June 18, 2019

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

Re: FR Document No. 2019-07827, RIN 0970-AC72
Comments on the Education Elements of the Adoption and Foster Care Analysis and Reporting System 2016 Final Rule

Dear Ms. McHugh:

Thank you for the opportunity to share comments regarding the Adoption and Foster Care Analysis Reporting System (AFCARS). Pursuant to the Notice of Proposed Rulemaking (NPRM) published in the Federal Register on April 19, 2019 (84 Fed. Reg 16572), the American Bar Association (ABA) submits these comments to commend the Department of Health and Human Services’ (HHS) decision to retain three of the four education data elements from the Final Rule and to encourage reconsideration of the proposal to eliminate the education stability data element. These comments also serve to affirm our strong support for the AFCARS Final Rule issued in 2016.

The ABA is a voluntary professional membership organization with more than 400,000 members. The ABA has submitted prior comments in support of the 2016 Final Rule with a particular emphasis on the importance of retaining data elements for education, consistent with ABA Resolution 117C, which supports education access and stability for children in foster care.

The NPRM maintains three key data elements concerning education for children and youth in foster care: school enrollment, educational level, and special education. We concur with HHS’s assessment that each of these elements provides critical information to “assess nationally the well-being of children placed in out-of-home care as part of monitoring the title IV-B and IV-E programs.” (84 Fed. Reg 16572, 16580).

However, we respectfully urge reconsideration of the proposal to eliminate the data element on educational stability for the reasons detailed in the remainder of this letter.
Education Stability Data Supports Congress’s Goals as Expressed in Federal Legislation

Like the three other education elements, data about education stability is critical to assessing children’s well-being while in out-of-home care. The significance of education stability for children is evident in Congress’s attention to the issue in two different pieces of federal legislation.

- The *Fostering Connections to Success and Increasing Adoptions Act* of 2008 (Fostering Connections) mandates school stability for children in foster care. Under this law, child welfare agencies must take steps to place children close to the schools they have been attending. Child welfare agencies must also collaborate with education agencies to ensure children who experience a change in living placement remain in the same school unless a change in school is in a child’s best interest.

- The *Every Student Succeeds Act* (ESSA) further reinforces Fostering Connections by recognizing the role of education agencies in promoting school stability and interagency data sharing related to students in foster care. Pursuant to ESSA, state departments of education are now required to report on the educational performance of students in foster care in the State Education Agency (SEA) Report Card.

By including the education stability element in AFCARS, state and federal agencies, and Congress will be able to more effectively measure progress on the education stability goals in these two important pieces of legislation.

Education Stability Data Supports Children’s Goals

Education stability is not only important to Congress and state and federal agencies, it is also important to children and youth in foster care. Indeed, one of the main reasons Congress has focused on education stability in federal legislation is because youth who have experienced foster care often cite frequent school placements and education disruption as a cause of poor education outcomes. (*Fostering Success in Education: National Factsheet on the Educational Outcomes of Children in Foster Care*, April 2018). This topic arises regularly in the context of legal representation as well, where children and youth seek to ensure their views about education access and stability are understood and represented in court. For example, in a New Jersey state-wide assessment of youth engagement in court conducted by the ABA Center on Children and the Law in 2017, education was the second most important issue (behind living placement) children and youth raised in their court hearings.

Education Stability Data Provides Key Benefits in Relationship to Other Education Elements in AFCARS

Education stability data is both distinct from and complementary to the three other education data elements in AFCARS. It is distinct because it addresses longitudinal information rather than a point-in-time reflection of children’s education status. In other words, while school enrollment, education level, and special education focus on what is happening in a child’s life at the time of the report, the education stability element provides key information about the child’s path while
in care and reflects changes that may have an impact on the other education elements. Because this information will already be collected in child welfare agency case plans, as required under Title IV E, capturing it in AFCARS is critical to help agencies compare their longitudinal stability information and trends with national data.

Education stability data is also complementary to the point-in-time education elements because it can be cross-referenced with data on school enrollment, education level, and special education, to make each of those elements more informative. For example, although it is valuable to track education level achieved, it is especially valuable to compare that data with education stability numbers to identify correlations between stability and point-in-time outcomes. By tracking these complementary data elements together in AFCARS, the overall information produced will be much more valuable to agencies and will enhance their work with children and families. This complementary information will also better inform assessments of national trends and the effective implementation of federal provisions of Fostering Connections and ESSA.

Concerns About Education Stability Data Can Be Addressed Without Eliminating the Data Element in the Final Rule

The NPRM indicated that information in the education stability data element may be “too detailed or qualitative for a national data set” which could lead to inaccurate reporting. (84 Fed. Reg 16572, 16576). In support of this view, commenters on the Advanced Notice of Proposed Rulemaking raised concerns about the specificity of the drop-down menu of options to define education stability. For example, Oklahoma noted “[t]he state is concerned with giving the CW specialist discretion without adequate knowledge of education prompts and limited input from education subject matter experts.” (Oklahoma ANPRM Commentary, June 12, 2018). Similarly, Louisiana commented that “education stability will be extremely subjective” and the reasons for education stability will be specific to each child and should not be limited to the five drop-down criteria listed (i.e., proximity, district rules, residential facility services, child and parent request). (Louisiana ANPRM Commentary, June 13, 2018).

To address concerns related to the subjectivity of the “reasons for school changes,” one alternative would be to revise the Final Rule to include a “yes” or “no” only and eliminate the additional explanatory information in this data element. In this structure, the caseworker would successfully track whether a child had moved schools during the reporting period without needing to provide potentially subjective explanations for the move. Although this would not provide detail about the reasons for school changes, it would allow for accurate and straightforward reporting that would support analysis of education stability progress and trends across the country, especially when viewed in relationship with the other AFCARS education data elements.

Massachusetts raised a concern that the element will be insufficient to fully understand education stability because it will capture only one school move during a reporting period where there may be multiple moves and because it does not address other disruptions such as poor attendance or suspensions. Although a limited “yes” or “no” response would not address all the variables that could impact education stability, it would still go a long way to improving the basic tracking of this issue in a way that significantly advances the status quo (i.e., no national education stability
information). Tracking the basic information about whether the child is in the same school as he or she was at the last reporting time, rather than eliminating this element altogether, would also be more consistent with the goals of federal law and with efforts to understand how to better support children’s paths to education success while in foster care.

**Education Stability Information Is Already Available or Collected**

Other ANPRM comments focused on the increased workload and the burden of tracking education data generally. This is consistent with general comments during the ANPRM process. As the NPRM requests, however, we have set out below key information about why education stability information constitutes “information already available or collected as part of the title IV-E agency’s casework.” (84 Fed. Reg 16572, 16578).

Specifically, because education stability is already a requirement under federal law that both child welfare agencies and school districts must work toward collaboratively, stability data should already be accessible to caseworkers. Indeed, the ANPRM commentary from Tennessee confirms the point by explaining the Department “strives to ensure stability for children in out-of-home care, which includes, to the extent practicable, keeping those children in their same school districts.” (Tennessee ANPRM Commentary, June 11, 2018). In other words, because child welfare agencies are already required to keep school stability information as part of their case plans pursuant to Fostering Connections, capturing it as a data element via AFCARS should not create unnecessary burdens.

By comparison, the additional benefits are substantial because tracking this data through AFCARS will encourage uniformity in reporting across states and allow for better analysis of the school stability challenges students in foster care face and seek to address in their case plans.

**AFCARS Is the Most Effective Vehicle for Collection of Education Stability Data**

Very little national data about the education of children in foster care currently exists, particularly about school stability. AFCARS is the most effective way to collect educational stability data because it allows for straightforward quantitative reporting of whether children have changed schools each reporting period. No other vehicle is better suited to tracking this type of data on a national scale.

Although qualitative review or case study regarding school stability is important, it does not preclude the need for quantitative data in this critical area. Research on the educational performance of students in foster care overwhelmingly shows increased attention to educational issues is critical – and that students with high mobility face many educational challenges. ([Fostering Success in Education: National Factsheet on the Educational Outcomes of Children in Foster Care](https://www.childtrends.org/wp-content/uploads/2018/04/36-Fostering-Success-in-Education-National-Factsheet-on-the-Educational-Outcomes-of-Children-in-Foster-Care-Mar-2018.pdf), April 2018). Moreover, the longitudinal nature of this data will provide key information to agencies themselves as they seek to track the correlation between education levels achieved, school enrollment, special education, and school stability over time in care.
Recent Information Does Not Contradict Prior Factual Findings

The education stability data element in the Final Rule was thoughtfully considered and found to be of great value in the prior review processes. Recent concerns about the subjectivity of the drop-down menu and the general burden of new data elements as expressed in the ANPRM process do not reach the level of contradicting those prior factual findings. *F.C.C. v. Fox Television Stations, Inc.,* 556 U.S. 502, 515-16 (2009) (an agency’s revised factual findings cannot contradict prior factual findings without a clear justification for doing so). Accordingly, under APA precedent there is no basis for eliminating this data element from the AFCARS Final Rule.

Conclusion

The ABA continues to support the inclusion of the educational stability data element in AFCARS as set out in the Final Rule. Education stability information is readily available through title IV-E agencies’ existing casework; it provides critical longitudinal information on children’s education path; helps states, federal agencies and Congress assess progress on important goals in federal legislation; and serves children’s interests by prioritizing one of the topics they continually identify as among the most important in their case plans and court hearings. The ABA respectfully requests HHS retain the education stability data element in the AFCARS Final Rule.

Sincerely,

Robert M. Carlson