August 29, 2017

Robert Sargis
Reports Clearing Officer
Administration for Children and Families
U.S. Department of Health & Human Services
330 C Street S.W.
Washington, D.C. 20201

Re: Response to Request for Comments on the Final Rule for the Adoption and Foster Care Analysis Reporting System (AFCARS)

Dear Mr. Sargis:

Pursuant to the notice published in the Federal Register on June 30, 2017 (82 FR 29866), the American Bar Association submits these comments on the final rule for the Adoption and Foster Care Analysis and Reporting System (AFCARS).

1) AFCARS final rule is important and the ABA supports the changes generally.

The release of the Final Rule in December 2016 was the culmination of many years, and no less than 3 public comment periods, including opportunities for agencies and the public to comment on the burdens and benefits of updating the AFCARS regulation. The resulting Final Rule and new data collection requirements were thoughtfully considered and seek to ensure child welfare agencies are gathering data on all the critical child and family related outcomes to ensure safety, permanency and well-being. The Final Rule brings child welfare data collection in line with several decades of statutory changes and requirements enacted since 1993. These changes were long overdue and will now provide accurate and consistent data across states on key outcome areas.

2) The proposed collection of information is necessary for the proper performance of the functions of the agency, and the utility and clarity of that information for the agency is necessary to improve practice and programs.

The Final Rule identified many key data collection requirements that support the proper performance of child welfare agencies and are necessary to ensure that children’s and families’ needs are addressed. In particular, the ABA would like to highlight three specific areas from within the Final Rule that are crucial to future child welfare agency data collection.
• **EDUCATION**

As early as 2008, again in 2010, and most recently in April 2015, the American Bar Association has submitted comments outlining the importance of including elements relating to education in AFCARS. The maintenance of educational data is not only essential to monitoring compliance with the Fostering Connections to Success and Increasing Adoptions Act (Fostering Connections) and the Every Student Succeeds Act (ESSA), but it is crucial to ensuring that the educational needs of children in foster care are met. Research related to educational performance of children in foster care indicates that data-sharing between child welfare agencies and education entities is a critical issue—more comprehensive collection can improve states’ practice and result in the more efficient and effective provision of services. The revised data structure and inclusion of new data elements as outlined by the Final Rule will allow child welfare agencies and education entities more effectively to follow an individual child’s entire journey through the foster care system and also measure cumulative outcomes for foster youth.

• **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 the Indian Child Welfare Act (ICWA).

Without the Final Rule, jurisdictions may collect racial and ethnic data, yet race/ethnicity data are not the best sources to show compliance with ICWA. ICWA status is related to tribal law governing membership. A child could have a significant percentage of native ethnicity, identify as such, and not be covered by the Act due to tribal law. A child could have zero percent native ancestry and be a member of a tribe via adoption.

Without the data that will be collected pursuant to the Final Rule, it will be significantly more difficult to monitor whether jurisdictions are compliant with ICWA. Crucially, if states do not inquire as to potential tribal status as required by the ICWA Regulations, it is possible they are failing to follow the Act; because we lack data, we cannot know. For more information, see “Indian Child Welfare Act: Existing Information on Implementation Issues Could Be Used to Target Guidance and Assistance to States” (GAO-05-290; http://www.ncjfcj.org/sites/default/files/NCJFCJ 2013 Dispro TAB Final.pdf; 25 CFR Part 23; 25 U.S.C.A. § 1914.)

• **LGBTQ**

The Final Rule also created, for the first time, a standardized method of collecting information about a child’s self-reported sexual orientation. There is evidence that LGBTQ-identified youth have specific needs that can best be served when the child welfare agency has information about which children fit into this category. This group of youth are over-represented in the child welfare population, but more data are necessary to understand essential information about these youth.
Acknowledging the support LGBTQ youth need, and working to collect information to assist in accessing this support, is an important step the Final Rule takes to improve the current data collection process.

3) Ways to minimize the burden of the collection of information on respondents.

In the comment section of the Final Rule, the Department outlined the efforts made to streamline the proposed new data requirements and reduce the burdens on agencies from the revised AFCARS regulation. The public already had an opportunity to raise concerns in the past several Notices of Proposed Rule Making, and comments should have already been considered during those public comment periods.

Seeking additional information, 8 months into a 3-year implementation process, and causing potential delays in state efforts to move forward in revising their data collection systems, creates burdens and unnecessary confusion for state agencies. Specifically, because many states are currently conducting their Round 3 Child and Family Services Reviews, many jurisdictions are contemplating updates to information systems and strategic plans. Delays in application of the AFCARS regulations create uncertainty that is costly. Additionally, the burdens of collecting ICWA data, in terms of staff time for jurisdictions, are greatly outweighed by the issues created by noncompliance. When states fail to follow the Act initially, parties may be subject to further hearings because of noncompliance with the Act.

Because ESSA requires state education agencies to collect and report education outcome data specifically for children in foster care, federal law already requires child welfare and education agencies to work together to share data across systems. Interoperability between systems is not only vital to efficient data collection and maintenance, but can serve to minimize any burden on child welfare agencies to comply with the data-collection requirements outlined within the Final Rule.

In conclusion, the American Bar Association continues to support the new data requirements as they are set out in the Final Rule. The requirements were included in the Rule after robust and thoughtful discussion and are tailored to address areas of weakness in current data collection and reporting. These long-awaited updates will be instrumental in the ongoing efforts to better serve foster children and their families, particularly as they relate to ICWA, education, and LGBTQ youth.

Sincerely,

Thomas M. Susman