indian country and the health, well-being, and culture of Native peoples.

The Tribal Law and Policy Institute submits these comments on the Notice of Proposed Rulemaking regarding the Adoption and Foster Care Analysis Reporting System (AFCARS) for Title IV-B and Title IV-E as they relate to the Indian Child Welfare Act (ICWA). Data points specific to ICWA were incorporated into AFCARS as detailed in the Final Rule published on December 14, 2016.

### *I. The Data Collection Requirements of the Final Rule are Consistent with ACF's Statutory Mission.*

Section 479 of the Social Security Act mandates 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.

The Final Rule's data collection elements are necessary to ACF's statutory mission under Section 479 of the Act. The Final Rule, which the Administration on Children and Families (ACF) promulgated pursuant to

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these statutory requirements, will ensure the collection of necessary and comprehensive national data on the status of American Indian/Alaska Native (AI/AN) children for whom ICWA applies and historical data on children in foster care.

Moreover, tribal consultation is fundamental in constructing an effective and comprehensive data collection scheme that comports with the fundamental mission of the Administration for Children and Families. Without collecting tribe's data, consulting with tribes, and listening to the needs of tribes and tribal advocates, the Administration overlooks a percentage of those that the administration is obliged to protect. Consulting with tribes ensure that decades, in some instances centuries, old treaties are correctly understood and that the unique legal and political relationship between tribes and the federal government is not misunderstood. At the cornerstone of the relationship between tribes and the government is a general acknowledgement of the trust responsibility and a respect for tribal sovereignty. Without adequate consultation, the federal government fails to meet these duties owed to tribes in perpetuity.

## *II. The Administration Provided All Interested Parties with Ample Notice and Opportunities to Comment on the Final Rule.*

Tribes, tribal organizations and tribal advocates have long sought the inclusion of ICWA-related data points in the AFCARS. The initial rules were changed due to comments by these entities and others after reviewing ACF's February 2015 proposed rule. On April 2, 2015 the Agency issued a Supplemental Notice of Proposed Rulemaking (SNPRM) changing certain data elements. Yet another SNPRM was issued in April 2016. Specifically, the Agency sought comments on the inclusion of the ICWA data points in both the April 2015 Intent to Publish a SNPRM, as well as the April 2016 SNPRM. Ultimately, the Final Rule was published on December 14, 2016 (Final Rule), and included the ICWA data elements.

The Final Rule thoroughly responded to comments on both the benefits and burdens of the proposed regulatory action. Given the multiple opportunities to comment throughout this time period, any additional collection activity is unnecessary. In addition, tribes, tribal organizations, and advocates received notice of all of these opportunities, and with ample time to comment on this vital and important rule change.

States also had ample opportunity to participate. As the Final Rule explains in detail, ACF engaged in robust consultation with states and responded to their concerns, for example, by streamlining many data elements. 81 Fed. Reg. 90524, 90565-66. States had at least six different opportunities to raise their concerns, which the ACF considered and addressed fully. 81 Fed. Reg. at 90566.

## *III. In Contrast, this Proposed Information Collection Activity Was Not Distributed to Tribes in a Timely Manner and Tribes Were Pressed for Time to Provide Comment.*

Per Executive Order 12866, the typical comment period is 60 days. This NPRM is only open for a 30-day comment period. The cited rationale for the shorter comment period for this NPRM, that any delay in issuing a final rulemaking might lead to title IV-E agencies diverting resources to unnecessary changes to their systems to comply with the December 2016 AFCARS final rule,

ignores the weight of the substantial resources that will have been wasted if this delay goes into effect. States have been working, in many cases together with tribes, to implement the regulation for over 15 months.

This collection activity fails to comport with the requirements of the ACF Tribal Consultation Policy, 76 Fed. Reg. 55678, 55685 which requires, “timely, respectful, meaningful, and effective two-way communication and consultation with tribes.”

#### *IV. States are Already in the Process of Implementing These Changes.*

Since these regulations have been effective for approximately fifteen months, all states should be in the process of implementing them. We are aware, for example, that California, a state with 109 federally-recognized tribes, is already well under way with its implementation efforts. Any delay of the implementation of the ICWA-related data points would be contrary to the best interest of tribal children and families, a waste of finite state child welfare resources and creates confusion over whether to continue implementation.

#### *V. These Regulations are Important to Us, Our Families, and State Child Welfare Systems.*

The regulations themselves—in response to the comments from stakeholders across the country—describe the importance of these 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.

Generally, tribes, organizations representing tribal interests, national child welfare advocacy organizations, and private citizens fully support the overall goal and purpose of including ICWA-related data in AFCARS, and the data elements as proposed in the 2016 SNPRM. These commenters believe that collecting ICWA-related data in AFCARS will:

1. provide data on core ICWA requirements such as “active efforts” and placement preferences, as well as assess how the child welfare system is working for Indian children as defined by ICWA, families and communities;
2. facilitate access to culturally-appropriate services to extended families and other tribal members who can serve as resources and high-quality placements for tribal children;

3. help address and reduce the disproportionality of AI/AN children in foster care; and
4. 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.

Overall, tribal commenters and national child welfare advocacy organizations believe that collecting ICWA-related data in AFCARS is a step in the right direction to ensure that Indian families will be kept together when possible, and will help prevent AI/AN children from entering the foster care system. Many of the tribal commenters that supported the 2016 SNPRM also recommended extensive training for title IV-E agencies and court personnel in order to ensure accurate and reliable data.

Other federal reports have demonstrated the need for quality national data to assess states' efforts in implementing ICWA.<sup>1</sup>

There remains a pressing need for comprehensive national data on ICWA implementation. Congress has not amended the Act's data collection provisions. And there have been no changes in circumstances that would alter the burdens or benefits of the final rule's data collection requirements.

For the foregoing reasons, we strongly oppose any delay in the implementation of the regulation and request this proposed information collection activity be withdrawn by the agency.

Sincerely,



Jerry Gardner  
Executive Director  
The Tribal Law and Policy Institute

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<sup>1</sup> See Government Accountability Office, *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>.