April 16, 2018

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

Re: Response to Request for Public Comments on the Proposed Delay to the Effective Date of the Adoption and Foster Care Analysis and Reporting System (AFCARS) Final Rule

Dear Ms. McHugh,

Thank you for providing an opportunity to share comments regarding the Adoption and Foster Care Analysis and Reporting System (AFCARS). Pursuant to the notice published in the Federal Register on March 15, 2018 (83 Fed. Reg. 11450), the American Bar Association (ABA) submits these comments on the proposed delay to implement the AFCARS Final Rule issued in 2016. The ABA is a voluntary professional membership organization with more than 400,000 members, and I write today on their behalf to reiterate our support for the Final Rule issued from your Department and to express our concerns about the proposed two-year implementation delay.

The updated requirements in the 2016 Final Rule represent a shift away from “point in time” data toward a more longitudinal data approach which will help agencies address children and families’ needs more effectively. The Final Rule also includes new information that will allow agencies to develop more comprehensive information about the circumstances that bring families into contact with agencies, such as data on medical needs, living arrangements, older youth and mental health. The Final Rule incorporates data requirements that have arisen from legislation and regulations that have come into effect since 1993, including most recently through the Every Student Succeeds Act (ESSA) and the updated Indian Child Welfare Act (ICWA) regulations.

The ABA continues to support the Final Rule and opposes a two-year delay for implementation. Postponing the effective date when states are already more than a year into the implementation process would disrupt efforts to revise data collection systems and would create burdens and unnecessary confusion for state agencies. Delaying the potential for further changes in the regulations would also interfere with the collection of key data that is not covered by existing AFCARS requirements. Although there may be some burdens associated with incorporating these new data provisions in state systems, the benefits of including those provisions far outweigh the burdens. This is critical, as federal courts have recently ordered federal agencies considering delays for final rules to look at both the potential burden and the potential benefits of timely implementation before changing implementation deadlines. California v. U.S. Bureau of Land Management, No. 17-cv-3804, (N.D. Cal., Oct. 4, 2017), for example, held that the Bureau of Land Management’s (BLM) postponement of a final rule’s compliance date was arbitrary and capricious because BLM considered only the burdens of meeting the compliance deadline and failed to consider the rule’s benefits when postponing compliance.

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In this case, the benefits of timely implementation of the 2016 AFCARS Final Rule outweigh the potential burdens because the new data elements are long overdue, fill problematic gaps in child welfare data collection, and address legislative requirements that have arisen since the AFCARS update over two decades ago. Three new data categories highlighted below each demonstrate the benefits of timely implementation: Education, LGBTQ, and the Indian Child Welfare Act (ICWA).

- **Education**: Education-related data elements are essential to monitoring compliance with the Fostering Connections to Success and Increasing Adoptions Act (Fostering Connections) and the Every Student Succeeds Act (ESSA). Pursuant to that legislation, states should already have begun planning for how they may update their existing Statewide Automated Child Welfare Information Systems (SACWIS) to comply with new Comprehensive Child Welfare Information System requirements, including an emphasis on the importance of data elements and interoperability between child welfare agencies and schools. Delaying implementation of the 2016 Final Rule, and indicating that there may be further changes to the proposed rule creates uncertainty for states about whether they should wait to update these systems and whether they should delay collection of critical education data.

- **LGBTQ**: LGBTQ-identified youth are over-represented in the child welfare population, and their specific needs are best served when child welfare agencies have information about which children are in this category. Currently, however, there is no clear way to capture that information. New data elements in the Final Rule address this problem, and a delay in implementation will result in a continued lack of information about this vulnerable population.

- **ICWA**: Currently, jurisdictions may collect racial and ethnic data, yet race and ethnicity are not the best sources to show compliance with the Indian Child Welfare Act (ICWA). The Final Rule created, for the first time, a standardized requirement for Title IV-E jurisdictions to collect data on cases that fall under ICWA. Without the data collected pursuant to the Final Rule, it will be more difficult to monitor whether jurisdictions are compliant with ICWA.

The ABA continues to support the new data requirements as they are set out in the Final Rule and opposes any delay to the effective date. Updates to data collection requirements included in the Final Rule are long-awaited and are the result of robust and thoughtful discussion over many years. These requirements are tailored to address current areas of weakness in data collection and reporting and should not be delayed.

Sincerely,

Thomas M. Susman