

National Indian Health Board



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June 18, 2019

Children's Bureau
Administration for Children and Families
U.S. Department of Health and Human Services
Attn: Kathleen McHugh, Director, Policy Division
330 C St SW
Washington, DC 20201

**RE: RIN 0970-AC72, Adoption and Foster Care Analysis and Reporting System
Proposed Rule**

Dear Ms. McHugh,

On behalf of the National Indian Health Board (NIHB),¹ and the 573 federally recognized American Indian and Alaska Native (AI/AN) Tribes we serve, I write to respond to the Notice of Proposed Rulemaking (NPRM) to amend the Adoption and Foster Care Analysis and Reporting System (AFCARS) regulations issued by the U.S. Department of Health and Human Services (HHS) Administration for Children and Families (ACF). For entities that are not Title IV-E agencies under the Social Security Act, the ACF requests specific reasons as to why AFCARS is the most effective vehicle for collection of the data proposed in this NPRM; why an alternative method is not feasible to collect the information; and whether the data elements in the proposed rule will enhance the work of organizations working with children and families. NIHB supports the inclusion of the ICWA related data elements in AFCAR information collection, as finalized in the 2016 rule.² As in previous years, NIHB is opposed to any streamlining, modification, or elimination of critical AFCARS data elements pertaining to the welfare of American Indian and Alaska Native Children.

¹ Established in 1972, the National Indian Health Board (NIHB) is an inter-Tribal organization that advocates on behalf of Tribal governments for the provision of quality health care to all American Indians and Alaska Natives (AI/ANs). The NIHB is governed by a Board of Directors consisting of a representative from each of the twelve Indian Health Service (IHS) Areas. Each Area Health Board elects a representative to sit on the NIHB Board of Directors. In areas where there is no Area Health Board, Tribal governments choose a representative who communicates policy information and concerns of the Tribes in that area with the NIHB. Whether Tribes operate their entire health care program through contracts or compacts with IHS under Public Law 93-638, the Indian Self-Determination and Education Assistance Act (ISDEAA), or continue to also rely on IHS for delivery of some, or even most, of their health care, the NIHB is their advocate.

² Adoption and Foster Care Analysis and Reporting System, RIN: 0970-AC47, 45 C.F.R. 1355 (Dec. 14, 2016), <https://www.federalregister.gov/documents/2016/12/14/2016-29366/adoption-and-foster-care-analysis-and-reporting-system>.



Background

The United States (U.S.) has a unique legal and political relationship with American Indian and Alaska Native Tribal governments. This relationship was established through treaties and affirmed by the U.S. Constitution, Supreme Court decisions, federal laws and regulations, and presidential executive orders. Central to this relationship is the federal government’s trust responsibility to protect the interests of Indian Tribes and their children,³ including through the provision of health care and public health related policies.

Despite the federal trust responsibility to protect AI/AN families, decades of official federal policy aimed at assimilating Tribes, and particularly American Indian and Alaska Native children, into mainstream society resulted in the removal of these children from their homes by state child welfare agencies at rates far higher than those of non-Indian families. In response to the national crisis of separation of AI/AN children from their families, Congress enacted the Indian Child Welfare Act (ICWA or the Act) in 1978.⁴ ICWA establishes minimum federal standards for the removal of Indian children from their families and their placement in foster care or adoption care that will reflect the unique values of American Indian and Alaska Native culture.

The intent of Congress in passing the ICWA legislation was to promote the best interests of AI/AN children and to protect the rights of parents. At the same time, Congress sought to balance the jurisdiction and political interests of Tribes and the states. The AFCARS rule, finalized in 2016, for the first time incorporated and outlined ACF’s responsibilities to AI/AN children under ICWA. Regulations required AFCARS data to include a review of state recordkeeping procedures, state court requirements under ICWA, and a review of whether states made “active efforts” prior to removal of AI/AN children and prior to the termination of parental rights, among other protections.⁵ The Indian Child Welfare Act is as essential today as in the year of its passage to achieve the best interests of American Indian children, and to preserve the unity between AI/AN children and their Tribes. The Agency should not, through this NPRM, undermine the congressionally sanctioned special protections in place for AI/AN children by removing valuable ICWA related reporting requirements that make a difference to the lives of children, and that help to strengthen the advocacy on their behalf.

Proposed Rule

In this NPRM, the Agency requests that commenters focus on the data elements that the Agency is proposing to remove or revise from the 2016 Final Rule. The 2016 Final Rule contained updated statutory requirements since the first issuance of the rule in 1993, implemented statutory penalties for non-compliant data submissions, and enhanced the type of information reported to better measure outcomes of children and families – including information related to ICWA.

³ The 25 U.S.C. § 1901(2)–(3) (Supp. IV 2016) (“Congress, through statutes, treaties, and the general course of dealing with Indian Tribes, has assumed the responsibility for the protection and preservation of Indian Tribes and their resources . . . there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian Tribe . . .”).

⁴ 25 U.S.C. § 1901 et seq.

⁵ Department of the Interior (June 14, 2016), <https://www.federalregister.gov/documents/2016/06/14/2016-13686/indian-child-welfare-act-proceedings>.



We appreciate that ACF is proposing to retain the 2016 AFCARS Final Rule data elements that require states to inquire as to whether a child is American Indian or Alaska Native, whether the child and parent are Tribally-affiliated, and whether the state notified the Tribe of court proceedings. We note, however, that ACF is proposing to eliminate over 90% of the other data elements for AI/AN children from the 2016 Final Rule. The Agency notes, “In particular, we propose to streamline data elements related to child information, placements, and permanency planning based on public comments to the Advanced Notice of Proposed Rule Making (ANPRM) and the work of federal experts with an interest in AFCARS data.” We think this is much more than just “streamlining” and undermines the ability of Tribes, states, and federal policymakers to understand how ICWA is being implemented nationwide and in individual states. This includes the requirement under Title IV-B for states to consult with Tribes on the implementation of ICWA, which ACF plays a role in providing oversight on.

Under Section 479(c)(3) of the Social Security Act,⁶ information collected through AFCARS must provide “comprehensive national information.” Exempting some states from reporting the proposed ICWA related data elements is not consistent with this statutory mandate, and would render it difficult to use this data for development of national policies for Indian children.⁷ By not providing fuller data through AFCARS, ACF will have to resort to guessing if states are implementing ICWA properly and ensuring that Tribal children and families are receiving its protections. American Indian and Alaska Native children are already disproportionately represented in state foster care systems in at least 13 states and nationally, and Tribal families still experience biased treatment in state child welfare systems;⁸ removing these data elements will only exacerbate the problem.

AFCARS is the most effective tool for collecting a consistent set of data elements for states to use to address the well-being of AI/AN children.

There are many benefits of collecting the ICWA data elements identified in the 2016 AFCARS rulemaking. While ACF is proposing to retain five of the ICWA data elements from the 2016 Final Rule, the 2019 NPRM eliminates many of the data elements that are needed to understand the unique issues that AI/AN children experience related to historically poor outcomes in state child welfare systems. States, Tribes, federal agencies, and policymakers need better data for AI/AN children and families to understand how to effectively address these persistent and long-term problems.

When local ICWA data is available, Tribes use it to identify discrepancies in state ICWA caseloads or to identify practice issues that need improvement. Unfortunately, many states do not collect this data. The 2016 AFCARS data elements would provide a consistent set of data that Tribes and

⁶ 42 U.S.C. 679.

⁷ Supplemental Notice of Proposed Rulemaking (SNPRM), Adoption and Foster Care Analysis and Reporting System (Apr. 7, 2016), <https://www.federalregister.gov/documents/2016/04/07/2016-07920/adoption-and-foster-care-analysis-and-reporting-system>.

⁸ *Id.* (“Representatives from 13 states [...] stated that some of their states currently collect information [...] related to Indian children, such as Tribal membership, Tribal notification, and Tribal enrollment status. They noted that some of the information with regard to ICWA, such as placement preferences and active efforts, are contained in case files, case notes, or other narratives, and not currently captured within their information systems, and noted issues with extraction of such data for AFCARS reporting.”).



states could use to address ICWA implementation challenges and other child welfare issues. Moreover, many of the ICWA data elements proposed for elimination in the 2019 NPRM have the potential to help ACF support effective implementation of the Family First Prevention Services Act (2018), which has implications for AI/AN children who are in state custody and eligible for ICWA protections.⁹

The U.S. Department of the Interior (DOI) issued final regulations that address requirements for state courts regarding ICWA [81 FR 38778]. DOI, however, does not have a relationship with states in child welfare and does not have an operational data base, or resources, to collect data on AI/AN children in state foster care systems. Under the binding DOI regulations, ACF is required to oversee that states are consulting with Tribal governments on measures taken by the state to comply with ICWA [42 USC 622(b)(9)]. The 2016 Final Rule ICWA data elements are needed to understand how states are working with Tribes on ICWA implementation and whether their efforts indeed address specific areas of concern.

For this reason, alternative methods for collecting ICWA related data, such as the Child and Family Services Reviews,¹⁰ are not feasible and the structure of these reviews does not support collection of this type of data. ACF notes that research or surveys could fill the ICWA data collection void, but the history of funding this type of research has demonstrated that it can't be relied upon to provide accurate and regularly reported data for AI/AN children.¹¹

Several of the ICWA data elements in the 2016 Final Rule that are now proposed for elimination, provide important information and context that inform case planning and systemic efforts to improve outcomes. Therefore, we strongly suggest that ACF retain many of the data elements in the 2016 Final Rule, including the following:

1. **Date of court determination of ICWA application.** This provides information on whether there were significant differences between when the state court and state IV-E agency confirmed application of ICWA and how this affected implementation.
2. **Transfer of jurisdiction.** This provides information on whether a request for transfer of jurisdiction was requested, whether it was approved or denied, and if denied, what the basis for denial was. ACF's alternative to this data element based on the data element "reason for exit" will not provide the necessary information to understand when transfer was requested in a case, why it did or did not happen, and how this impacted other service provision or case planning.
3. **Foster care placement preferences.** This provides information on whether foster care placement preferences were met, which placement preference was used, and if placement preferences were not met was good cause found and on what basis. While the NPRM proposes to identify whether a placement involves a relative or someone

⁹ See National Indian Child Welfare Association, Child and Family Policy Update (Sept. 2018), <https://www.nicwa.org/wp-content/uploads/2018/09/Child-and-Family-Policy-Update-September-2018-FINAL.pdf>.

¹⁰ Children's Bureau, <https://www.acf.hhs.gov/cb/monitoring/child-family-services-reviews>.

¹¹ Supplemental Notice of Proposed Rulemaking (SNPRM), Adoption and Foster Care Analysis and Reporting System (Apr. 7, 2016), <https://www.federalregister.gov/documents/2016/04/07/2016-07920/adoption-and-foster-care-analysis-and-reporting-system> ("It is a well-established that, historically, quantitative and qualitative data on AI/AN populations, including children, has been incomplete and unreliable resulting in such populations being among the most under-counted populations groups in the United States.").



- that is a member of a Tribe it does not provide information on whether a Tribal placement preference was used that could be different than ICWA's, whether the good cause was found to deviate from the placement preferences and the basis for good cause, and did the Tribe approve of the placement if it involved a congregate care setting (institution or group care setting).
4. **Adoptive placement preferences.** This provides information on whether the adoptive placement preferences were met, which placement preference was used, and if placement preferences were not met was good cause found and on what basis. While the NPRM proposes to identify whether a placement involves a relative or someone that is a member of a Tribe, it does not provide information on whether a Tribal placement preference was used that could be different than ICWA's, whether the good cause was found to deviate from the placement preferences, and the basis for good cause.
 5. **ICWA notice on foster care placement and termination of parental rights to Tribes and parents.** While ACF is proposing to retain a modified data element on notice from the 2016 Final Rule, in its modified form it contains flaws. The NPRM data element only tracks whether notice was sent by the state IV-E Agency. The NPRM data element does not provide information on whether the notice was sent within ICWA's statutory timelines and whether it was sent to both parents and the child's Tribe. This is important information that informs whether the parents and child's Tribe had the ability to participate in case planning, placement decisions, and court proceedings. Analyzing this data from the proposed data element could lead to erroneous conclusions regarding whether ICWA requirements were met or whether the parents or Tribe had an opportunity to participate in important case planning decisions and court hearings. The modified notice data element also does not track if the notice was sent by the state court instead of the state IV-E Agency which occurs in some jurisdictions. This is data that should be easily retrievable from a case file.

These are all quantitative data elements and should appear in any well-maintained case file. We understand the Agency's rationale that highly descriptive data elements are better suited for qualitative analysis, and may even be too descriptive for information collection reporting at the national scale. However, data related to American Indian and Alaska Native children would not be "overly burdensome" for state child welfare systems to collect, especially since in the vast majority of states AI/AN families are less than 5% of the state child welfare system and once states establish that a child is not ICWA eligible, which is only one data element, no other data elements have to be completed. ACF is thus in the best position to capture necessary data on AI/AN children and families in state child welfare systems and AFCARS—not an alternative method—is the only federal data system that has the ability to capture placement related data.

It is manageable and not "overly burdensome" for State IV-E Agencies to collect data elements required under ICWA for AI/AN children.

The 2016 supplemental notice of proposed rulemaking and the 2016 Final Rule addressed issues related to state burdens. Affirming states' concerns, the Agency concluded that information collecting burdens were warranted given the lack of basic data for American Indian and Alaska Native children, and the benefits for policy development, technical assistance and training, and



programming.¹² ACF and states' estimates of burden are based in part upon a misunderstanding of ICWA application. Only three of the ICWA data elements from the 2016 Final Rule would need to be asked to every child in state custody. These are: 1) was inquiry into whether the child is a member or eligible for membership within a federally-recognized Tribe conducted; 2) is the child a member or eligible for membership in a federally-recognized Tribe and, if so, which Tribe(s); and 3) does ICWA apply? These questions are necessary to determine if ICWA applies while other data elements in the 2016 Final Rule would only need to be asked if ICWA does apply. Only 9 states have foster care placement rates where ICWA might apply for over 4% of the total state foster care population. In 41 states the rates are under 3%, with 37 states under 1 percent.¹³

While some of ICWA's requirements involve court determinations, most of the actions required are based on state IV-E agencies efforts. Good case management practice requires child welfare agencies to document court findings in case files, including those related to ICWA findings.

The ICWA related data elements in the proposed rule will enhance the work of organizations working with children and families.

A number of states that have cited concerns about expanded AFCARS data collection and reporting related to the 2016 Final Rule have also found ICWA data elements to be helpful. Part of the basis for their concerns centers on the ACF penalty structures for data that is not collected or reported. States have expressed specific concern regarding data that is not under the control of the state IV-E Agency.¹⁴ Interpretations by ACF of why a state may raise concerns about the number of ICWA data elements must be carefully examined and not unduly conflated with more general concerns related to penalty structures or other matters.

For a number of states that have begun integrating the 2016 Final Rule ICWA data elements, the information gathered has been an effective means to address ICWA implementation challenges, policy development, and program management. As noted in the NPRM, "states with higher numbers of Tribal children in their care reported that they supported including limited information related to ICWA in AFCARS because they believe child welfare programs will be enhanced by having this information to inform policy decisions and program management" [84 FR 16574].

Going forward, states should ask questions that ascertain whether a child is an American Indian child as defined in ICWA, including inquiring about the family's Tribal membership status. Specific data elements on notification of proceedings and transfers to Tribal court are important because the timelines in ICWA are rarely met, and information on termination of parental rights, removals under ICWA, and placement preferences are important for determining ICWA compliance. As the Agency itself has recognized, "Not including ICWA related data elements in AFCARS, or including too few data elements, may exclude Indian children and families from the

¹² Supplemental Notice of Proposed Rulemaking (SNPRM), Adoption and Foster Care Analysis and Reporting System (Apr. 7, 2016), <https://www.federalregister.gov/documents/2016/04/07/2016-07920/adoption-and-foster-care-analysis-and-reporting-system>.

¹³ Figures provided by the National Indian Child Welfare Association (NICWA), *Example Talking Points for NPRM Comments* (June 2019).

¹⁴ *Id.*



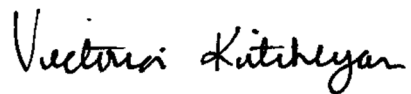
additional benefit of improving AFCARS data.”¹⁵ Collection of ICWA data points enhances the integrity of the AFCARS system as a whole.

Conclusion

NIHB and the Tribes remain dedicated to lifting the unified voice of Tribal communities and their families on the very important matter of Indian child welfare. We thank you for this opportunity to provide our comments and recommendations to the Administration of Children and Families as it concerns the notice of proposed changes to AFCARS data collection.

Should you have any questions regarding NIHB’s comments, or for more information, please contact NIHB’s Director of Policy, Devin Delrow, at ddelrow@nihb.org.

Sincerely,



Victoria Kitcheyan, Chair
National Indian Health Board

Cc: Stacey Ecoffey, Principal Advisor for Tribal Affairs, U.S. Department of Health and Human Services

¹⁵ Supplemental Notice of Proposed Rulemaking (SNPRM), Adoption and Foster Care Analysis and Reporting System (Apr. 7, 2016), <https://www.federalregister.gov/documents/2016/04/07/2016-07920/adoption-and-foster-care-analysis-and-reporting-system>.

