

FOREIGN AFFAIRS COMMITTEE
SUBCOMMITTEE ON AFRICA, GLOBAL HEALTH,
GLOBAL HUMAN RIGHTS AND
INTERNATIONAL ORGANIZATIONS

JUDICIARY COMMITTEE
SUBCOMMITTEE ON COURTS, INTELLECTUAL
PROPERTY AND THE INTERNET
SUBCOMMITTEE ON CRIME, TERRORISM,
HOMELAND SECURITY AND INVESTIGATIONS

WWW.BASS.HOUSE.GOV



KAREN BASS
CONGRESS OF THE UNITED STATES
37TH DISTRICT, CALIFORNIA

WASHINGTON OFFICE:
2241 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
202-225-7084

DISTRICT OFFICE:
4929 WILSHIRE BLVD. SUITE 650
LOS ANGELES, CA 90010
323-965-1422

June 12, 2018

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: 2018 Adoption and Foster Care Analysis Reporting System Advance Notice of Proposed
Rule Making, RIN 0970-AC72, FR# 2018-05042

Ms. McHugh,

I submit these comments regarding the Advance Notice of Proposed Rulemaking (ANPRM) published in the *Federal Register* on March 15, 2018 (Volume 83, No. 51, page 11449). I write in my capacity as a Member of Congress representing the 37th Congressional District of California, as founding member of the bi-partisan Congressional Caucus on Foster Youth, and as the former Speaker of the California Assembly with an unwavering commitment to foster youth. The Congressional Caucus on Foster Youth provides a forum for over 100 Members of Congress to discuss and develop policy recommendations to strengthen the child welfare system and improve the overall well-being of youth and families. Information including data related to child welfare is critical for raising awareness of and coming to agreement on issues ranging from funding needs to reforms in child welfare. In addition to introducing bipartisan legislation that aims to improve the lives of foster youth, the Caucus hosts briefings, and hearings. In May 2018 the Congressional Caucus on Foster Youth hosted the sixth annual Foster Youth Shadow Day

through which over 100 foster youth alumni from 36 states traveled to Washington DC to shadow Members of Congress and share their experiences in the child welfare system.

My comments herein relate to the Adoption and Foster Care Analysis Reporting System (AFCARS) in general and the data elements specific to lesbian, gay, bisexual, and transgender (LGBT) and American Indian and Alaska Native (AI/AN) children included in the 2016 AFCARS Final Rule published on December 14, 2016 and effective on January 13, 2017. As a former state legislator and leader of state legislators, I understand the burdens on states of implementing federal mandates. Considering this knowledge, I'm thoughtful about where federal mandates have the greatest benefit. Given my long commitment to foster youth and track record on state and national child welfare issues, I have full confidence that the burdens associated with fulfilling the requirements of the 2016 AFCARS Final Rule are profoundly outweighed by the benefits of comprehensive national data on child welfare. Consequently, I oppose any streamlining, modification, or elimination of the critical AFCARS data elements for LGBT and AI/AN children and families because making changes raises substantial issues directly related to the experiences of these populations in state child welfare systems. The 2016 AFCARS Final rule already represents the streamlining, modification, and elimination of non-essential data that were proposed in the 2015 AFCARS NPRM and the 2016 AFCARS SNPRM. Further streamlining is unnecessary and risks undermining the comprehensiveness of the 2016 AFCARS Final Rule. Children's Bureau should increase efforts to implement the 2016 AFCARS Final rule so that title IV-E agencies are collecting all data elements by April 2019 and reporting all the updated data elements to AFCARS by October 2019 as required in the 2016 AFCARS Final rule.

Any reduction or modification of data elements in the 2015 AFCARS Final Rule affects governing and administration of child welfare systems as well as other public systems that intersect with child welfare. Assessing the value of ICWA and LGBT data elements relative to the possibility that resources could be diverted by requiring collection and reporting should not be considered in isolation from the entirety of AFCARS data collected, nor in isolation from systems that impact and are impacted by child welfare.

Due to my state and federal work directly with foster youth I hear routinely from my Congressional peers about the value of data for evaluating and creating policies that improve child welfare systems. I hear overwhelmingly from foster youth about the value of data for understanding and communicating their experiences in foster care to policymakers. Foster care is profoundly isolating for young people. Aggregated data and national trends often help them understand and situate their experiences in larger systems and social or policy developments when communicating their stories. Youth are particularly concerned with policies that effect the experiences and well-being of children of color and LGBT youth in child welfare systems. Foster alumni are concerned about race-based discrimination throughout foster care and discrimination in related systems like criminal and juvenile justice. Foster alumni are concerned about systemic, societal, and individual discrimination based on sex, including discrimination against LGBT youth and families in child welfare. They are concerned about the physical and mental health consequences of discrimination based on sex, sexual orientation, gender identity, and gender expression. LGBT foster youth seek safe, affirming and supportive families as protection against systemic and social discrimination. In addition, LGBT foster youth have broad support from their fostered peers.

There are substantial individual health and systemic benefits to be gained from better national data that helps policymakers understand the experiences of LGBT youth and families in child welfare systems. For example, a State of California economic impact assessment of state practices prohibiting gender discrimination in health care, cited the following benefits: (1) reduced violence against affected individuals; (2) reduced depression and suicide attempts among the affected population; and (3) overall declines in substance abuse, smoking and alcohol abuse rates, and improvements in mental health among treated individuals in lesbian, gay, bisexual, or transgender (LGBT) populations who receive appropriate medical treatment. Moreover, in its report on non-discrimination in health care, HHS states that because discrimination contributes to health disparities, the prohibition of sex discrimination in health care can help reduce health disparities (GAO-16-702R: Jun 2, 2016). Child welfare data collected on LGBT youth and families has the potential to help families support and affirm LGBT youth which can promote similar and interrelated positive individual, social and child welfare system benefits found by California in the health care context.

Native youth consistently relate painful isolating experiences and express anxiety about ineffective state implementation of the Indian Child Welfare Act (ICWA). ICWA is a federal child welfare law that applies to Indian children removed from their family by state child welfare agencies, including state-initiated removals and placements funded by title IV-E and IV-B. Native foster youth tell us that ICWA protects and preserves their family, cultural, and community ties to their tribes by requiring states to notify tribes; make active efforts to prevent removal; meet burdens of proof prior to removal or termination of parental rights; to place Indian children in appropriate placements; and protect the interests of tribes. Native foster youth tell us that these essential ties are critical to their well-being while in foster care and afterward. Children's Bureau should require states to collect the entirety of the ICWA-related data elements in the 2016 AFCARS Final rule because decision-makers must have the data to assess the extent to which AI/AN foster children have the resources they need, including essential family, cultural, and tribal ties protected by ICWA.

Children's Bureau has the statutory authority to collect the ICWA-related AFCARS data elements. Analysis of this authority is clearly articulated in the March 2015 announcement of intent to publish a supplemental notice of proposed rulemaking (80 FR 17713):

"Upon further consideration following the publication of the 2015 NPRM, we have determined that there is authority under the statute (section 479(c) of the Act) to collect ICWA-related data in AFCARS. Specifically, the statute permits broader data collection in order to assess the current state of adoption and foster care programs in general, as well as to develop future national policies concerning those programs. However, the statute includes limits on this broad interpretation of section 479 of the Act that we must take into consideration when contemplating collecting data related to ICWA in AFCARS, including: data collected under AFCARS must avoid an unnecessary diversion of resources from child welfare agencies (see section 479(c)(1) of the Act) and must assure the reliability and consistency of the data (see section 479(c)(2) of the Act)."

The process for identifying the legal authority is articulated the 2015 SNPRM (81 FR 20283):

"ACF legal counsel re-examined the issue and determined it is within ACF's existing authority to collect state-level ICWA-related data on American Indian and Alaska Native (AI/AN) children in child welfare systems pursuant to section 479 of the Social Security Act. Such determination was informed by comments received on the February 2015 AFCARS NPRM as well as an extensive reevaluation

of the scope of ACF's statutory and regulatory authority.”

The same statutory foundation, explanation of process, and need for collecting ICWA-related data are clearly and thoroughly articulated in 2016 AFCARS Final Rule (81 FR 90524).

Children’s Bureau has been collecting ICWA-related child welfare data as required by title IV-B through state Child and Family Services Plans (CFSPs) and qualitative methods such as case file reviews. Neither of these methods has resulted in reliable, consistent, national comprehensive data on children to whom ICWA applies as evidenced by Children’s Bureau’s report entitled *“States’ Consultation and Collaboration with Tribes and Reported Compliance with the Indian Child Welfare Act: Information from States’ and Tribes’ 2015-2019 Child and Family Services Plans.”* The report found that 23 states and the District of Columbia did not report any data on their assessment of ICWA compliance. It also found that 14 of the 30 tribes reviewed reported some degree of concern about how the state(s) comply with ICWA or how the state(s) consult and collaborate with the tribe.

These findings are not surprising considering in the report Children’s Bureau describes CFSP’s this way:

The CFSP “is a product of joint planning between each individual state and Children’s Bureau regional office staff and is also to reflect input from a wide variety of stakeholders. Depending on the status of the state programming across the continuum of reporting requirements in the CFSP, some states may not include as much detail as others. Moreover, there is no specific format for the CFSP. As such, the breadth and depth of the content provided for any specific provision in the CFSP can vary from state to state and across reporting periods for various reasons... the content does not necessarily reflect the full scope of state activity in any given area.”

Children’s Bureau’s description of CFSPs clearly demonstrates that this method of collecting ICWA-related data could not possibly be reliable, consistent, comprehensive or national and clearly establishes that CFSP’s are not intended to meet these data standards.

The report explains that the primary way states assess ICWA implementation is through case reviews as part of Court Improvement Program audits, Continuous Quality Improvement Reviews, Best Practice case reviews, and Child and Family Services Reviews. Thus, implementing case file review as a means for collecting national data on ICWA, as suggested by

some states in public comment to AFCARS proposals, is currently happening. The ineffectiveness of this qualitative method explains why a majority of states (27) do not report the ICWA-related data required in CFSPs. Qualitative and largely voluntary methods of collecting ICWA-related data have been tried and proved unsuccessful. It is time to recognize that these methods have failed and replace them with required, systematic and consistent quantitative data collection and reporting to AFCARS.

Including data elements related to ICWA has been contemplated since the beginning of AFCARS. The Advisory Committee on Adoption and Foster Care Information concluded in its October 1987 report (required by sec. 479), among other things, “Special provision needs to be made for Indian children who are affected by requirements in the Indian Child Welfare Act of 1978, 25 U.S.C. 1901, especially section 1951 mandating submission of adoption data to the Bureau of Indian Affairs (BIA) of the Department of the Interior. Indian children served by a Tribe would be reported to the BIA which would, in turn, report to ACYF” (58 FR 67914).

It has been 40 years since the Indian Child Welfare Act became the law of the land and over 30 years since sec. 479 was added to Title IV. It is long since time to require states to systematically collect and report ICWA-related data to AFCARS. Many states already collect ICWA-related data in state SACWIS systems. There is nothing new about including ICWA-related data in AFCARS except doing it.

Collecting ICWA-related AFCARS data may provide information that can improve child welfare for all children and families. The 2016 AFCARS Final Rule acknowledges a truism included in public comment to the 2016 AFCARS SNPRM and subscribed to by Indian and non-Indian child welfare advocates and agencies that ICWA is the “gold standard” of child welfare practice.

“Moreover, some states, tribes, national organizations and federal agencies have stated that ICWA is the “gold standard” of child welfare practice and its implementation and associated data collection will likely help to inform efforts to improve outcomes for all children and families in state child welfare systems.”

Thus, collecting data related to ICWA benefits all children and families with child welfare experiences. This is particularly true for improving implementation of broad federal child welfare requirements that are corollaries to ICWA requirements like notice to extended family

members, family finding processes, increasing the frequency and stability of kinship placements, state efforts to prevent removal and preserve families (including prevention activities funded by Family First Prevention Services Act), and keeping children connected to their home communities and community networks.

Foster youth remind us that they are living complex lives at the intersections of race, sexual orientation, gender and tribal affiliation. They remind us that child welfare systems analysis and policies are not complete if race, sex, sexual orientation, gender, and tribal affiliation are each considered in isolation from one another. Therefore, to be comprehensive as required by sec. 479, AFCARS must include data elements related to race, sex, sexual orientation, gender, and tribal affiliation. These elements must be considered and analyzed in combination and in relation to each other for federal legislation, agency action, and training and technical assistance to be effective.

I value the voices and experiences of foster youth and I share their concerns and priorities. That's why I strongly oppose streamlining, modifying, or eliminating any data elements from the 2016 AFCARS Final Rule. Until the 2016 AFCARS Final Rule there was no data required to be collected consistently and systematically related to children to whom ICWA applies nor data on LGBT children and families. That means that without all the data elements in the 2016 AFCARS Final Rule there is no national data on LGBT youth of color, LGBT families of color, or LGBT tribal youth in state foster care placements funded by title IV-E or IV-B. The absence of data related to the number and unique needs of these populations is astounding when we consider that the groups are over-represented in child welfare and therefore children at the intersections must also be over-represented. Additional information that allows for intersectional analysis would be very useful for strengthening legislation, policy, and supports for these children in foster care. Therefore, I strongly urge Children's Bureau to require states to collect and report all of the data elements in the 2016 AFCARS Final rule related to ICWA and LGBT youth and families.

Congress and administrative agencies also need comprehensive national child welfare data to identify trends and intersections with other federal programs like Medicaid/Indian Health Service, substance abuse treatment, TANF, SNAP, child care, domestic violence prevention and

intervention, housing, youth and family homelessness, and criminal justice. As part of the federal family Children's Bureau should be collecting national data that also helps elucidate how these systems impact child welfare and how child welfare impacts other systems.

A review of the legislative history prior to the addition of sec. 479 in 1986 clearly evidences Congress' frustration with the lack of child welfare data to address critical issues related to the health, safety, and well-being of all children and families in foster care systems. The absence of meaningful data was due to Children's Bureau policies at the time that allowed for voluntarily reported data without consistent definitions, formats, or requirements. In 2018 we find ourselves similarly situated regarding LGBT and ICWA-related data. A review of investigations and testimony of the General Accountability Office (GAO) since 2000 provides additional evidence of the child welfare data-related issues of concern to Congress. The absence of relevant child welfare data and the exasperating necessity of relying on child welfare data that is not comprehensive or national in scope is evident in reports ranging from implementing AFCARS (2003) and fulfilling the requirements of the Indian Child Welfare Act (2005) to Sex Trafficking in Indian Country (2016) and the impact of LGBT non-discrimination policy in health programs and activities (2016). Congress and administrative agencies need comprehensive national child welfare data to allocate resources and provide oversight that addresses the needs of all children and families with child welfare experiences.

As Children's Bureau considers the value of ICWA and LGBT data elements relative to the prospect that resources could be diverted by requiring data collection and reporting, I recommend that:

1. Children's Bureau not make their assessments of the LGBT and ICWA data elements in isolation from the entirety of AFCARS data collected;
2. Children's Bureau consider how LGBT and ICWA data elements, in combination with other AFCARS data elements, create a comprehensive, national data system that informs Congress, Executive agencies, states, tribes, and the public to better meet the needs of all children and families in child welfare systems (including LGBT children of color, LGBT families of color, and LGBT tribal youth);
3. Decision-makers avoid pre-judging the burden of collecting and reporting LGBT data elements because some states and individuals continue to discriminate;

4. Decision-makers avoid pre-judging the ICWA data elements because some states and individuals report that implementing the federal law is burdensome;
5. Children's Bureau centers the lives and well-being of children in their decision-making;
6. Decisions account for the responsibility and obligation of states, tribes, and the federal government to work together, and to work with families and communities, to protect each child;
7. Children's Bureau consider how the data elements work nationally, including how the data helps track national trends and compares the experiences of all children and families across tribes, states and regions; and
8. Children's Bureau consider the ICWA and LGBT data elements in relation to their value to inform systems that impact and are impacted by child welfare.

I make the forgoing recommendations because AFCARS data are intended to enable the Federal government to more effectively direct and manage the national foster care and adoption assistance programs. In addition, the data collection enables Congress, HHS, and the Office of Management and Budget (OMB) to implement, evaluate, develop, and change policies to promote the welfare of all foster care and adopted children.

The burden on states and tribes of collecting and reporting AFCARS data is a valuable consideration and is likely appreciated by states and tribes. However, the burden of collecting and reporting data is not a factor contemplated by Congress when it added section 479 to the Social Security Act. Section 479(c) identifies the Congressionally required factors to consider when regulating the data collection system (emphasis added):

- (c) Any data collection system developed and implemented under this section shall—
 - (1) **avoid unnecessary diversion of resources from agencies responsible for adoption and foster care;**
 - (2) **assure that any data that is collected is reliable and consistent over time and among jurisdictions through the use of uniform definitions and methodologies;**
 - (3) **provide comprehensive national information** with respect to—
 - (A) the **demographic characteristics** of adoptive and foster children and their biological and adoptive or foster parents,
 - (B) the status of the foster care population (including the number of children in foster care, length of placement, type of placement, availability for adoption, and goals for ending or continuing foster care),
 - (C) the number and characteristics of—

- (i) children placed in or removed from foster care,
- (ii) children adopted or with respect to whom adoptions have been terminated, and
- (iii) children placed in foster care outside the State which has placement and care responsibility,
- (D) the extent and nature of assistance provided by Federal, State, and local adoption and foster care programs and **the characteristics of the children with respect to whom such assistance is provided;** and
- (E) the annual number of children in foster care who are identified as sex trafficking victims--
 - (i) who were such victims before entering foster care; and
 - (ii) who were such victims while in foster care; and
- (4) utilize appropriate requirements and incentives to ensure that the system functions reliably throughout the United States.**

The Congressional requirements for regulating AFCARS are clear in the statute. AFCARS is to be regulated in a manner that avoids unnecessary diversion of resources from foster care agencies and collects comprehensive national demographic and status data that is reliable and consistent over time by using uniform definitions and methodologies. To the extent that Children's Bureau assesses burden on states its analysis should include only those burdens that unnecessarily divert resources from child welfare agencies or that cannot have uniform definitions and methodologies such that it affects the reliability or consistency of the data. Children's Bureau ought also to demonstrate that they have identified and implemented appropriate requirements and incentives to ensure that the system functions reliably throughout the United States, including the supportive steps they will take to reduce burden on states and tribes as they implement AFCARS changes. In general, agencies should not take into account factors that are not within the considerations made relevant by statute or valid regulation. This axiom of administrative law is articulated in *Massachusetts v. EPA*, 549 US 497 (2007) in which the Court goes on to say, "To the extent that this constrains agency discretion to pursue priorities of the Administrator or the President, this is the congressional design." (549 US at 533)

Finally, collecting data related to ICWA implementation, LGBT youth, and LGBT families is desirable even if the burdens outweigh the benefits and some agency resources are necessarily diverted. Overrepresentation of these groups in child welfare justifies the need to collect this data. In addition, historical and social factors such as discrimination against LGBT persons and families, and US policies and state practices of breaking up Indian families by unnecessarily

forcing them into child welfare systems, militates strongly in favor of collecting and reporting child welfare data related to the specific systemic experiences of these populations.

I concur with arguments and assertions made by my colleague, Senator Ron Wyden, in his comments to the ACF Notice of Proposed Rule Making for delaying implementation of the 2016 AFCARS Final Rule (2018-05038). I support his principled decision to decline to vote on confirmation of Lynn Johnson, the President's nominee for Assistant Secretary for the Administration for Children and Families, until the 2016 AFCARS Final Rule is implemented. I include the following comments and concerns which are as relevant to the 2018 Advance Notice of Proposed Rule Making as they are to the 2018 NPRM for delay:

1. The revisions to AFCARS are long overdue and the current AFCARS data set is out of date.
2. Revisions to the 2016 AFCARS Final Rule would prevent policymakers, service providers, and advocates from effectively serving children and families involved in the foster care system or evaluating and improving the foster care system.
3. Revisions to the 2016 AFCARS Final Rule would increase the risk of harm to foster children that are not adequately accounted for, effectively returning the updated 2016 AFCARS data regulation to its formerly outdated status with respect to AI/AN and LGBT children and families.
4. Child welfare agencies have had numerous, sufficient, and material opportunities to comment on the critical questions the AFCARS update answers, including the level of burden for collecting and reporting data.
5. In the 2016 Final Rule ACF responded to and thoughtfully addressed all substantial issues raised by commenters, including those commenters who raised concerns about the burden of the rule.
6. With the proposed additional changes ACF is blocking Congressional efforts to bring foster care data collection systems into alignment with what is currently taking place in the field.
7. It is indefensible for the Children's Bureau to take 15 years to implement data element changes that shed light on how to improve policies that affect vulnerable populations like LGBT and AI/AN foster children.

8. Realizing the full potential of Congress' work over the past 15 years to improve the lives of children and families involved with the child welfare systems demands a modernized data system that can appropriately track the implementation of new policies and enable oversight of changes in the child welfare field.
9. As highlighted by the recent enactment of the Family First Prevention Services Act, Congress is not going to suspend its oversight and legislative responsibilities in the child welfare space.
10. As AFCARS and CCWIS are implemented I strongly encourage Children's Bureau to work more diligently to promote intrastate and interstate alignment of data systems in order to reduce the burden on child welfare agencies in collecting and reporting child welfare data. Contemporaneous implementation of CCWIS and AFCARS reduces costs to states, tribes, and taxpayers. Integrating state child welfare information systems with related data systems like Medicaid, TANF, child care, tribal child welfare systems, and courts reduces the time required by social workers for data entry, and reduces costs to states, tribes, and taxpayers.
11. Given the wide variety of changes that have been made in the child welfare world, it is unacceptable to modify the updated 2016 AFCARS data elements particularly when states and tribes are already in the process of updating their data systems. Any new modifications increases the burden on states and tribes, and increase costs.
12. This critical new data will be used to enable the appropriate oversight of the child welfare system to better the lives of vulnerable children in foster care. It is our job to ensure that children in foster care receive quality services, supports, and paths to permanency and it is through data and oversight that policymakers can promote positive changes to the child welfare system in the United States.

In conclusion, I strongly oppose any streamlining, modification, or elimination of the critical AFCARS data elements related to LGBT and AI/AN children and families. The 2016 AFCARS Final rule already represents the streamlining, modification, and elimination of non-essential data that were proposed in the 2015 AFCARS NPRM and the 2016 AFCARS SNPRM. Further streamlining is unnecessary and undermines the comprehensiveness of the 2016 AFCARS Final Rule. Children's Bureau should increase efforts to implement the 2016 AFCARS Final rule so

that title IV-E agencies are collecting all data elements by April 2019 and reporting all of the updated data elements to AFCARS by October 2019 as required in the 2016 AFCARS Final rule.

Sincerely,

A handwritten signature in blue ink that reads "Karen Bass". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Karen Bass
Congress of the United States
37th District, California