



June 18, 2019

Kathleen McHugh
U.S. Department of Health and Human Services
Administration for Children and Families
Director, Policy Division
330 C Street S.W.
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Re: Proposed Rulemaking amending the Adoption and Foster Care Analysis and Reporting System (AFCARS) System to remove questions relating to sexual orientation (Apr. 19, 2019) [RIN 0970-AC72]

Dear Ms. McHugh:

On April 19, 2019, the US Department of Health and Human Services (HHS), Administration for Children Youth and Families (ACYF), issued a Notice of Proposed Rule (NPRM) to amend the NPRM of the 2016 Adoption and Foster Care Analysis Reporting System (AFCARS) Final Rule (Final Rule). This is the Child Welfare League of America's (CWLA) response.

CWLA is pleased with the inclusion of certain data elements that will provide long overdue improvements in data elements and information. Among these are the critically needed first time data on the Indian Child Welfare Act (ICWA), additional information on foster care placements, additional information on adoptions and guardianships, and new data elements on education and health care. In many of these areas however data elements were reduced or eliminated.

While the revised AFCARS regulations places a heavy emphasis on the need to reevaluate the 2016 final regulations due to Executive Order (E.O.) 13777 and 13771 such reviews need to consider the fact that this is the only revision in data collection since its inception in 1993. Due to the fact that it has taken a quarter century to revise and hopefully implement these important AFCARS regulations this revision must be looked at as both a critical and rare opportunity to implement changes that will inform child welfare practices for the next several decades.

One of the prime arguments used to justify the reduction in data collection and reporting is cost. We appreciate ACYF's concern about the need for states to have the financial resources to implement the Family First Prevention Services Act and how ACYF does not want to divert funds unnecessarily. CWLA agrees and we are working with policy makers along these lines to make

sure there is adequate funding for implementation, and it is why we oppose past proposals such as the elimination of the Social Services Block Grant (SSBG) because of its significant funding role in child welfare.

Clearly there will be a cost associated with this revision, as was the case in 1993. As a result, we suggest that the HHS include in its coming budget request to Congress similar funding support as existed in the 1990s when implementation was offset with a 75 percent match in Title IV-E federal funding. That would mean that the projected total cost submitted in the April 19, NPRM of \$87 million, (with the states absorbing half the cost at \$43 million) would be reduced to \$21 million in state costs. We stand ready to support your request since there is precedent and a need for this rare opportunity to update AFCARS in a way that will better inform policy and legislation over the next twenty years.

This new AFCARS data offers an opportunity to inform how policies enacted in recent years regarding foster care placements, human trafficking, health care status, ICWA and most importantly implementation of the Family First Prevention Services Act are changing the outcomes of families and children.

Sexual orientation for youth who identify as LGTBQ and prospective parents

The April 19, NPRM removes questions and resulting data around sexual orientation both for youth in care and adults who foster or adopt. Let us discuss this as two separate issues. Much of the argument for removing the data and questions of youth in care do not apply to adults who are foster or adoptive parents.

An adult or couple seeking to become an adoptive or foster parent who have taken the great and consequential step to become a foster parent or to adopt a child has the skills to decide whether or not to respond to questions regarding sexual orientation.

AFCARS represents the best national data base of child welfare information carried out by all the states. It has become abundantly clear over the past several years that the issue of discrimination based on sexual orientation will continue to be an area of focus by federal and state policymakers. Without this AFCARS information, there will not be national information beyond studies that will be limited in scope.

It is clear that we have a shortage of foster family homes across the United States. Some of this shortage is driven by the most recent drug epidemic. It is likely that the changing nature of families in structure and income is also making it harder to find foster families. In recent years policymakers are recognizing the different needs of children in care. In 2008 Congress mandated keeping sibling together but foster families willing and able to keep these children together are a challenge to recruit. We are expanding our scientific knowledge of adolescent brain development which, in the coming decades will result in a demand for foster families with different training, skills and capacity. Additionally, the enactment of the Family First Prevention Services Act was predicated on the goal and belief that reduced institutional care placements would be replaced by family foster care placements. Much of the need for new family foster care will be families that are willing and able to care for adolescents and teens.

In addition to the changing face of foster care, we have over 118,000 children waiting to be adopted according to 2017 AFCARS data. This national data suggests a shortage of adoptive parents despite increases in adoptions to 59,000 in 2017, based on current national AFCARS information. This first update of AFCARS since 1993 is a rare opportunity to build the profile of adoptive and foster parents across the county and to learn what shortfalls need to be addressed and where those gaps can be found.

Perhaps most significantly this new AFCARS data is needed because there are ongoing debates at the state and federal level about restricting foster and adoptive parents based on sexual orientation. These debates are unlikely to subside and as a result this new data is critical to these legislative and administrative actions that will doubtless take place in the coming years. New AFCARS data will have an impact on these policy decisions.

The second data issue regarding sexual orientation deals with youth in care. We are not unsympathetic to the concern raised regarding how this information is collected, especially in those states that have enacted discriminatory policies regarding placement of children and recruitment of parents. We understand that the ultimate data may not be one hundred percent accurate, but it begins to provide a critical measure over time. For example, recent AFCARS data suggest that only 14,684 children (5 percent) were removed from their parents care due to alcohol abuse in 2017. Many would conclude that that number should be much higher but not all contributing factors are parsed out from the more global category of “neglect.” Despite this, the inclusion of this data into the AFCARS report sets a measure of how this problem grows or decreases each year.

Data that indicates sexual orientation will begin to build a profile of the youth in care who will be disproportionately impacted by reform efforts to reduce and eliminate certain forms of institutional care (group homes). Again, the growing science around adolescent brain development and the need to have a diverse census of family foster care appropriate to the needs of youth requires greater information on these youth in care.

We urge ACF to examine ways to align this data collection with requirements under Section 475 of Title IV-E “Definitions” which requires that a child age 14 or older receives a written description of programs and services available to them with the purpose of preparing them for transition from foster care to adulthood. We also urge ACF to examine ways to align this data collection along with requirements to collect data and information for the National Youth Transition Database.

The trend of the past five years has pushed up the foster care population to over 440,000 children and youth. This is a significant increase from the low point less than 400,000 in 2012. At the same time the number of youth aging out of care has decreased from a high of just under 30,000 to 19,000 over a ten-year period. We can’t be sure how the current increases in foster care now will change the number of youth aging out of care in five or ten years but building a better profile with national data on who these young people are will no doubt inform national and state policy. We urge you to keep this data collection in some format to build this profile.

Indian Child Welfare Act (ICWA)

CWLA appreciates the fact that the AFCARS regulation will for the first time since ICWA was enacted begin to collect Indian Child Welfare Act (ICWA) data. It is long overdue. As a result, we urge great caution in overemphasizing the cost in implementing these new data elements as a rationale to restrict this new ICWA data.

Ultimately the use of AFCARS is most appropriate in collecting important ICWA data since HHS and ACF have oversight of federal funding and policy regarding child welfare policy. Other federal cabinets and agencies do not have this understanding or authority.

As pointed out by Tribal and Native American representatives, only three data elements result in the need to be asked regarding every child in state custody: 1) inquiry into whether the child is a member or eligible for membership in a federally-recognized tribe conducted; 2) if so which tribe(s); and 3) does the Indian Child Welfare Act apply?

In a 2005 GAO Report (GAO-05-290) requested by the Congress, the authors were limited in their ability to assess ICWA's impact. They surveyed four states and suggested that tools such as the Child and Family Services Reviews (CFSRs) were limited.

“While ACF’s Child and Family Services Reviews have identified some ICWA concerns in states, the structure of this oversight tool was designed to review the overall performance of a state’s child welfare system, rather than any particular law or program. As a result, it does not ensure that ICWA concerns will be addressed or that identified problems will be included and monitored...”

New AFCARS data will help fill some of these monitoring shortfalls. Policymakers at all levels need better data on Native American children and families to understand the impact of the law and the outcomes for families and children.

CWLA highlights some important needs and data elements including:

Foster care and adoption preferences; these two elements will provide information on whether placement preferences in the case of an adoption or out of home care placement were met. If they were not, then what was the basis?

ACF has also curtailed important court action and jurisdiction information. This includes the elimination of the date of court determination of ICWA application and information on the transfer of jurisdiction. The transfer of jurisdiction will provide important information on a whether a request for transfer of jurisdiction was made, if it was approved or denied, and what was the reason for the denial.

CWLA also feels that the original data elements around notice on foster care placement and termination of parental rights to tribes and parents was more appropriate in the 2016 final regulation. The revamped data element only tracks whether notice was sent by the state child

welfare agency. As a result, it will not provide information as to whether the notice was being sent within ICWA's statutory timelines and if it was sent to both parents and the child's tribe.

One of the challenges for some tribal consortia and governments seeking to implement their own child welfare policy using federal funds is a lack of information systems and the data provided. If this new data regarding ICWA becomes available, tribal governments or consortia may be able to use it to identify challenges and issues that need improvement or need to be addressed. This also will have an impact on national policymaking. The 2016 AFCARS data elements would provide a consistent set of data that tribes and states could use to address ICWA challenges and other child welfare issues.

Health Care Status

The April 19, NPRM revises the health assessment data to a simple yes or no in response to the question of whether a child has had a health assessment during the *current-out-of-home care episode*. The criticism is that listing the date of the child's *most recent health assessment* would be too detailed for national statistics. If that is true, then a simple yes or no on whether an assessment has been conducted in the current spell of out-of-home care will also result in a statistic that most children had an assessment. There is a need for more accurate information beyond whether a child received an assessment. There has been great congressional interest in the health care and health care outcomes for children and youth in foster care as demonstrated by the past decade of action.

Accurate health care data on access to health care is important for measuring a state's compliance with its Title IV-B Health Oversight and Coordination Plan. We prefer the inclusion of health assessment based on some limited timeframe if a specific date is not workable. If this data element seems to be too difficult to collect or collate than we suggest a more fixed timeframe such as most recent six month or at least yearly timeframe.

The need or even demand for tracking health care status has been documented in several legislative actions including the 2008 Fostering Connections to Success Act and the 2011 reauthorization of the Title IV-B programs. As a result of those two legislative actions the state plan requirements were expanded to provide "*ongoing oversight and coordination of health care services for any child in a foster care placement*" This includes, according to statute, a schedule for initial and follow-up health screenings that meet reasonable standards of medical practice and steps to ensure continuity of health care services, which may include the establishment of a medical home for every child in care. States must also include a description of the activities that the state has undertaken to reduce the length of time children under age of five and who are without a permanent family. This includes "*the activities the State undertakes to address the developmental needs of such children who receive benefits or services under this part or part E.*" Certainly regular health assessments are critical to addressing these developmental needs.

Educational Stability

It was a Congressional imperative inserted into the 2008 Fostering Connection to Success Act that states pay close attention to the educational needs of children and youth in care. States were

directed to assure that either a child remained in his/her same school if appropriate or be enrolled in a new school without delay. When it was clear that the education community was not taking this mandate seriously enough and without enough urgency, Congress then amended the Elementary and Secondary Education Act (ESEA) to create a similar directive.

That reauthorization of the ESEA or the Every Student Succeeds Act (ESSA) for the first time directs state departments of education to report on the educational performance of students in foster care in the State Report Card.

These data collection sources through both child welfare and education will allow for longitudinal information about the educational needs of students in foster care to be tracked and reported over time. This is and will continue to be a focus of future congresses and any resulting legislative mandates can be made with or without that data. We believe it would be better to have that greater detail to better inform such future mandates on states —if any are necessary.

To this point we know general studies and reports about the limited education outcome of children in foster care. AFCARS is the most effective way to collect educational stability data because it allows reporting of how often children change schools and the reason. Child welfare agencies are already required to keep school stability information as part of their case plans as a result of the 2008 law.

We also point out that the 2016 regulation was written after extensive public comment and debate. The Final Rule was the end result of identifying a finite number of basic education data elements that will yield critical national level data. Education data was a missing critical element not included in the original 1993 implementation of AFCARS. As we pointed out earlier this is a rare opportunity to adjust that 1993 regulation in a way that can better inform the certain legislative actions of the future.

The Exclusion of Juvenile Justice Data Elements Related to Permanency Planning

The NPRM justifies the deletion of the juvenile justice element in section 1355.44(f)(5) that would require title IV–E agencies to report yes/no whether or not a court found the child to be a status offender or adjudicated delinquent during the report period. The Child Welfare League of America supports the final 2016 regulation because it will advance the education of public and private youth-serving organizations regarding the connections between maltreatment and delinquency and the need for an integrated approach to program development and service delivery.

The 2016 Final Rule modified the data element to require title IV-E agencies to report yes/no whether or not a court found the child to be a status offender or adjudicated delinquent. To delete it would not be in aligned with best practices or national, state, or local juvenile justice reform that is happening in multiple jurisdictions.

Research has found that many youth who are caught between the child welfare and juvenile justice systems have a history of trauma, mental health conditions or substance abuse issues that require specialized treatment, and often experience poor educational performance, higher

recidivism rates, higher detention rates, disruptive living arrangements and substantial behavioral health needs. Accessible national data is needed in identifying and understanding this vulnerable population of youth to keep them safe, off the streets, and deter them from a life of crime.

Collaboration between CWLA and the Robert F. Kennedy Children's Action Corps production of the Guidebook for Juvenile Justice and Child Welfare System Coordination and Integration: A Framework for Improved Outcomes has been used in multiple jurisdictions to implement enhanced multi-system practices that improve the outcomes for their youth and families.

Identifying key data elements are essential in integration and coordination of the child welfare and the juvenile justice systems. The overlap of the child welfare and the juvenile justice systems is evident by victims of child abuse and neglect who become juvenile delinquents and federal legislation is acknowledging this overlap by including cross system collaboration and funding incentives in both the child protection and juvenile justice systems.

There is clear congressional interest in this data. Senator Charles Grassley (R-IA) and Senator Gary Peters (D-MI) and have reintroduced legislation known as the Child Outcomes Need New Efficient Community Teams (CONNECT) Act. The legislation seeks to help states identify and respond to the needs of children who come into contact with both the juvenile justice and child welfare systems. This legislation is an attempt to collect data on youth with dual status to foster a better understanding of their unique circumstances and improve coordination in the delivery of services to children who are at risk.

Senators Peters released the following statement on introduction of the CONNECT Act:

"We cannot allow bureaucratic red tape to prevent the juvenile justice and child welfare systems from providing at-risk youth the services they need...By gaining a better understanding of the hardships dual status children have had to endure, we can do more to ensure that they have the opportunity to lead happy, productive lives."

Senator Grassley said,

"Youth involved in both the foster care and juvenile systems shouldn't face additional challenges because of lack of coordination. Too often, these state agencies don't interact enough. Child welfare and juvenile justice experts need to work together to keep vulnerable youth safe, off the streets, and away from crime. Our bill encourages state and local agencies to work as a team to develop best practices and better policies to help at-risk youth and help them succeed in life."

In addition, the Administration for Children and Families (ACF) development of the National Youth in Transition Database (NYTD) to collect outcome information on certain youth in foster care already included the adjudicated delinquent element that child welfare workers are already trained to collect. NYTD provides a sampling of the population and outcomes for youth primarily who will transition from the foster care system. AFCARS data can be used for identification and prevention of negative outcomes for children and youth by indicating a more exact number of youth involved in both the child welfare and juvenile justice systems. This

population of youth presents a unique challenge for both systems and having adequate data that assist states in work towards prevention is critical.

Transition Plans

The Children's Bureau bulletin for professionals, *Working with Youth to Develop a Transition Plan*, outlines the importance of ensuring that transition plans for youth who "age out" of the child welfare system is important. The elimination of section 1355.4(f)(8) that requires the title IV-E agency to report whether the child has a transition plan that meets the requirements of section 475(5)(H) of the Act and the transition plan date in paragraph (f)(9) should be reconsidered.

As a requirement of the Fostering Connections to Success and Increasing Adoptions Act of 2008, transition plans must take place ninety days prior to a youth's 18th birthday. Over the years many alumni of foster care and current youth in care have shared their stories of not being engaged by child welfare professionals before exiting from the foster care system. They are unfamiliar with transition plans and the mandate for title IV-E agencies.

The amendment of the regulation in 45 CFR Part 1355 justification was "to make it clear that agencies should report all plans developed in response to the statute, even if it is before the 90 day period," and should be upheld. The right of youth ages 14 and older to have a transition plan that is documented is critical to successful outcomes for young people transitioning to adulthood.

Within Administration on Children and Families there is a focus on older youth engagement and across many states and local jurisdictions there is a willingness and practice to engage with youth and young adults in many facets that underscores the misconception that this data element is not relevant or would not be of quality.

Conclusion

The Child Welfare League of America appreciates the opportunity to submit these comments on the revisions of the 2016 AFCARS final rule. As we stated in the beginning we feel this is a critical opportunity to amend the AFCARS data elements for the first time in 26 years. We want to make sure we take every opportunity to adjust this data in a way that will provide critical information that can better inform both policy and practice.

Sincerely,



Christine James-Brown
President/CEO, Child Welfare League of America