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Kathleen McHugh
United States Department of Health and Human Services
Administration for Children and Families, Director, Policy Division
330 C Street SW, Washington, DC 20024
VIA EMAIL ONLY: CComments@acf.hhs.gov

Re: Advance Notice of Proposed Rulemaking – Adoption and Foster Care Analysis and Reporting System: Docket No. ACF-2018-0003; RIN: 0970-AC72.

Dear Director McHugh,

The Margery Hunter Brown Indian Law Clinic (MHBILC) at the Alexander Blewett III School of Law at the University of Montana respectfully submits these comments in response to the Advance Notice of Proposed Rulemaking (ANPRM) regarding the potential “streamlining” of the Adoption and Foster Care Analysis and Reporting System (AFCARS) data elements, which was published in the Federal Register on March 15, 2018.¹ As part of the MHBILC’s mission to “promote the study and understanding of tribal sovereignty, culture, and history in a culturally-appropriate manner; and support the enrollment and success of Native and all law students interested in the study of Federal Indian, Indigenous Peoples’ and Tribal Law,” we often assist or represent Indian tribes and individuals in Indian Child Welfare Act (ICWA) cases.² Therefore, we submit these comments in furtherance of our mission to promote understanding of the importance of ICWA and in light of our experience in working with ICWA cases.

Prior to ICWA’s 1978 enactment, one-third of all Indian children were being placed in non-Indian homes, foster care, and federal or state facilities.³ The widespread removal of Indian children from tribal homes and communities effectively continued the failed federal assimilation policies of the late 1800s and significantly impacted the wellbeing of both Indian children and their tribes. In recognition of that ongoing travesty, Congress specifically identified tribal children as one of the most precious tribal resources and committed the United States, as part of its trust responsibilities to Indian Country, to their protection.⁴ Thus, ICWA seeks to ensure that “the best interests of Indian children,” are met by promoting “the stability and security of Indian tribes and families.”⁵

¹ Adoption and Foster Care System Analysis and Reporting System, 83 Fed. Reg. 11,449 (March 15, 2018).

² *American Indian Law*, ALEXANDER BLEWETT III SCHOOL OF LAW, <http://www.umt.edu/law/academics/programs/ail/default.php> (last visited June 13, 2018).

³ Lorie M. Graham, “*The Past Never Vanishes*”: A Contextual Critique of the Existing Indian Family Doctrine, 23 AM. INDIAN L. REV. 1, 2 (1998).

⁴ 25 U.S.C.A. § 1901(3) (West 2018).

⁵ *Id.* § 1901.

The lack of available data on which children fall under ICWA's protections and how those children are being treated within the child welfare system makes assessing whether States are meeting Congress' mandate and complying with ICWA much more challenging. For example, the lack of statistical data on Indian children in state foster care and social work systems largely prohibits any comprehensive analysis of whether and how closely ICWA is being followed. Without maintaining a federal database containing collective information from across the nation it is nearly impossible to monitor when, how, and even if ICWA is being appropriately applied. The lack of available data on Indian children within the child welfare system is a huge obstacle. Statistical data is needed to monitor ICWA standards and their application.

Using the AFCARS to collect data on the children that go through the adoption and foster care process is one way to help eliminate barriers. In the past, the information gathered using this system was minimal and only mildly informative, but with the regulations adopted in late 2016, AFCARS became much more useful by adopting certain ICWA-related data elements.⁶

Despite the obvious benefits of these new ICWA-related data elements, the ANPRM and prior statements from the Department of Health and Human Services (HHS) suggest that the agency is considering removing or reducing them.⁷ In contrast to these recent concerns, however, an earlier HHS report identified state child welfare information systems as a key data source for assessing ICWA compliance and noted that "[k]ey [l]imitations in data systems, including challenges related to adding or revising data fields and limited options for running reports related to ICWA," was a "common challenge" reported by states "related to complying with ICWA, assessing their compliance with ICWA, and consulting and collaborating with tribes on state CFSPs."⁸

Beyond that recognition, HHS also engages with ICWA by providing training specifically relating to infant adoptions that may be governed by ICWA.⁹ Therefore, although HHS claims it is not the appropriate agency to handle ICWA-related matters, it has already been doing so for the last several years.

Finally, while it appears that the ANPRM's primary goal is to "streamline ... data elements and remov[e] any undue burden," the agency should consider the significant potential for additional data, collected pursuant to the 2016 Final Rule, to streamline and reduce long-term burdens on state and tribal agencies. As the December 2016 Final Rule noted, improving ICWA "implementation and associated data collection will likely help to inform efforts to improve outcomes for all children and families in state child welfare systems."¹⁰ These improved outcomes, and associated reductions in administrative and agency burdens, can only be accomplished by understanding the existing scope of ICWA challenges and successes. That understanding can only be achieved through collecting data – precisely the goal of the 2016 Final Rule.

Therefore, more data and more work is needed to improve outcomes for state and tribal child welfare agencies and, most importantly, to meet Congress' mandate to serve the best interests of Indian children and overcome a long history of federal and state interference in their wellbeing. These benefits clearly outweigh any potential

⁶ Adoption and Foster Care Analysis and Reporting System, 81 Fed. Reg. 90,524, 90,527 (Dec. 14, 2016).

⁷ *Id.*

⁸ States' Consultation and Collaboration with Tribes and Reported Compliance with the Indian Child Welfare Act: Information from States' and Tribes' 2015-2019 Child and Family Services Plans, Report No. HHSP23320110015YC, 4,5 *available at* https://www.acf.hhs.gov/sites/default/files/cb/state_tribal_cfsp_2015_2019.pdf, 8 (ACYF, ACF Dec. 17, 2015).

⁹ Children's Bureau: An Office of the Administration for Children & Families, *Infant Adoption Awareness Training Program*, May 17, 2012, *available at* <https://www.acf.hhs.gov/cb/resource/adoption-awareness-training>.

¹⁰ Adoption and Foster Care Analysis and Reporting System, 81 Fed. Reg. at 90,527.

administrative burdens associated with additional data elements under AFCARS, as was determined when the Final Rule was promulgated.¹¹ ICWA is the “gold standard” of child protection and the Administration for Children and Families should demand the data necessary to meet that standard, improve ICWA compliance, and leave in place the data collection elements of the December 2016 Final Rule.¹²



¹¹ *Id.* at 90,528.

¹² *Id.* at 90,527.