Aaron A. Payment, MPA, MEd, EdD

Tribal Chairperson

Address:
523 Ashmun St.
Sault Ste. Marie,
MI 49783

Phone:
906.440.5937

Email
aaronpayment@saulttribe.net

FaceBook
'Aaron Payment'

June 12, 2018

Attn: Kathleen McHugh
United States Department of Health and Human Services
Administration of Children and Families, Policy Division
330 C Street SW
Washington, DC 20024

Via electronic correspondence at: CBComments@acf.hhs.gov

Re: RIN 0970-AC72 Adoption and Foster Care Analysis and Reporting System, Advance Notice of Proposed Rulemaking (3-15-2018)

Dear Sir or Madam:

Sault Ste. Marie Tribe of Chippewa Indians (Sault Tribe) submits these comments on Advance Notice of Proposed Rulemaking (ANPRM) regarding Adoption and Foster Care Analysis Reporting System (AFCARS) for Title IV-B and Title IV-E as they relate to the Indian Child Welfare Act of 1978 (ICWA). Data points specific to ICWA were incorporated into AFCARS as detailed in the Final Rule published on December 14, 2016.

The ANPRM is specifically requesting tribes to submit suggestions for streamlining AFCARS data elements and removing any undue burden related to reporting AFCARS. The ANPRM states: "We are specifically soliciting comments on the data elements and their associated burden through this ANPRM."

Sault Tribe provided comments to 45 CFR 1355 in May 2016 on the SNPRM regarding then Proposed AFCARS data elements. Those comments are attached and incorporated here by reference. Since May 2016, there has been little change in consistency and accuracy of state data provided to Sault Tribe.

Sault Tribe has spent significant resources attempting to get more access to reliable state data regarding its children that are or may be under state jurisdiction. We find that many cases involving Indian children where the state has substantiated abuse or neglect do not receive active efforts and the Indian tribe, even though known, is not being engaged at all, by design, until after the removal petition has been filed, thus compromising active efforts. In many jurisdictions, ICWA is not treated respectfully—as a valid law—by many agencies, departments and courts. Tribes have relatively few resources to devote to monitoring the states' ICWA compliance. There have historically been no repercussions when the legal requirements were ignored. The tribes know, and Congress knew but attempted to prevent, that by state actors not following ICWA, there are lifelong devastating consequences for Indian children, their families and tribes.

Data collection requirements of the Final Rule promote consistent and accurate data.

Collection of ICWA data elements required by the Final Rule are consistent with HHS's, ACF's, and the Children's Bureau's statutory missions. Such a collection will promote more consistent and accurate data regarding Indian children who are in the care of and within the jurisdiction of the state courts, agencies, and departments throughout the United States, thereby improving identification of, knowledge regarding and outcomes for Indian children in foster care. This is especially true in jurisdictions where that information is shared with the Indian children's tribes as soon as it is determined the child may be an Indian child. It would be especially useful for the tribes to consistently have access to information regarding their children with whom the states' child welfare systems are involved.

There is no "undue burden."

Requiring ICWA data elements to be captured will identify problem areas of non-compliance; and, having that information far outweighs the burden of collecting it. In many cases, these are children who become lost to their tribes forever. There may be an additional cost/burden involved with requiring more consistent and better data for children in general and Indian children, specifically; however, to avoid the loss of Indian children, tribes and tribal families, the burden is not an "undue" burden.

There would be a burden to the states to upgrade their reporting/data/computer systems regardless of the ICWA data elements. How quickly the states/agencies are able to transition to recording/reporting new data elements is more impacted by their updating their system than the data elements themselves, thus technological in nature. Since these regulations have been effective for approximately fifteen months, all states should be well into the process of implementing them, now. At this stage, any modification of the data collection requirements would be a waste of resources, itself creating a new burden. Additionally, the final rule indicates repeatedly that the ACF will provide ongoing technical assistance to address some of the perceived burdens.

Many agencies state the burden outweighs the benefit of the information to be collected. The burden for many of these agencies is likely the burden of having to record the responses to the questions these agencies should have though have not been asking since ICWA was enacted. Thus, the specific, probably unspoken, "burden" is that some agencies are not consistently asking the ICWA related questions they should be, and, it will be a burden to them to now have to consistently not only ask, but also record and report the information. The burden is not undue, it is both a preexisting and overdue burden.

Even with the data of Indian children being underreported for decades, we know Indian children are disproportionally removed from their families. Without reliable data, we cannot know the extent of the disproportionality; therefore, we cannot even begin to measure the impact of services, ICWA, permanency, or various programs on the Indian tribes and children, nor can any true conclusions be reached about the current data.

The burden to tribes, who struggle to keep their child welfare staff and resources adequate to keep their children safe, having to again stop what they are doing in their jobs to advocate for accurate, legally required, data to be collected for their children in the states' jurisdiction is an undue burden.

The administration provided all interested parties ample notice and opportunities to comment prior to the Final Rule.

The Final Rule thoroughly responded to comments on both the benefits and burdens of the proposed regulatory action. Given the multiple opportunities to comment throughout this time period, any additional collection activity is unnecessary and burdensome. In addition, tribes, tribal organizations, and advocates received notice of all these opportunities, with ample time to comment on this vital and important rule change.

States also had ample opportunity to participate. As the Final Rule explains in detail, ACF engaged in robust consultation with states and responded to their concerns, for example, by streamlining many data elements. 81 FR 90524, 90565-66. States and agencies had at least six opportunities to raise their concerns, which the ACF considered and addressed fully. 81 FR at 90566. States and agencies have also had forty years of notice that this information is of a quality that should be gathered and recorded.

These regulations are important to us, our families, and state child welfare systems.

The regulations themselves—in response to the comments from stakeholders across the country—describe the importance of these changes. As stated in the December 2016 Final Rule, 81 Fed. Reg. 90524, 90527:

> Overall, tribes, organizations, states, and private citizens supported our mission to collect additional information related to Indian children as defined in ICWA. 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.
>
> Generally, tribes, organizations representing tribal interests, national child welfare advocacy organizations, and private citizens fully support the overall goal and purpose of including ICWA-related data in AFCARS, and the data elements as proposed in the 2016 SNPRM. These commenters believe that collecting ICWA-related data in AFCARS will:
>
> 1. provide data on core ICWA requirements such as ''active efforts'' and placement preferences, as well as assess how the child welfare system is working for Indian children as defined by ICWA, families and communities;
>
> 2. facilitate access to culturally-appropriate services to extended families and other tribal members who can serve as resources and high-quality placements for tribal children;
>
> 3. help address and reduce the disproportionality of AI/AN children in foster care; and
>
> 4. provide avenues for collaboration between states and tribes that are more meaningful and outcome driven, including improved policy development,

> technical assistance, training and resource allocation as a result of having reliable data available.
>
> Overall, tribal commenters and national child welfare advocacy organizations believe that collecting ICWA-related data in AFCARS is a step in the right direction to ensure that Indian families will be kept together when possible, and will help prevent AI/AN children from entering the foster care system. Many of the tribal commenters that supported the 2016 SNPRM also recommended extensive training for title IV–E agencies and court personnel in order to ensure accurate and reliable data reporting.

Other federal reports have demonstrated the need for quality national data to assess states' efforts in implementing ICWA. See Government Accountability Office, *Indian Child Welfare Act: Existing Information on Implementation Issues Could be Used to Target Guidance and Assistance to States*, GAO-05-290 (Apr. 4, 2005) http://www.gao.gov/products/GAO-05-290.

Nothing has changed since ACF made clear in its final rule that data collection is necessary to protect Indian children and families and their tribes. There remains a pressing need for comprehensive national data on ICWA implementation. Congress has not amended the Act's data collection provisions. And there have been no changes in circumstances that would alter the burdens or benefits of the final rule's data collection requirements.

Tribes have relied on the final rule.

Tribes have long sought data points regarding the implementation of ICWA. This has included advocacy on local, state, and federal levels. With the promulgation of the Final Rule in December of 2016, tribes largely ceased advocacy efforts to mandate data collection, instead refocusing tribal resources toward working collaboratively with their governmental partners to implement the data elements listed in the Final Rule. To this end, some tribes have worked to develop and update agreements to reflect the data elements in the final rule and the 2016 BIA ICWA Regulations, since a goal of both is to increase uniformity.

The ANPRM is arbitrary and capricious where it seeks only information on burdens.

This ANPRM arbitrarily focuses on collecting information about burdens without considering benefits. As required by law, the final rule conducted a careful analysis of the benefits and burdens, and appropriately amended the proposed rule to achieve a balanced final rule. The agency "determined in the final rule that the benefits outweigh the burden associated with collecting and reporting the additional data." 81 FR 90528. The agency explained how its weighing of the benefits and burdens led it to make certain changes to its proposal. For example: as stated in the Final Rule at 81 FR 90528:

> In response to state and tribal comments suggesting congruence with the BIA's final rule, we revised data elements in this final rule as appropriate to reflect the BIA's regulations including removing requirements that state title IV–E agencies report certain information only from ICWA-specific court orders. These changes should allow the state title IV–E agency more flexibility, alleviate some of the burden and other concerns identified by

states, help target technical assistance to increase state title IV–E agency communication and coordination with courts, and improve practice and national data on all children who are in foster care.

There have been no material changes in circumstances justifying the agency's new approach. The executive order is not a sufficient basis for the agency to act, as the executive order itself is arbitrary and unlawful where it provides an insufficient basis for reasonable decision-making relying solely on an examination the burden of regulations without the required balancing of benefits. Additionally, the executive orders fail to provide justification to deviate from the statutory requirement for regulations.

Responses to the Questions for Comment provided in the ANPRM:

1. Identify the data elements, non-ICWA-related, that are overly burdensome for state and tribal title IV-E agencies and explain why. Please be specific in identifying the data elements and provide a rationale for why collecting and reporting this information is overly burdensome.

Although data elements may be burdensome, they are not unduly burdensome. The need and usefulness outweighs the burden to obtain, record and report. Specific data elements are attached.

2. Previously, we received comments regarding burden and the system changes needed to report the ICWA-related data elements of the 2016 SNPRM. We would like to receive more detailed comments on the specific limitations we should be aware of that states will encounter in reporting the ICWA-related data elements in the final rule. Please be specific in identifying the data elements and provide a rationale for why this information is overly burdensome.

The ANPRM requests IV-E states and tribes to provide the number of children in foster care who are considered Indian children as defined in ICWA. However, it is specifically due to the lack of a national data reporting requirement, that any number provided in response to this question would be significantly inaccurate. This speaks to the critical importance of the ICWA-related data points – without a data reporting requirement, many states simply do not appropriately identify or track Indian children in their child welfare system.

Some commenters, current and past, estimated significant burden associated with collecting the data necessary to report on the ICWA data elements. These arguments are the precise reason that it's essential to require the collection of all of the ICWA data elements. The ICWA data elements within the final rule correspond directly with the information that has to be collected for ICWA compliance. Any commenter estimating an increase in burden hours associated with the collection of, or training for the collection of, ICWA data is admitting a failure to apply the minimum standards established within ICWA for the safety and wellbeing of AI/AN children. Even the data elements that require an agency to report on court findings pertain to information that caseworkers and agencies have to track and monitor as the petitioners of a case; it may be the judge's responsibility to make the necessary findings, but the legality of the agency's continued custody of AI/AN children is reliant on those findings. The collection of ICWA information is already a requirement for the states pursuant to ICWA. Any burdens associated with reporting the information that agencies have an existing obligation to know and collect is dwarfed when compared to the benefits of protecting abused and neglected AI/AN children from a child welfare system known to abuse and neglect AI/AN children. One state's child welfare agency/department has not even been able to consistently report on the AI/AN children in care for which a particular

tribe has filed interventions regarding into the case—the state's data at the time of the final rule included only roughly half of the number of that state's Indian children's actually in care and for which that tribe had filed formal written interventions and provided notice of the interventions to the state.

3. Previously, we received comments that particular data elements did not lend themselves to national statistics and were best assessed with qualitative methods such as case review. Please provide specific recommendations on which data elements in the regulation to retain that are important to understanding and assessing the foster care population at the national level. Also, provide a rationale for your suggestion that may include its relevance to monitor compliance with the title IV-B and IV-E programs or another strong justification for using the data at the national level.

As discussed above, there has been ample opportunity for comment and this additional ANPRM is itself both unlawful as crafted and is a waste of finite resources. Tribes and states properly relied on the final rule in working toward implementation for nearly a year and a half. Any modification to the existing data points frustrate those efforts, would require states to begin again collaborating with their tribal partners and ultimately further delay implementation. This comes at the expense of the health, safety and welfare of not only Indian children, their families, and their tribes, but the child welfare system at large where a modification of the final rule would cost system-wide resources.

Case reviews will not capture the data needed to assess compliance, outcomes, engagement, consistency, uniformity and other ICWA related components. Such information is necessary to make a determination about the status of AI/AN children within the system. In addition, Sault Tribe has requested to be involved in the case review process of cases for which we are an intervened party and has only once been called upon, as the intervening ICWA party, to engage in case reviews. The system is set up so the caseworker/agency is the one who informs the reviewer of the parties to contact in conducting the reviews and the tribe is not one of the parties for whom contact information is generally given to reviewers.

4. Previously we received comments noting concerns with variability in some of the data elements across states and within jurisdictions. Please provide specific suggestions to simplify data elements to facilitate the consistent collection and reporting of AFCARS data. Also, provide a rationale for each suggestion and how the simplification would still yield pertinent data.

In the absence of a national data reporting requirement, it is guaranteed there will be variability with data elements frustrating a stated purpose of the 2016 BIA ICWA Regulations, to establish uniformity of application throughout the nation. The need to eliminate the data variability is precisely why it is important to have a national data collection standard. It will assist HHS/ACF efforts to support states in properly implementing ICWA by having targeted, data-driven identification areas where states need support the most. The continuation of AI/AN underreporting impacts programs, systems, tribes, and tribal children across the country. Underreporting is directly related to no meaningful requirement to obtain, record, and report information in the data elements. The data elements should not be simplified further. Some were already eliminated after the intensive comment periods previously and the remaining data elements are crucial to gaining meaningful, useable data.

5. Previously we received comments questioning the utility, reliability, and purpose of certain data elements at the national level. Provide specific recommendations on which data elements in the

regulation to remove because they would not yield reliable national information about children involved with the child welfare system or are not needed for monitoring the title IV-B and IV-E programs. Please be specific in identifying the data elements and provide a rationale for why this information would not be reliable or is not necessary.

As discussed above, ICWA is the "gold standard" of child welfare and ensuring compliance with this federal law informs how the existing child welfare system may improve. Each of the ICWA-related data points are tied to existing federal law and regulation and are necessary to monitor and support title IV-B and IV-E programs. Each of the ICWA-related data points are critical.

For the foregoing reasons, we strongly support each of the ICWA-related data points and believe, as your agency did in publishing the Final Rule in 2016, the benefits of this data collection outweighs any burden.

Any hindrance or streamlining of ICWA data point collection significantly impacts tribal children, families, and county agencies trying to comply. The Social Security Act requires the Secretary of the HHS to collect national, uniform, and reliable information on children in state care. Furthermore, the Secretary of the HHS has an obligation to promulgate final regulations concerning data systems that collect data relating to adoption and foster care in the United States.

ICWA instructs state and federal agencies as to the minimum standards of placement for AI/AN children. HHS should be using AFCARS to report to Congress whether or not states are meeting ICWA's minimum standards and holding the states accountable when they are not. In the interest of protecting our children and families, we respectfully submit these comments and ask HHS, ACF, and the Children's Bureau to implement the 2016 AFCARS final rule, as previously approved, without delay. **Comments regarding each of the specific data elements are attached.**

If there are any questions regarding these comments, please contact Sault Tribe's Indian Child Welfare Attorney, Elizabeth A. Eggert, at:

Sault Ste. Marie Tribe of Chippewa Indians
2218 Shunk Road
Sault Ste. Marie, MI 49783
906.632.5250
eeggert@saulttribe.net

Respectfully,

Aaron A. Payment

During the listening session on May 15, 2018, tribes were encouraged to detail which data elements (both ICWA and others) the tribes believe are important, if there are any data elements that can be streamlined for efficiency, and if any of the data elements are unduly burdensome. Sault Tribe supports all the ICWA data elements remaining in the AFCARS requirements, believes there are additional data elements that would be beneficial that were considered and denied for inclusion by ACF, understands the reasons certain data elements were previously removed or denied, and does not agree that any of the current (Dec. 2016) data elements are unduly burdensome. Specific comments regarding each of the data elements from Sault Tribe are below.

Comments Regarding Specific Data Elements:

Section 1355.43 Data Reporting Requirements:

(a) The Final Rule increased the time frame from 30 to 45 days and this rule is not unduly burdensome.

(b) Agree that issuing one final rule on AFCARS with all revisions is the efficient way to review AFCARS, rather than stages, especially since revision has been proposed since the 2008 NPRM. There is nominal burden considering that the technology must be updated anyway, and multiple stages would be more resource consuming/less cost effective. Limiting to most recent information in .44(a) and (b) should have lessened the associated burden here.

(c) Adoption and guardianship assistance data would be helpful to identify the efficiency of these permanency plans and limiting the reported information to the recent information on the last day of the reporting period should have lessened the associated burden here.

(d) It is particularly important to Sault Tribe that there be a distinction between "blank" and "missing" to more easily identify when perhaps certain questions just were not asked as opposed to asked, but still unknown.

(e) Allowing the reports to be submitted electronically should relieve the burden of paper copies.

(f) For children still of an age to be in or reenter care, all records should be retained. It should be made clear to agencies, departments, and Indian Tribes (even those that are non-IV-E agencies) at what point they are able to dispose of their case files and if there is a storage location for case files of children who have aged out of foster care and the hard files are still required.

Section 1355.44 Out-of-Home Care Data File Elements

(a)-(b)(2)(ii). No comment.

(b)(3). This is not unduly burdensome. The primary reason this could be viewed as unduly burdensome by states or agencies is if the information is not currently being gathered, as it should be. To propose the information be obtained from case reviews or narratives will not provide useable data to allow and assessment of ICWA compliance, the number of Indian

children coming into care, the permanency outcomes for Indian children, etc. If these questions are not asked at the beginning of the case when all other family/demographic information is being gathered, it is not likely the questions will be asked later or throughout the case.

(b)(4) and (b)(5). This is not be unduly burdensome as this is information the title IV-E agencies are supposed to know already. The final rule is asking to have the information reported that the agencies by law should already have. As discussed in the 2016 SNPRM and in the December 2016 final rule, "data elements related to whether ICWA applies are essential because application of ICWA triggers procedural and substantive protections and this data will provide a national number of children in the out-of-home care reporting population to whom ICWA applies." Each of the data elements within this section are crucial and are not unduly burdensome.

(b)(6)(i)-(iii). This particular data element would be of particular importance to ICWA compliance, because rarely do we receive notice of a removal with ten-day notice prior to a court hearing. With the policies of some states to not share Child Protection Services information with tribes, they have made it very difficult for workers to truly provide active efforts, requiring qualified tribal experts to be prepared to testify within a day or two of receiving notice of a removal or extending the emergency removal by requesting the allowed extension of time. Often, Sault Tribe is not even getting notice until after the first two hearings due to the states' policies in these cases. One state's policy gives a worker up to three days after the removal to notify the tribe, even if the Indian child's tribe is known for months in advance. The statute states no hearing shall take place until 10 days after notice is provided, not within 10 days of the hearing.

In addition--suggestion, when there are multiple tribes a child is enrolled in, the tribe the child was enrolled in first should be the deciding factor unless there are no ties with that tribe, but there are with the other tribe. A practical reason for this analysis is that most tribes recognize that a child should only be enrolled in one tribe, but it does happen where a child has been enrolled in two.

Sault Tribe is often notified of a proceeding by a grandparent or aunt/uncle of the Indian child and sometimes not until permanency, even though there were reasons for the agency/department to know the child was an Indian child. Often, we also receive information regarding an Indian child involved in something with the state, but do not receive a petition or additional information without having to make a specific request and sometimes multiple requests for information. In addition, we are often told the information is confidential unless you are a party to the case. We cannot intervene and become a party to the case unless they supply us with the information first.

(b)(7). These data elements will provide important information nationwide regarding the volume of cases that are transferred to tribal courts. This information is valuable to track permanency outcomes and other critical information regarding Indian children.

(b)(8). This is a very important data element and the burden is outweighed by the benefit of the federal government and tribes having state by state as well as overall national information regarding this, as well as the reasons for denial of transfers in order to review compliance. This should be very easy information for agencies/departments to obtain since a transfer of a case to

tribal court is an outcome that would be very apparent. The dynamics involved in transfer of timely services for the families as well as the involvement and policies of the Interstate Compact for the Placement of Children Office would be very helpful as well.

(b)(9) – (b)(10). Collecting data regarding the race of the children in care throughout the country is very important to show trends in child welfare and the differences in the data given certain demographics. Identifying a child who is eligible for or a member/citizen of a federally recognized Indian tribe has a significant legal meaning in "child custody cases" pursuant to ICWA, so those data elements are crucial for legal compliance in addition to understanding trends within certain demographics. The collection of this data is not unduly burdensome.

(b)(11) - (b)(13). Collection of this information is not unduly burdensome. In addition, with the research regarding "Adverse Childhood Experiences" and the relation to health issues, it may be very helpful to have national data for health assessments.

(b)(14) - (b)(16). This information is important to show patterns and trends that could be helpful to the legislature in creating laws to address any identified issues and is not unduly burdensome.

(b)(17) - (b)(22). This information is important to show patterns and trends that could be helpful to the legislature in creating laws to address any identified issues and is not unduly burdensome.

(b)(23) - (b)(25). Maintaining a relationship with and placement with siblings is a very important consideration in foster care/adoption cases. Ensuring the agency/department working with the family understands those relationships is important and reporting the data should not be unduly burdensome.

(c)(1) and (c)(2). No comment.

(c)(3) and (c)(4). This is important information and should be information already obtained by the agency/department, thus would not be an undue burden.

(c)(5). This information can assist to see trends across the country to track what is occurring from state to state and nationally to parental rights. The benefit to having this information outweighs the burden.

(c)(6)(i)-(iii). This information is legally significant and would be a good indicator of ICWA compliance at involuntary termination hearings at the national level. This is not unduly burdensome.

(c)(7). This information is beneficial to know nationally whether the states are complying with ICWA in voluntary terminations. It might be helpful to know if there is collection of data regarding ICWA notice occurring in voluntary termination under (b)(6), above.

(d). This is necessary information and not an undue burden. This is all information the agency/department should already be obtaining, if not reporting yet.

(d)(1). This information is necessary to track in order to track timelines for corresponding information. However, in ICWA cases is this the emergency removal or the order removing after making the required findings under ICWA. Or, does the removal date back to the date of the emergency removal once the findings have been made to validate the removal as a valid ICWA removal? Either way, the information is not unduly burdensome.

(d)(2). No comment.

(d)(3). This information is extremely important to determine ICWA compliance. It would also be a good tool to determine where training may be necessary. Collecting this information is not unduly burdensome.

(d)(4). No comment.

(d)(5). No comment.

(d)(6) - (d)(8). This information is important to understand the national dynamics of certain circumstances the country's youth are experiencing and at what rate. This is not unduly burdensome.

(e) - (e)(7). This information is important to understand the national dynamics of certain circumstances the country's youth are experiencing in foster care placements. This is not unduly burdensome.

(e)(8) and (e)(9). Foster homes are in short supply, both ICWA compliant and non-ICWA compliant homes. Compiling data regarding placement of Indian children would yield good information regarding how many Indian children are able to be placed with family or tribal homes. This information is necessary to determine what level of programming should be activated for foster home recruitment. Collection of this data is not unduly burdensome.

(e)(10) and (e)(11). This information will assist to determine ICWA compliance nationally. Collection of this data is not unduly burdensome.

(e)(12). No comment.

(e)(13). This is important information and should be recorded and reported. This is information readily available to the agencies/departments and should not be unduly burdensome

(e)(14) - (e)(25). Collecting data regarding the birth date, gender and race of the foster parents, as well as the pre-existing relationship, if any, to the child would be useful to show trends in the data given certain demographics.

(f) - (f)(9). No comment.

(f)(10). Active efforts is a foundational requirement of ICWA and capturing the data regarding the active efforts provided in a case will provide information to assist in determining ICWA

compliance. There are many jurisdictions where Sault Tribe intervenes in a case and the state's foster care caseworker believes providing referrals to the parents and sending an email to the tribal ICWA monitoring caseworker once every few months to report if the parents have been "working their plan" is sufficient to satisfy active efforts. Tracking data regarding active efforts will provide a more comprehensive understanding as to where those jurisdictions are located so appropriate training can be provided.

(g) - (g)(4). No comment.

(h) - (h)(14), except (h)(4) and (h)(10)-see below. Collecting data regarding the birth date, gender and race, of the adoptive parents, as well as the pre-existing relationship, if any, with the child could be important to show trends in the data given certain demographics.

(h)(4) and (h)(10). Due to placement preferences in ICWA, this information is important to track for ICWA compliance. It remains unclear, however, if verification of tribal citizenship is required by individuals reporting to be citizens/members of a particular federally recognized tribe. "Indian Tribe" should be as defined in 25 CFR 23.2. This is information the agencies/department would have as a legal requirement, thus would not be unduly burdensome.

(h)(15) - (h)(18). No comment.

(h)(19). Maintaining a relationship with and placement with siblings is a very important consideration in foster care/adoption cases. Gathering data regarding siblings placed or adopted together is important to understand whether siblings are ultimately being placed together. This would not be unduly burdensome.

(h)(20). This is important information to obtain, however, there should be evidence in the file that there was a diligent search by the agency/department to identify an ICWA compliant placement as indicated in 25 CFR 23.130. This data element is not unduly burdensome. Often in practice, it is stated diligent efforts were made to find an ICWA compliant placement; however, when investigated further, the diligent efforts were to ask the parents if there were any relatives they wanted to consider for placement, often only at the time of removal.

(h)(21). This information is required to measure ICWA compliance and is not unduly burdensome.

(h)(22)-(h)(23). This is not unduly burdensome. It is very important to be able to track whether or not the law is being complied with and appropriate legal findings are being made. This importance outweighs the burden.

1355.45 Adoption and Guardianship Assistance Data File Elements

No comment (a)(1)-(d).

(e). This would be helpful information because in some jurisdictions the courts are treating permanent/subsidized guardianship permanency plans as limited guardianships and are

dismissing the "permanent" guardianships as soon as the parent files a motion and is able to show that they have improved their circumstances with no requirement to engage in services to show that the statements of sobriety, employment, stability, safe associations, etc are verified. Getting national statistics on this would be helpful to provide education/training in those areas.

1355.46 Compliance

No comment.

1355.47 Penalties

There should be penalties for not complying with legal requirements and AFCARS is the only way to monitor whether or not legal requirements are complied with on a national level. The penalties should not be such that the agency/department becomes unable to perform its duties, but it should be of a degree that the agency/department is incentivized to perform in a legally competent manner with both state and federal laws. To provide penalties in the area of ICWA compliance further demonstrates to state agencies/departments, the importance of following ICWA. In many jurisdictions, ICWA does not seem important to many agencies/departments because there is no repercussion to ignoring the legal requirements of ICWA.

Aaron A. Payment, MPA

Office of the
Tribal Chairperson

523 Ashmun Street
Sault Ste. Marie
Michigan
49783

Phone

906.635.6050

Fax

906-632-6829

Email

aaronpayment@saulttribe.net

FaceBook

'Aaron Payment'

May 6, 2016

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: Supplemental Notice of Public Rulemaking—Proposed AFCARS data elements related to the Indian Child Welfare Act of 1978 (*Federal Register*, Volume 81, No. 67, published April 7, 2016, pages 20283–20301)

The Sault Ste. Marie Tribe of Chippewa Indians welcome the opportunity to provide comments on the Supplemental Notice of Public Rulemaking (SNPRM) regarding proposed Adoption and Foster Care Automated Reporting System (AFCARS) data elements related to the Indian Child Welfare Act of 1978 (ICWA). American Indian and Alaska Native (AI/AN) children have a unique legal status as citizens of tribal governments with federal laws, like ICWA, that provide important safeguards to help them maintain their tribal and family relationships. This unique legal status and the requirements of federal laws like ICWA are not addressed in current federal reporting requirements for state child welfare systems that serve AI/AN children and families. This has contributed to states feeling less comfortable in examining their implementation of ICWA, and difficulty in developing responses that can effectively address disproportionality and other areas for improvement. Tribes also suffer under the current data limitations, as they experience significant limitations in their ability to track the progress of their tribal members' children and families effectively across multiple states and collaborate successfully with partner states. As states and tribes together try to understand the best approaches to address these issues, access to reliable data is critical if effective solutions are going to be developed. With AI/AN children nationally facing disproportionate placement in state foster care at a rate over two times their population, the need for ongoing, reliable, and accessible data has never been greater.

The SNPRM proposes the first federal data elements that can provide detailed information on ICWA implementation. It proposes a series of data elements tied to ICWA requirements that 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 permanency for AI/AN children. Improved policy development, technical assistance, training, and resource allocation can flow from having reliable data available. Establishing the data elements proposed in the SNPRM will provide AI/AN children the same opportunities to benefit from data that other children currently have, and will better inform responses that address the unique issues in both policy and practice.

Data elements proposed in the SNRPM include data that is easily obtained in the case files of Title IV-E managing agencies. This includes common case management data that details the activities of the Title IV-E agency and related activities of the court in particular cases. The full AFCARS NPRM, like the SNPRM, also proposes data from Title IV-E agencies and courts. Examples of similar AFCARS data elements include Transfer to Another Agency (1355.43(g)(4)), Living Arrangement and Provider information (1355.43(e)(1-16), Authority for Placement and Care court order (1355.43(d)(4)), Termination of Parental Rights date (1355.43(c)(3)(ii)), and Date of Judicial Finding of Abuse or Neglect date (1355.43(c)(4). The integration of ICWA-related data provides for the unique legal issues for AI/AN children,

while following a very similar framework and sources of data that have been a part of AFCARS requirements for many years and proposed in the current full AFCARS NPRM.

We would also note that Title IV-E of the Social Security Act provides authority for the Secretary of the Department of Health and Human Services (DHHS) to regulate the collection and reporting of data regarding children who are in the care of a Title IV-E agency (42 U.S.C. 679). This has more recently been interpreted by DHHS to include the collection and reporting of data related to implementation of ICWA involving AI/AN children in state child welfare systems. For many years, tribal advocates, and in some cases states, have argued for this interpretation, and we are pleased to see the current Administration adopt this common sense clarification of current authority.

We want to thank DHHS for their efforts to correct significant data gaps in federal data collection concerning AI/AN children and families, and express our support for the establishment of the proposed data elements contained in the SNPRM. It has been over 36 years since the enactment of ICWA, and while conditions and outcomes for AI/AN children have improved since that time, there are still substantial issues that need attention in order to reduce AI/AN disproportionality and improve tribal, state, and federal responses. We look forward to working with DHHS in the future to strategize on how to use the new data proposed in this SNPRM.

Sincerely,

Aaron A. Payment, Chairperson
Sault Tribe of Chippewa Indians

To: Administration for Children and Families (ACF) (2016-07920)/(0970-AC47)

Fr: Sault Ste. Marie Tribe of Chippewa Indians

Dt: May 9, 2016

Re: Comments on AFCARS Proposed Indian Child Welfare Act data elements

---

Introduction

Sault Ste. Marie Tribe of Chippewa Indians (Sault Tribe) is an Indian tribe located in the Upper Peninsula of Michigan. Although the majority of our tribal population was once located in this region; today, Sault Tribe has tribal citizens located throughout the country. Thus, it is imperative to Sault Tribe that the agencies and state courts affecting our children not only adhere to the laws created to protect the future of our tribe, but to do so conscientiously and uniformly.

On April 07, 2016 the Administration for Children and Families (ACF), a division of the Department of Health and Human Services (HHS), announced it was supplementing the notice of proposed rulemaking of the Adoption and Foster Care Analysis and Reporting System (AFCARS).

The proposed regulations are an extension of an earlier proposed rule, and address the requirements for State Title IV-E agencies to collect and report data to ACF on children who are in out-of-home care and in subsidized adoption of guardianship arrangements with the State. The proposed regulations also address AFCARS penalty requirements, under the Adoption Promotion Act of 2003, which will be applied to the Title IV-E agencies for failure to comply with AFCARS collecting and reporting data requirements.

The proposed AFCARS regulations include several new modifications to address changes made by the Fostering Connections to Success and Increasing Adoptions Act of 2008, and the Preventing Sex Trafficking and Strengthening Families Act of 2014. Under these Acts, Title IV-E agencies will be required to collect and report data related to the guardianship assistance program, sibling placement, the extension of Title IV-E assistance to children 18 or older, educational stability plans, and transition plans for children in foster care. In addition, information regarding victims of sex trafficking, children in foster care who are pregnant or parenting, and children in non-foster family settings will also be required.

The new AFCARS regulations propose collecting specific data related to American Indian / Alaskan Native children. The terms American Indian and Native American will be used interchangeably throughout this comment.

Since the enactment of ICWA in 1978 the lack of statistics and meaningful data related to Indian children in "child custody proceedings" in State courts is woefully inadequate. Implementing the proposed collection of enhanced ICWA data elements is a monumental attempt to ensure compliance with and measure the effectiveness of ICWA, given that there has been no consistent and reliable data for the past 38 years.

The federal government has the ability and authority to collect this data, and to assist in ICWA compliance. The Sault Tribe is encouraged by the acknowledgement by HHS and ACF of the extreme need for this information. We welcome the opportunity to participate in information sharing regarding our people, experiences, and vision for the future. We believe the enhanced data collection requirements will lead to improved outcomes for Sault Tribe children and families.

Congress identified ICWA's purpose as:

> ... *it is the policy of this Nation to protect the best interests of Indian children* and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

25 U.S.C. § 1902 (2006).

In practice, this policy has not filtered down to the everyday experiences of Indian Tribes and families in state courts. Until the Proposed Rules can enforce ICWA there are no incentives or consequences for non-compliance by the state courts and agencies tasked with implementing ICWA.

The Authority of AFCARS to Require ICWA Data Reporting

The Sault Tribe agrees that HHS has the authority to require that state title IV-E agencies maintain a data collection system to capture the proposed ICWA data elements and to impose penalties to for failure to comply with AFCARS reporting.

Proposed AFCARS Regulations:

Section 1355.43: Out-of-home care data file elements.

Sections 3 (i), (iii), (v), (vi) in all of these subsections, the language "inquired" is vague. It is not clear what the state agency is inquiring about in these sections.

Sault Tribe feels that the language needs to be precise so that regardless of the specialized training and education of the interviewer, the information received can be accurate and consistent. The questions are part of the state agency's research into whether there is a reason to know that the child is an Indian child under ICWA. The language in these subsections should clearly state what is being asked. For example, "Indicate whether the state agency inquired with the child's biological or adoptive mother if the child is an Indian child".

Section 4 (ii) under this subsection, the agency is required to indicate the name of all federally recognized Indian tribe(s) that may potentially be the Indian child's tribe(s). Sault Tribe would recommend that the title IV-E agency also be required to document the verification of tribal membership by the child's Indian tribe and if a child is identified as either enrolled or eligible in a federally recognized tribe that the specific tribe and date of verification are included as a data element. Sault Tribe would also recommend that there be a data element that captures when the child is eligible for more than one tribe.

Section 5 if there is "no court finding" the state title IV-E agency must indicate no name listed. Sault Tribe feels that the agency should identify the Tribe's position/involvement in the case even if the court order does not clearly make a finding. The state title IV-E agency should be required to continue to report data that accurately reflects tribal involvement even when a court order does not include the information. It has been Sault Tribe's experience that the courts are not diligent about engaging the Tribe or including required ICWA findings in the court orders. By requiring this data element to remain blank if no finding is made it seems like this will be another way to misrepresent the true number of ICWA cases involved in State court and will further skew data related to specific tribal affiliation. Sault Tribe has a number of cases where the Tribe has legally intervened in a case but there are no ICWA findings contained in the court orders.

Section 7 Sault Tribe agrees with this section however, feels that "good cause" findings should be made as outlined in the Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 FR 10156. Sault Tribe would recommend an additional data element that captures the specific "good cause" finding used to decline each transfer.

Section 10 Sault Tribe would recommend adding the date of the tribal request for additional information and the date the agency responded to the tribe's request for additional information. It has been Sault Tribe's experience that the agencies are not always timely in responding to requests for additional information.

Section 11-13 Sault Tribe is concerned that, historically, the definition of active efforts has been a very subjective concept; however, they are clearly defined in the Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80

FR 10150. Sault Tribe supports that the state title IV-E agency is required to report active efforts very specifically to coincide with the definitions as found in the Guidelines (or proposed rules, once adopted).

Section 13 (i-xiii) Sault Tribe would recommend data elements be included that capture how the state title IV-E agency actively engages the tribe in case planning and with any key case decisions to include ongoing active efforts, placement and permanency goal changes.

13(xi) Sault Tribe would recommend that multiple data elements be added this section to capture "Conduct or cause to be conducted a diligent search for the Indian child's extended family members for assistance and possible placement; if no extended family members are identified, a diligent search should be conducted for other ICWA compliant placement options; and if the Tribe supported the placement and adoption of the child.

Section 15 Sault Tribe is concerned with the language "which foster care or pre-adoptive placements that meet the placement preferences of ICWA in 25 U.S.C. 1915(b) were available to accept placement." The language seems to leave the answer open to a very subjective interpretation of "were available to accept placement" and answering yes or no does not document diligent or active efforts to ensure the child is placed in an ICWA compliant placement. Suggested language would be "were pursued to accept placement pursuant to subsection 13 (xi)," as amended above.

Section 18 (v) Sault Tribe is not clear what "Other" good cause might be. Sault Tribe recommends that if there is a good cause finding denoted as "Other" that further narrative data is captured that explains the court's good cause findings. Sault Tribe feels that capturing this specific data will assist to identify any education, training, or compliance issues.

Section 19 Sault Tribe is concerned that there are no definitions of "voluntary" or "involuntary". Sault Tribe would recommend having a definition of what constitutes a "voluntary" placement. ICWA does not seem to define what a voluntary proceeding for termination of parental rights requires. See Comment for Section 22-24.

Section 22-24 Sault Tribe would recommend that data is captured regarding whether active efforts or culturally appropriate services were provided prior to a voluntary consent to termination of parental rights.

Section 26 Sault Tribe is concerned with the language "which adoptive placements that meet the placement preferences of ICWA in 25 U.S.C. 1915(b) were available to accept placement." The language seems to leave the answer open to a very

subjective interpretation of "were available to accept placement" and answering yes or no does not document diligent or active efforts to ensure the child is adopted by an ICWA compliant placement. Suggested language would be "were pursued to accept a placement for adoption pursuant to subsection 13 (xi), as amended above.

Section 27 Sault Tribe would recommend that a data element be added to capture if the Tribe supported the placement and adoption of the child.

Section 28 (v) Sault Tribe is not clear what "Other" good cause might be. Sault Tribe recommends that if there is a good cause finding denoted as "Other" that further narrative data is captured that explains the court's good cause findings. Sault Tribe feels that capturing this specific data will assist to identify any education, training, or compliance issues.

Conclusion

The lack of consistent data about American Indian / Alaska Native children is one of biggest concerns from tribal officials. The Federal government through the AFCARS process has the opportunity to collect and create a much needed consistent body of data.

Sault Tribe actively responds to all ICWA notices and is diligent with intervening in all cases involving Sault Tribe children across the United States. It is the experience of Sault Tribe that there are vast inconsistencies across states and jurisdictions with the interpretation and application of ICWA. The collection of accurate and consistent data is a first step to start a meaningful discussion about what is currently happening with Native American children in state IV-E agency custody.

When tribal children are taken into state custody and not properly identified they and their families lose the enhanced protections that are afforded to them under ICWA. Poor plans are made and lead to chaos and unnecessary trauma for tribal children. Tribes lose their children and their futures. Children lose their families and their connection to their tribe. These losses are irreplaceable parts of their identity and have lifelong consequences. Consistent and accurate data is the first step to open a meaningful discussion for creating a better future for Indian children and tribes across the country.

When tribal children are identified when being taken into state custody, they are provided the support and connection with their tribes. Children are reunited with their relatives, extended families and tribal communities. Tribes are able to advocate for tribal children and families. Support can be provided to develop plans that include culturally appropriate services and decrease the barriers Indian

families face to safely parent their children. When children are connected with their families and their Tribes, outcomes for Indian children improve.

The fear that tribes continue to face is the fear of the unknown. With no reliable and accurate data, it is unclear what is happening with tribal children. It is not known how many children and families are being lost in the system, thus lost to their tribes and the tribe's long and rich history lost to the children of future generations. Until accurate and consistent data is collected, the tribes are very concerned about their children in state custody. If state IV-E agencies were able to reliably report what is happening with Indian children in state custody the conversations and collaboration between states and tribes would be more meaningful and outcome driven. Goals, action steps and outcomes could be measured and data would create a clear vision of the future and how to further improve outcomes for Indian children and families.

Sault Tribe's experience with state title IV-E agency data is that there can be as much as a 50% discrepancy between the numbers reported by the state agency and the number of children known to be in state custody by the tribe, thus the tribe is aware of twice as many children in state custody as what is reported by the state. This is an alarming number and further highlights the need for improved data collection and reporting.

We hope these recommendations are helpful to the Department of Health and Human Services and the Administration for Children and Families in its commitment to assessing the incidence, characteristics, and status of adoption and foster care in the United States, and develop the appropriate national policies and data measures with respect to adoption and foster care by including requirements that conform with the Indian Child Welfare Act.