

June 18, 2019

Ms. Kathleen McHugh, Director  
Policy Division, Children's Bureau  
Administration for Children and Families  
U.S. Department of Health and Human Services  
330 C Street, S.W.  
Washington, DC 20201

Re: Comments Regarding AFCARS Notice of Proposed Rulemaking (RIN 0970-AC72)  
Published April 19, 2019 in the Federal Register

Dear Ms. McHugh:

Please accept the comments of the National Indian Child Welfare Association (NICWA) regarding the notice of proposed rulemaking (NPRM) published on April 19, 2019, in the Federal Register (RIN 0970-AC72). NICWA is a private, nonprofit Indian organization headquartered in Portland, Oregon. We are dedicated to the well-being of American Indian and Alaska Native (AI/AN) children and families and carry out our mission through public policy and advocacy, research, community development, and training and technical assistance with tribal, state, federal, and private agencies. We have extensive knowledge and expertise in federal child welfare programming, including the Department of Health and Human Services programs under Title IV-B and Title IV-E of the Social Security Act. Our comments will focus on the impacts of the NPRM for AI/AN children and families.

#### **NICWA Experience with Child Welfare Data Collection**

Within a few years after the passage of the Indian Child Welfare Act in 1978 (25 USC 1901 et seq.), otherwise referred to as ICWA, tribal child welfare programs began pursuing methods to collect data on state efforts to implement ICWA. These efforts included working with state partners and sometimes the Bureau of Indian Affairs under the Department of Interior to improve both tribal and state data collection and reporting of data related to ICWA requirements. NICWA entered this work in 1987 upon the request of tribes and states in the Northwest (Oregon, Idaho, and Washington) to provide expertise on ICWA requirements, effective casework practices with AI/AN children and families, intergovernmental relationships, and understanding of how data could be used to inform practice and policy for this population. AFCARS did not exist at this time, but NICWA developed early knowledge and expertise in how state child welfare data systems captured data concerning AI/AN children and families and strategies to improve the reliability and accuracy of that data.

In the 1990's, after the establishment of the AFCARS data collection and reporting system and the passage of a federal law provision requiring the Administration for Children and Families (ACF) to ensure states were consulting with tribes on measures to comply with ICWA (42 USC 622(b)(9)), NICWA expanded our technical assistance services to include data collection methods for integrating ICWA requirements into state AFCARS systems. In addition, NICWA also developed partnerships with a number of Children's Bureau child welfare resource centers to provide technical assistance to tribes and states on child welfare practice and systems enhancements into the late 2000s, including the National Resource Center for Child Welfare Data and Technology. NICWA was also involved in supporting tribes and states in efforts to improve tribal access to state AFCARS and ICWA related data for tribal child welfare agencies (remote access).

After the passage of the Fostering Connections to Success and Increasing Adoptions Act of 2008 (P.L. 110-351) which authorized tribal governments to directly operate the Title IV-E program, NICWA began technical assistance efforts to help tribes applying to operate the Title IV-E program and newly approved Title IV-E tribes who were developing AFCARS data systems. This technical assistance required

innovative thinking to develop AFCARS data collection methods that would meet AFCARS regulatory rigor and the often limited capacity of tribes to develop and operate robust electronic data collection and reporting systems.

NICWA's data collection and reporting technical assistance have always been rooted in several fundamental principles. They are as follows:

- Support effective partnerships between tribal, state, and federal government agencies that respect the rule of law and tribal sovereignty. View tribes as essential partners and contributors in the data collection and reporting process that involves their tribal citizens.
- Add value through innovation and proven methods to enhance data collection for AI/AN children and families and improve accuracy and reliability of data collected.
- Ensure any data collected and reported is readily accessible by tribes.
- Promote the collection of data that is meaningful for AI/AN children and families and contributes to the effective public policy solutions and systems change efforts to improve outcomes for AI/AN children and families.

### **Appropriate Consultation with Tribal Nations**

Tribal consultation is an essential element of any proposed changes to federal agency policy that impacts AI/AN children and families. Both the Department of Health and Human Services and ACF have consultation policy established through executive action that reinforces and instructs agency officials on the process for conducting appropriate consultation. In the NPRM, ACF identifies several meetings and written documents as examples of consultation with tribes on AFCARS and proposed AFCARS changes. Unfortunately, some of the identified consultation meetings regarding AFCARS were not announced as tribal consultation by ACF and did not provide tribes with opportunities to discuss their issues or concerns, such as webinars where tribes were not allowed to ask questions or when ACF officials declined to respond to tribal questions in a meeting. In addition, a significant amount of the consultation process outlined in the NPRM relies on email listserv announcements that only Title IV-B or Title IV-E tribes receive, which is not the full number of tribes with children in state child welfare custody.

Going back to 2017, numerous tribal leaders and tribal child welfare directors have expressed concerns to NICWA regarding the lack of appropriate consultation regarding proposed changes to AFCARS. In many cases this has the effect of discouraging the participation of tribal governments in the regulatory process. Case in point is the low attendance for the recent June in-person and telephone AFCARS consultation sessions for tribes. While NICWA appreciates the recent AFCARS consultation sessions for tribal nations that ACF hosted prior efforts did not meet the standard for appropriate consultation and unfortunately were an influencing factor in low participation by tribal nations in subsequent consultation efforts.

### **The Benefits of Collecting the 2016 ICWA Data Elements**

States, tribes, federal agencies, and policymakers need better data for AI/AN children and families to understand how to effectively address persistent and long-term poor outcomes for AI/AN children and families. AFCARS data tells us that AI/AN children have long been overrepresented in state foster care systems both nationally and in many states with foster care rates climbing as high as 14 times the AI/AN child population rates in these states. AI/AN children also tend to be in foster care longer than white children and have more foster care placements too. In addition, it is widely recognized that more data and support for states and tribes is needed to improve ICWA implementation. ACF, under Title IV-B of the Social Security Act (42 USC 622(b)(9)), is required to oversee that states are consulting with tribal governments on measures taken by the state to comply with ICWA. The 2016 Final Rule ICWA data elements are needed to understand how states are working with tribes on ICWA implementation and whether their efforts are being successful in addressing specific areas of concern.

In the NPRM, ACF questions whether AFCARS is the most appropriate data collection system for capturing a number of ICWA data elements. While we understand the purpose of AFCARS and limits of a data system like AFCARS, AFCARS is still the best federal data system to capture data on AI/AN children and families in state child welfare systems, especially data related to placements of AI/AN children and associated ICWA requirements. ACF officials have suggested the Department of Interior is a better federal agency for collecting ICWA related data, but the Department of Interior 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. Other alternative methods for collecting ICWA related data, such as the Child and Family Services reviews, are not feasible and the structure of these reviews does not support collection of this type of ICWA related data. ACF states that research or surveys could fill this 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.

Many tribes rely on state data to help them understand the disposition of not only individual ICWA cases involving their tribal citizens, but also larger systems issues within their state. Washington State collects a robust set of ICWA measures that help tribes understand statewide, regional, and local ICWA implementation much better. Washington uses their data to inform training of their state and tribal workforce, policy development, contractual performance of state contractors, and issues related to the judicial role in ICWA proceedings. 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 practice issues. Below are several ICWA data elements in the 2016 Final Rule proposed for elimination in the NPRM that provide important information that inform case planning and systems efforts to improve outcomes. These data elements should be easily retrievable from any case file, are quantitative in nature, and should be easy to record in AFCARS.

- **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 ICWA implementation.
- **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 regarding the request. ACF's NPRM alternative to this data element is based on the AFCARS data element "reason for exit," but this 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 provisions or case planning.
- **Foster care placement preferences.** This provides information on whether foster care placement preferences were met and which placement preference was used at that time. It asks, if placement preferences were not met, was good cause found to apply 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 good cause was found to deviate from the placement preferences and the basis for good cause, and whether the tribe approved of the placement if it involved a congregate care setting (institution or group care setting).
- **Adoptive placement preferences.** This provides information on whether the adoptive placement preferences were met and which placement preference was used. It asks, 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 good cause was found to deviate from the placement preferences, and the basis for good cause.
- **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, it contains flaws in its modified form. The NPRM data element only tracks if 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

data from the proposed data element in the NPRM 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.

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 requirements with AI/AN children and families such as active efforts and timely notice of proceedings. ACF may be considering future data elements to address Family First Prevention Services activities in the future, but our believe is that they must include key requirements of ICWA or they will fail to represent what is most critical to understand with regards to success or failure with AI/AN children.

We also note that ACF has suggested in the NPRM that expanding AFCARS significantly at this time would deter state efforts to successfully implement the Family First Prevention Services Act. Our response to this is a number of the ICWA data elements in 2016 Final Rule, such as active efforts and timely notice to tribes of proceedings, could be beneficial to ACF as they roll out the new law. In addition, the amount state and federal funds spent over the last number of decades to support the high rates of out of home placements for AI/AN children in state systems significantly exceeds the estimated costs for implementing these additional ICWA related data elements and could result in much less trauma for the children and families involved. Each year between 9,000 to 10,000 AI/AN children are identified in state foster care. Using an average foster care monthly rate of \$500 per month for 9,000 AI/AN children a year in state foster care equals \$54 million each year being expended in federal and state funds. This does not include administrative and other services costs to support these foster care children. With better data and some more targeted interventions as we have seen in some state and county jurisdictions it is very possible that the number of AI/AN children in state care could decrease by 15% and possibly more. That is a savings of \$8.1 million each year from the current levels of spending, which in five years would pay for the cost of implementing the ICWA data elements in the 2016 Final Rule.

#### **Burdens for State IV-E Agencies to Collect ICWA Data Elements are Manageable**

The 2016 supplemental notice of proposed rulemaking and the 2016 Final Rule addressed issues related to burdens on states. They concluded there were burdens for states, but they were warranted given the lack of basic data for AI/AN children and the benefits for policy development, technical assistance and training, and programming. While we understand the burden to states must be given, serious consideration in the implementation of the Final Rule we question some of the assumptions that ACF has used to justify the changes contained in the NPRM.

ACF and state 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 nine states have foster care placement rates where ICWA might apply to over 4% of the total state foster care population. In 41 states the rates of AI/AN children in state foster care are under 3% with 37 of those states having rates less than 1%.

ACF comments that ICWA's requirements are almost entirely directed at courts and therefore difficult to access for state IV-E agencies. While some of ICWA's requirements involve court determinations, most of the actions required are initiated by and based upon state IV-E agency activities. Good case management practice requires child welfare agencies to document court findings in case files, including those related to ICWA findings.

A number of states that have cited concerns about expanded AFCARS data collection and reporting related to the 2016 Final Rule noted they also believe the ICWA data elements are helpful. A key element of their concerns centers on ACF penalty structures for data that is not collected or reported properly.

States have expressed specific concern regarding data that is not under the control of the state IV-E agency. We believe that ACF should be careful in how they interpret the reasons a state might raise regarding collection and reporting of the ICWA data elements in the 2016 Final Rule and not embellish these concerns by conflating them with a general desire to not collect ICWA data. In our conversations with three states, they expressed a willingness to collect more than just the five ICWA data elements proposed in the NPRM, but they were more concerned about statements made by ACF officials with regard to penalties attached to not properly collecting and reporting any data elements in AFCARS. This suggests that the penalty structure and rules for AFCARS may be a bigger concern than the number of ICWA data elements in the 2016 Final Rule.

NICWA is also aware that a number of states have already begun integrating the 2016 Final Rule ICWA data elements in their AFCARS or Comprehensive Child Welfare Information System systems and are finding the data to be very helpful in addressing ICWA implementation challenges, policy development, and program management. Before ACF makes a final decision on a Final Rule, we recommend ACF contact tribes and states that are working with ICWA data elements from the 2016 Final Rule to learn more about the costs and their experience.

### **Conclusion**

We appreciate ACF's desire to improve data collection for AI/AN children and programming efforts they have made in their capacity centers to improve ICWA implementation. These are significant and have already begun to help improve ICWA implementation in different parts of the United States. As ACF and other federal agencies increase their movement to be more data-driven, we encourage ACF to consider the value of retaining more of the ICWA data elements in the 2016 Final Rule. With this in mind, we offer to share our experience in working with states and tribes on data collection related to ICWA. Thank you in advance for consideration of our comments. Any questions regarding our comments may be directed to David Simmons, NICWA government affairs and advocacy director at [desimmons@nicwa.org](mailto:desimmons@nicwa.org).