



April 23, 2024

Ms. Aysha E. Schomburg, Associate Commissioner
Children's Bureau
Administration for Children and Families
United States Department of Health and Human Services
330 C Street, SW
Washington, DC 20201

Re: Notice of Proposed Rulemaking—Proposed Adoption and Foster Care Analysis and Reporting System data elements related to American Indian and Alaska Native children (RIN 0970-AC98)

The Child Welfare League of America (CWLA) welcomes the opportunity to provide comments on the Notice of Proposed Rulemaking (NPRM) regarding Adoption and Foster Care Analysis and Reporting System (AFCARS) data elements related to Indian children placed by state child welfare agencies.

CWLA is a coalition of hundreds of private and public agencies that, since 1920, has worked to serve children and families who are vulnerable. Our expertise, leadership and innovation on policies, programs, and practices help improve the lives of millions of children across the country. Our impact is felt worldwide.

As the nation's oldest and largest child welfare membership organization, CWLA has developed 13 volumes of Standards of Excellence in Child Welfare, covering a range of services and programs in the child welfare field. For 70 years, CWLA's Standards have played a unique national role in shaping quality child welfare practice. They have been a foundation tool for improving the national child welfare system, guiding policymakers, practitioners, advocates, and the broader public. The Standards are widely accepted as the foundation for sound U.S. child welfare practice, providing goals for the continuing improvement of services to children and their families.

In addition to the Standards of Excellence, CWLA published the National Blueprint for Excellence in Child Welfare in 2013. The National Blueprint "presents a vision for the future of child welfare that all children will grow up safely in loving families and supportive communities."¹ This Blueprint is intended to drive change and to spur communities and

¹ CWLA National Blueprint for Excellence in Child Welfare. Child Welfare League of America. Washington, D.C. 2013. p. 1.



agencies to pursue improvement and reform. It also forms the foundation for current and future updates to the Standards.

In offering these comments, we draw upon the concepts and vision for child and family wellbeing set forth in the National Blueprint and the Standards of Excellence for Family Foster Care Services.

Background

The unique legal status of AI/AN tribes and families and the requirements of federal laws like ICWA are not addressed in current federal reporting requirements for state child welfare systems. This lack of data collection results in states not having a full understanding of their progress in implementing ICWA and difficulty in developing effective and collaborative responses with tribes. Tribal nations also lack access to informed and accurate data needed to educate policymakers about the challenges their tribal children and families are experiencing or to justify the appropriate solutions.

It has been over 45 years since the enactment of ICWA and close to 30 years since the establishment of AFCARS, yet the collection of ICWA data has yet to be established. CWLA has supported the expansion of AFCARS to include data elements specific to American Indian/Alaska Native (AI/AN) children, youth and families to better understand implementation of the Indian Child Welfare Act. In our response to the 2019 Proposed Rulemaking amending the Adoption and Foster Care Analysis and Reporting System (AFCARS) System to remove questions relating to sexual orientation [RIN 0970-AC72], we noted, “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 of implementing these new data elements as a rationale to restrict this new ICWA data.”

At the time, we urged the Administration to maintain the collection of data related to ICWA, as the elements included in the 2016 final rule would have provided helpful information in understanding the experiences of AI/AN children, youth and families in foster care. As we note in our National Blueprint, “[e]ach entity should collect meaningful data to support its ability to make decisions; improve proactively; and help children, youth, and families to achieve identified outcomes.”² The data elements proposed in 2016, and again in this new NPRM, are consistent with this principle in our Blueprint.

AFCARS as the Appropriate Method for ICWA Data Collection

Ultimately the use of AFCARS is most appropriate in collecting important Indian child welfare data since the Department of Health and Human Services (HHS) and the Administration for

² Ibid, p. 85



Children and Families (ACF) have oversight of federal funding and policy regarding child welfare policy. Other federal cabinets and agencies do not have this understanding or authority.

Other respondents have suggested that the Child and Family Services Reviews (CFSRs) are a more appropriate place for this data; in a 2005 GAO Report (GAO-05-290) requested by Congress, the authors were limited in their ability to assess ICWA's impact. They surveyed four states and suggested that tools such as the 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.”³

New AFCARS data will help fill some of these monitoring shortfalls. Once fully implemented, the new AFCARS data will be provided annually, whereas the CFSR process is conducted in various rounds that can take years to carry out. Policymakers at all levels need better, more timely data on tribal children and families to understand the impact of the law and the outcomes for families and children.

Best Practice for ICWA Implementation for AI/AN Children, Youth and Families

As the proposed rule notes, the process of implementing the new data collection and the ongoing process of recording and reporting the new data will result in some additional administrative burden. CWLA continues to believe that states and child welfare providers have a responsibility to uphold the commitment of ICWA, regardless of the additional burden it may cause.

The CWLA National Blueprint calls for child welfare agencies to proactively address AI/AN children who become involved in the child welfare system and to fully implement ICWA protections for these children and families. The Blueprint states, “[e]ach entity should minimize cultural disruption and alienation for American Indian/Alaska Native children, youth, and families, use active efforts to prevent unnecessary removal from their families, and understand the Indian Child Welfare Act (ICWA), and how it applies to their work with children, youth, and families.” It goes on to say, “[e]ach entity should have a mechanism for monitoring its compliance with ICWA requirements.”⁴

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

³ Indian Child Welfare Act: Existing Information on Implementation Issues Could Be Used to Target Guidance and Assistance to States. Government Accountability Office. April, 2005. Retrieved from: <https://www.gao.gov/products/gao-05-290>

⁴ CWLA National Blueprint for Excellence in Child Welfare. Child Welfare League of America. Washington, D.C. 2013. p. 111.



this new data regarding ICWA implementation 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 proposed 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, better positioning child welfare entities to uphold this Blueprint principle.

Few states have large numbers of AI/AN children in their foster care systems that would require large-scale data collection efforts. Only eight states have 5% or more of their state foster care population identified as AI/AN. States are already required to ascertain whether a child is a member of a federally recognized tribe and therefore subject to ICWA; the new data elements would only apply to those children and that are deemed to be ICWA-eligible. The majority of the proposed data elements elicit a “yes” or “no” response; there are few instances in which data elements ask for a more qualitative response, specifically to indicate the child’s tribe(s) and dates regarding ICWA application, and this information should already be available in the child’s case file.

In this case, the clear benefit of having accurate, consistent data from every state to better serve AI/AN children and families should outweigh the concern of additional burden on states to collect the data. However, we know the true cost of implementing this data collection rule will be in ICWA implementation that some states have not yet done in a robust way. **We request that HHS provide technical assistance and/or guidance on the identification of Indian children, technical assistance on best practices in coordination with tribes, and training for staff on data collection related activities with concrete recommendations to reduce administrative burden where possible.**

The Availability of the Data Elements

Data elements proposed in the NRPM include data that should be accessible in the case files of state Title IV-E agencies and should be considered part of any appropriately documented case file. This includes common case management information that details the activities of the Title IV-E agency related to case planning and services and related activities of the court in particular cases, such as court orders that inform the agency’s mandate and work.

CWLA’s Standards of Excellence for Family Foster Care Services outlines the responsibilities of the public child-placing agency, which include ensuring that “children in family foster care are protected and cared for and that they receive the services they need.”⁵ This includes attending “scheduled meetings, conferences, case reviews, and/or court hearings,”⁶ and ensuring that, “the child’s needs for protection and nurturing are being met by adherence to relevant statutes, agency

⁵ Standards of Excellence for Family Foster Care Services: Revised Edition. Child Welfare League of America. Washington, D.C. 1995. P. 14

⁶ Ibid, p. 15.



policies, and written services plans, and by compliance with any existing court orders.”⁷ State agencies are a regular party to state child welfare proceedings and, as such, regularly attend and participate in court hearings and are represented by department legal counsel. This includes filing reports, questioning witnesses, and presenting evidence related to judicial determinations. While there may be situations where the court does not provide all the specific information that a state agency may desire regarding a particular judicial determination, this is something that can be remedied through enhanced communication and training and should be pursued to ensure the state agency is appropriately serving the best interests of the child and family. Caseworkers should be maintaining accurate records and case files for each child and family on their caseload, to meet these standards of care; while there is some additional burden in gathering this information to be collected for AFCARS, it is not unreasonable to require caseworkers to record this information regularly and consistently.

The proposed ICWA data elements would not be the only ones to rely on court order information. Examples of existing AFCARS data elements that have similar reach and purpose include Reason for Discharge and Transfer to Another Agency, Living Arrangement and Provider information, Date of Child’s Removal (court order establishing agency placement and care responsibility), Termination of Parental Rights and Adoption (includes court order information).

Addressing Disparities and Disproportionality

With AI/AN children nationally facing disproportionate placement in state foster care at a rate over two times their population and other poor outcomes, the need for ongoing, reliable, and accessible data has never been greater. According to CWLA’s National Blueprint, it is the responsibility of the child welfare agency to address this disparity: “[e]ach entity should examine disparities in its service delivery, as well as the ways in which it contributes to racial, ethnic, and other disproportionalities that negatively impact children, youth, and families.”⁸

Current data tells us there are disparities, but it does not provide enough information to fully understand the scope of the problem or to posit solutions. Examining and addressing these disparities for AI/AN children and families requires the collection of additional data, which this NPRM sets forward.

Conclusion

CWLA supports the proposed revision of AFCARS to include the collection of data elements specific to AI/AN children, youth and families and implementation of ICWA. The resounding decision by the U.S. Supreme Court in the *Brackeen v. Haaland* case cemented ICWA’s

⁷ Ibid, p. 57.

⁸ CWLA National Blueprint for Excellence in Child Welfare. Child Welfare League of America. Washington, D.C. 2013. p. 114.



constitutionality; now, it is essential that HHS and ACF have the data necessary to support effective and robust implementation of the law that is considered to be the “gold standard” in child welfare. The collection of this data is consistent with CWLA’s National Blueprint and Standards of Excellence, and we are ready to support child welfare entities in implementing this rule once it is finalized. Thank you for the opportunity to offer these comments.