



children's defense fund

Leave No Child Behind®

June 17, 2019

Ms. Kathleen McHugh
Director, Policy Division
Administration for Children and Families
United States Department of Health and Human Services
330 C Street, SW
Washington, DC 20024

Re: Response to Request for Public Comments on amending the Adoption and Foster Care Analysis and Reporting System (AFCARS) 2016 Final Rule (RIN 0970-AC72)

Dear Ms. McHugh:

The Children's Defense Fund (CDF) is pleased to have the opportunity to comment on the notice of Proposed Rulemaking (NPRM) for amending the Adoption and Foster Care Analysis Reporting System (AFCARS) 2016 Final Rule published in the Federal Register on April 19, 2019 (Federal Register Vol. 84, No. 76, page 16572). CDF is very concerned about possible modifications to the AFCARS 2016 Final Rule (Final Rule) and strongly urges that you continue moving forward with implementation of the Final Rule without changes.

CDF has worked for more than four decades to improve outcomes for children who are at risk of placement in foster care or already in the care of public child welfare systems. CDF worked with others to establish the original federal mandate for a national data collection system that was included in federal law in the Omnibus Budget Reconciliation Act of 1986 and then kept the pressure on to get it finally operational in 1994. We believed then and continue to believe that the federal government has an important role in ensuring children are benefitting from federal child welfare laws. Over the years CDF, like many others, has responded to the numerous requests for public input on ways to update and improve AFCARS, including the 2008 NPRM for AFCARS, the 2010 Request for Public Comment on AFCARS, the 2015 NPRM for AFCARS and 2015 Supplemental Notice of Proposed Rulemaking (SNPRM) on the new data elements related to the Indian Child Welfare Act (ICWA), the 2018 NPRM on delaying the effective date of the AFCARS 2016 Final Rule, and the 2018 ANPRM about streamlining the AFCARS 2016 Final Rule. After advocating for nearly 25 years – spanning four Administrations – for updates to the original regulations published in 1993, we are very supportive of the AFCARS Final Rule released in 2016. Given numerous past notices, and the robust consultation and public comment that resulted from past requests for comment, we strongly recommend that implementation of the AFCARS 2016 Final Rule proceed as published without further delay and without further changes. The Final Rule reflects the improvements and changes in data requirements agreed upon and advocated for by the broad child welfare community to better reflect and inform us about experiences of children involved in the child welfare system and ways to strengthen child outcomes and the system.

The benefits of the AFCARS 2016 Final Rule outweigh any burden from the new data. These updates were long overdue. The rule from 1993 is outdated and does not reflect current child welfare practices or protections added to federal child welfare law over the past 25 years or new reporting required of states, which is why we strongly oppose any further amendments to the Final Rule as this continues to delay the critical updates in data included in the Final Rule that we so desperately need. The Administration for Children and Families (ACF) needs to know how children are faring. Prior to the Final Rule, the reporting system fell short in helping to clarify the needs of children who come to the attention of the child welfare system, the services and supports they and their families receive, the timeliness of those services, the stability of their placements when in foster care, permanence provided, and children's final outcomes. The Final Rule made a number of significant changes and improvements that will provide a more comprehensive picture of a child's time in care as required in Section 479 of Title IV-E of the Social Security Act. It is because of this that we strongly believe any consideration of burden with the Final Rule needs to be balanced with a corresponding examination and acknowledgement of the benefits of the Final Rule.

In assessing burden, it is also essential to take into account the enormous advances that have been seen in technology over these many years that have made the task of data collection much easier. The recent improvements and updates to state data systems through the new Comprehensive Child Welfare Information System (CCWIS) removes some of the challenging requirements around a single comprehensive state system and allows for the use of cost-effective and innovative technologies to automate and stay up to date on the collection of high-quality case management data. Rather than focusing now on burden, ACF instead over this next year should assist states to use their CCWIS to meet the requirements in the Final Rule without any further changes or delays.

There will be a cost associated with this revision, as was the case in 1993. As a result, we suggest that HHS include in its FY2021 budget request to Congress similar funding support as existed in the 1990s when implementation was offset with a 75 percent match in federal funding. The April 19 NPRM projected the cost of the Final Rule to be \$87 million, with the states absorbing half of that cost at \$43 million, so readjusting the federal matching rate to 75 percent would reduce that cost to less than \$22 million on the states. CDF would be eager to support your request, and ready to organize our partners around such a proposal, 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.

As written, the 2016 Final Rule provides ACF the opportunity to learn more about outcomes for children in the child welfare system, how different practices impact performance and the relationship of gains to policies that are in place. ACF and all of us can learn where work is needed to improve outcomes for children and ACF can monitor compliance with federal protections for children. We still know far too little about the needs of children who come to the attention of the child welfare system, the services and supports they and their families receive, the timeliness of those services, the stability of their placements when in foster care and their health and educational outcomes, particularly for those youth in demographics at high risk of adverse outcomes. The Department has an extremely important opportunity to get the 2016 Final Rule in place so states can use it as a guide as they continue to work to improve outcomes for the safety, permanence and well-being of children.

As CDF is not a Title IV-E agency, we cannot offer specific estimates regarding the burden or cost placed on Title IV-E agencies for reporting AFCARS. In the comments below, we focus on the specific reasons as to why certain elements that have been proposed to be removed are necessary to maintain in AFCARS. We address why AFCARS is the most effective vehicle for collection of this data and why no other current method is feasible to collect the information.

Transition Plan Data Elements (1355.44(f)(8) – 1355.44(f)(8) in 2016 Final Rule)

For twenty years, since the passage of the Foster Care Independence Act of 1999, child welfare systems have acknowledged the need to prepare youth to transition out of care. Still, for the more than 20,000 youth who age out of the child welfare system each year, outcomes are very poor. As a result, the Fostering Connections to Success and Increasing Adoptions Act of 2008 (Fostering Connections), the Preventing Sex Trafficking and Strengthening Families Act of 2014, and the Patient Protection and Affordable Care Act of 2010 have all required that jurisdictions complete personalized transition plans for youth at risk of aging out of foster care into adulthood.

CDF strongly endorses retaining the transition plan questions in the Final Rule (1355.44(f)(8) and 1355.44(f)(8)), so that the Department can monitor compliance with these laws and improve outcomes for youth in care. Given that states are already required to track transition planning in case files, the cost burden of the two quantitative questions in AFCARS, simply verifying the existence of a transition plan and the date of its creation, is negligible. While there have been arguments that reporting this information in AFCARS is not necessary because this data is covered in the National Youth in Transition Database (NYTD), such reporting is insufficient. Because of the voluntary nature of NYTD, the data set is incomplete and not representative of the experiences of the broader population. AFCARS is the only place that can sufficiently track transition planning for youth at risk of aging out of care.

Educational Stability and related Data Elements (1355.44(b)(16)-1355.44(b)(16)(vii) in 2016 Final Rule)

The data elements relating to educational stability should be retained as it is critical to measure effective implementation of federal child welfare and education law – specifically requirements under Fostering Connections and the Every Student Succeeds Act (ESSA) of 2015. Under Fostering Connections, child welfare agencies must coordinate with local education agencies to ensure children remain in their school of origin, unless it is not in the best interest of the child. This educational stability requirement was put in place due to evidence that children entering care – and their subsequent moves to different placements while in foster care – resulted in school moves, which often lead to the loss of educational progress. Acknowledging the importance of education to child outcomes, CDF urges the Department to retain these elements that will allow ACF to track compliance with education standards in foster care.

ESSA further reinforced the need to ensure educational stability for students in foster care by amending federal education law to mirror the educational stability requirements included in Fostering Connections, including interagency data sharing related to students in foster care. For the first time, state departments of education are required to report on the educational performance of students in foster care in the State Education Agency (SEA) Report Card. Together, these two data collection sources – AFCARS and SEA Report Cards – will allow for longitudinal information about the educational needs of students in foster care to be tracked and reported over time.

AFCARS is the most effective tool to collect educational stability data because it allows for straightforward quantitative reporting of how often children change schools and the reason. No other vehicle is better suited to tracking this type of data on a national scale. Child welfare agencies are already required to keep school stability information as part of their case plans pursuant to Fostering Connections; capturing this data element via AFCARS will encourage uniformity across states, which will result in more accurate data. Further, as states are already required to document this information, reporting on educational stability will not create an unnecessary burden.

If the administration insists on altering this school stability data point, we would suggest, at a bare minimum, keeping the response options to “yes” or “no” related to whether there has been school stability since the last reporting period, as captured in data element 1355.44(b)(16) from the Final Rule. Although this compromise would not provide detail about the reasons for school changes, it would allow for accurate and straightforward reporting that would enable analysis of progress and trends across the country.

Indian Child Welfare Act (ICWA) Data Elements

ICWA is critical in supporting well-being, safety and permanence for Native children involved in the child welfare system. Although progress has been made as a result of ICWA, Native children are still at great risk of being removed from their families and tribes and placed in non-Native homes. For too long, these children have not had the full benefit of federal protections in ICWA that were designed to reduce their numbers in care and help maintain their identity and culture. Compliance with ICWA by states is erratic and state court decisions inconsistent. Improving what is known about ICWA implementation can only help address this long-standing concern and support the full implementation of the law that has been limited by uncertainty and inconsistent practice.

The proposed removal of ICWA-related data elements from AFCARS would mean that the unique legal status of Native children and the requirements of ICWA are not addressed in federal reporting requirements for state child welfare systems that serve Native children and families. The ICWA data elements in the Final Rule address this gap in data, provide data that states can use in understanding the experiences of Native children in foster care and assess implementation of the special protections afforded them in ICWA. The Children’s Defense Fund strongly urges ACF to maintain the existing ICWA elements without any changes.

Retaining these data elements will allow tribes, states and federal agencies the ability to develop a more detailed understanding of the trends in out-of-home placement and barriers to permanence for Native children. These data will improve policy development, technical assistance, training and resource allocation to better meet the needs of Native children. Including these data elements in AFCARS will allow ACF and the states the opportunity to disaggregate data on ICWA-eligible children, in order to better inform responses that address their unique issues in both policy and practice. ACF is in the best position to capture necessary data on Native children and families in state child welfare systems and AFCARS is the only federal data system that has the ability to capture placement-related data. The Department of the Interior does not have a relationship with states in child welfare and does not have an operational database, or resources, to collect data on Native children in state foster care systems. Without accurate reporting, it will not be possible for ACF to monitor whether states are consulting with tribal governments on measures taken by the state to comply with ICWA (Section 422(b)(9) of the Social Security Act).

Concerns about the time burden of the ICWA data elements are greatly exaggerated. Only three questions related to ICWA will be required for every child, while the remaining data elements are only applicable in the cases where ICWA applies. For all but nine states, this encompasses less than 3 percent of the total state foster care population, most under 1 percent. Further, the 2016 SNPRM and the 2016 Final Rule addressed issues related to burdens on states. They concluded that the burdens for states were warranted given the lack of basic data for Native children and the benefits for policy development, technical assistance and training and programming.

While some of ICWA's requirements involve court determinations, most of the actions required are based on state Title 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. As a result, the added burden of reporting this information in AFCARS would be minimal. A number of states have begun integrating the ICWA data elements from the 2016 Final Rule and are finding the data to be very helpful in addressing ICWA implementation challenges, policy development, and program management effectively.

Juvenile Justice Data Elements (1355.44(f)(5) in 2016 Final Rule)

We know that dual-status youth, those who are concurrently involved in both the child welfare system and the juvenile justice system, face specific challenges that do not impact their peers who are involved only in one system. Despite this, there is no national-level tracking of these youth and no longitudinal data tracking to ensure their specific needs are met. As more states move to respond to these needs with juvenile justice reform and specific programs for dual-status youth, ACF must require national, longitudinal tracking of data in AFCARS, to provide baseline and comparison data. Without national tracking of dual-status youth in AFCARS, accurate measures of progress will be impossible.

This data closely aligns with current Congressional priorities. This May, Senators Grassley (R-IA) and Peters (D-MI) introduced the Childhood Outcomes Need New Efficient Community Teams (CONNECT) Act (S. 1465) to encourage data collection and collaboration around dual-status youth. In his comments on the bill, Senator Grassley stated, "Youth involved in both the foster care and juvenile justice systems shouldn't face additional challenges because of a lack of coordination." Failure to track this data in AFCARS would stymie such coordination.

LGBTQ data elements (1355.44(b)(2)(ii), 1355.44(e)(19), 1355.44(e)(25), 1355.44(h)(8) & 1355.44(h)(15) in 2016 Final Rule)

Under the direction of the Family First Prevention Services Act (Family First), states are turning a focus towards providing a greater array of targeted prevention services and programs to keep children from entering foster care. As they do so, proper allocation of resources and provision of appropriate, evidence-based services will require a deeper understanding of the needs of youth at risk of entering care. Failing to capture sexual orientation and gender identity and expression (SOGIE) data ignores the specific needs of LGBTQ youth, who are disproportionately represented in the child welfare system and, thus, an important target population. CDF strongly supports capturing SOGIE data within AFCARS to allow states to better understand the needs of LGBTQ youth and provide targeted prevention services to keep them out of foster care.

With the limited research we have on LGBTQ youth in the child welfare system, we know they are overrepresented in out-of-home care and studies show they are disproportionately mistreated in foster care, including longer stays in care – particularly residential care – and poor outcomes, including high rates of aging out of care, homelessness and criminal justice involvement. Further, studies indicate that LGBTQ youth who run away or age out of care are at increased risk for commercial sexual exploitation. Knowing that the Preventing Sex Trafficking and Strengthening Families Act mandates the identification and documentation of children and youth at risk of sex trafficking, failure to collect SOGIE data falls short of the child welfare system's responsibilities and hinders the ability to better understand who is at risk and how to prevent young people in care from being trafficked.

Data on these youth at the state level are urgently needed to improve outcomes, reduce costs and reduce disparities; data at the national level are necessary to inform federal law, policy and funding determinations, to identify best practices for replication and to enhance ACF's efforts to prevent removal and allow children to remain safely at home with their families. Identifying LGBTQ youth through the voluntary sexual orientation question and implementing effective interventions to reduce instability, minimize costly stays in group homes, hospitals and juvenile justice facilities and improve permanency in family home settings would provide tremendous cost savings. CDF believes such benefits resulting from information related to these new data elements outweigh any burden and cost associated with implementation.

While studies have shown that LGBTQ youth experience worse outcomes in the child welfare system, our understanding of the scale of the problem is based on rough estimates. Currently, the most accurate understanding of the count of LGBTQ youth in care is based off of a small number of studies, mostly conducted in large urban centers. Given that studies indicate that LGBTQ youth who have faced maltreatment on account of their sexual orientation or gender identity and expression are more transient, particularly as they seek more affirming locales, we know their population distribution will not be uniform. In order to provide targeted services and improve outcomes for LGBTQ youth, we need to be able to accurately account for their numbers and needs on a national level. Further, national requirements for tracking SOGIE data are extremely important because the jurisdictions that are not tracking SOGIE data in their own systems are the ones where LGBTQ youth are most vulnerable and services are least available.

Beyond simply tracking SOGIE data for youth in care, it is important that this information be tracked for foster parents as well. LGBTQ youth are at a higher risk for placement changes, unnecessary congregate care, and adoption disruption as a result of their sexual orientation or gender identity and expression. While LGBTQ foster parents are suitable placements for any child, the likelihood of an LGBTQ youth facing a placement disruption is lower if they are placed in the care of LGBTQ parents. As Family First encourages states to move more children out of congregate care and into family-like settings, the current shortage of foster and adoptive parents will grow. LGBTQ foster parents can present an ideal placement for hard to place kids. Tracking this information in AFCARS will help caseworkers effectively match youth with foster families where their identity can be affirmed and they are unlikely to face placement disruption.

Tracking of information on LGBTQ youth in AFCARS is crucial. As states implement practices to serve LGBTQ youth, it is vitally important that they be able to compare their outcomes with other jurisdictions to assess progress and evaluate practices. For this to be effective, there must be a single tool tracking SOGIE data so that reporting is consistent and comparable across states. AFCARS is the ideal place for this tracking because no other database exists to track the needs of LGBTQ foster youth on a national level. Further, as Congress seeks to respond to the needs of these youth, AFCARS is the tool that they will use. While there has been movement to respond to the needs of youth in care, Congress has not had accurate information to track their numbers.

While ACF has expressed concerns regarding the accuracy and confidentiality of SOGIE data, questions regarding sexual orientation have been included in the Youth Risk Behavior Surveillance Survey from the Centers for Disease Control and Prevention for decades, and the Prison Rape Elimination Act requires youth correction officers to collect SOGIE data as part of their screening processes. Child welfare agencies have shown that they are capable of managing confidential information about sensitive topics such as sexual abuse, mental health diagnoses, mental health, and medication. Like all data kept by the state, SOGIE data would be protected by confidentiality and should not be treated differently than

other confidential data. The SOGIE data elements in the Final Rule can be administered safely, and ACF should provide training and resources to states and tribes to do so.

Health assessment data elements (1355.44(b)(11)(ii) and 1355.44(b)(12) in 2016 Final Rule)

ACF should maintain the data elements in the Final Rule related to timely health assessments, particularly the element related to date of assessment. In order to measure states' compliance with Title IV-B Health Oversight and Coordination Plans, it is important that the Department be able to assess access to care for the foster care population at both the state and national level. Health assessment dates provide a baseline understanding of the health of children entering the child welfare system, which ACF needs in order to assess whether states are complying with important federal requirements under the Title IV-B program.

The inclusion of the date of a child's health assessment is particularly important given the nationwide increase in parental substance use disorders, which has resulted in more children entering the foster care system with significant trauma. Children can manifest this trauma by developing various physical, developmental, educational and mental health conditions. Timeliness of health assessment is critical to ensuring that child welfare agencies can appropriately identify health needs such as trauma-related behavioral challenges and developmental delay and provide access to appropriate services as indicated by the assessment. By having a greater understanding of how this trauma is affecting children, they can receive needed services sooner and better heal from the trauma that they have experienced. AFCARS is the ideal space for this data, as it allows health assessment data to be directly compared with known impacts of trauma so ACF and the states can evaluate, nationally and longitudinally, how the evidence-based, trauma-informed practices mandated in Family First are impacting the health and well-being of youth in care.

Conclusion

The Children's Defense Fund strongly urges ACF to maintain the existing AFCARS 2016 Final Rule without any additional changes or further delays in the effective date. We appreciate the opportunity to respond to your request for input and urge you to abandon changes to the Final Rule given that the benefits – after multiple opportunities to comment on the rule – far outweigh burdens already reported on during consideration of the AFCARS Final Rule.

The Final Rule is the only revision made to AFCARS since its inception in 1993. Due to the fact that it has taken a quarter century to revise and hopefully implement these important changes to AFCARS, this revision must be seen as both a critical and rare opportunity to implement changes that will inform child welfare practices for the next decades. While we recognize that ACF must weigh the burden that reporting requirements can place on states, we hope that you also recognize the monumental importance of the improvements made to AFCARS in the Final Rule. Failure to include these elements in AFCARS will hinder the ability of child welfare systems to meet the needs of vulnerable children and youth for potentially decades to come.

The Children's Defense Fund thanks you for the opportunity to submit comments on AFCARS and related child welfare data concerns. Your ability to make improvements in AFCARS offers the opportunity for us all to better understand the experiences of children in foster care and the impact of those experiences on child outcomes. Robust data collection in AFCARS will help inform policy and practice to make life better for children and their families.

We would be happy to discuss any of our comments in more detail with you or others on your staff.

Sincerely yours,



Stefanie Sprow
Deputy Director,
Child Welfare and Mental Health
Children's Defense Fund



Steven Olender
Senior Policy Associate,
Child Welfare and Mental Health
Children's Defense Fund