

Response to the Proposed Rule on the
**Adoption and Foster Care Analysis
and Reporting System**

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Response to the Proposed Rule on the Adoption and Foster Care Analysis and Reporting System

The Administration for Children and Families (ACF) seeks to collect data through the Adoption and Foster Care Analysis Reporting System (AFCARS). This is a critical process to assess how state child welfare agencies implement the Indian Child Welfare Act of 1978 (ICWA) and identify relevant trends that affect Native families who interact with state child welfare systems. This proposed rule presents an opportunity for state Title IV-E agencies to collect more robust ICWA-related data to better understand the experiences of Native families and the extent to which they receive the Act's procedural protections. The proposed data collection would also enable ACF, state Title IV-E agencies, researchers, and other policymakers to better understand and address the continuing overrepresentation in foster care and other poor child welfare outcomes experienced by Native children and families. Further, these data can equip technical assistance (TA) providers with better insight on how to support state and local child welfare agencies to strengthen their ICWA implementation and promote well-being for Native families involved in those systems.

Federal policies once intended to eradicate Native people—such as the forced displacement of Tribal Nations and forced removal of Native children to attend boarding schools—are still felt today and endanger cultural heritage and continuity, traditional family structures, and community well-being (Birney et al. 2019; Gantt n.d.; Lawson 2013; Meza 2015). The proposed rule is necessary and timely, especially in the wake of the Supreme Court's *Haaland v. Brackeen* decision—which upheld ICWA procedural protections and affirmed ICWA's importance in addressing the historical and ongoing trauma of separating Native children from their families.

Mathematica's response to this request for comment provides recommendations to strengthen ICWA-related data collection by identifying three factors:

1. Data elements that can provide the most value for understanding the experiences of Native children and families
2. Strategies to improve data quality
3. Opportunities for tailored TA related to data collection and quality, as well as ICWA implementation and processes

For more than 50 years, Mathematica has worked with federal, state, local, and Tribal Title IV-E agencies and their partner organizations to provide data-driven training and TA. Our work has promoted the adoption and use of equitable data practices in federal, state, local and Tribal child welfare programs; supported capacity-building for Tribes to evaluate and build evidence of their own child welfare programs; and supported state–Tribal relations that enhance cultural humility, include Native voices in decision-making, and facilitate cross-jurisdictional cooperation and coordination. Mathematica staff prepared this response, including Tribal citizens, staff with extensive experience partnering with Tribal Nations and Indigenous communities on self-determination efforts, staff with long professional histories of working in state and local child welfare agencies, and staff with lived experience operating a licensed foster home.

V. Section-by-Section Discussion of Regulatory Provisions

Section 1355.44(b) Child Information

We recommend ACF require state Title IV-E agencies to report on all the data elements included in this section. These data elements could provide important insight into the extent to which states effectively implement ICWA and promote the well-being of Native children in foster care.

Mathematica has developed and enhanced data collection and analysis practices that support efforts to address disparities and systemic challenges faced by Native communities to work toward achieving equitable outcomes. Based on our experience, we support including these data elements in mandatory data reporting for the following reasons:

- By systematically collecting and analyzing information on reason-to-know determinations, Tribal membership, ICWA notifications, and court determinations of ICWA applicability, **ACF can better understand states' experiences implementing ICWA requirements, identify areas for improvement in federal and state practices, and inform policy and practice initiatives aimed at enhancing outcomes for Native children and families involved in the child welfare system.**
- Comprehensive reporting on these data elements can strengthen collaboration between state Title IV-E agencies and Tribal Nations, promote culturally responsive child welfare practices, and uphold the principles of Tribal sovereignty and self-determination.

Based on our experience providing data-driven TA to federal, state, and Tribal child welfare programs and our experience partnering with Tribal Nations, Indigenous communities, and Tribal agencies, we offer two recommendations about how to strengthen data collection for these proposed data elements. With these suggestions, the data can offer the most insight into the experiences of Native children and families:

Recommendation: Expand the proposed data elements in *Notification*. We recommend giving further consideration to *Notification*. Specifically, it would be helpful to expand this more broadly to not only collect information on which Tribal Nations received notice, but also providing notice to the Bureau of Indian Affairs (BIA). Because some cases might include children with Tribal identities with unconfirmed Tribal Nation citizenship, notification to the BIA is how some states can comply with the notice requirements when the Tribal Nation is unknown.

Recommendation: Consider the implications for non-federally recognized Tribal Nations. Some states have enacted their own ICWA laws that mirror the Act's original provisions and include considerations for non-federally recognized (including state-recognized) Tribal Nations in their state. ACF should explore the implications of this process for non-federally recognized Tribal Nations.

Section 1355.44(i) data elements related to ICWA

We recommend ACF require state Title IV-E agencies to report on all the data elements included in this section. These data elements—related to transfers to Tribal court, involuntary and voluntary terminations or modifications of parental rights, active efforts, and placement preferences under ICWA—could provide important insight into how states agencies implement Title IV-E and the experiences of Native children and families.

These data will make the greatest impact for child welfare systems and Native children and families when collected so the data are timely, reliable, and accurate. Based on our experience providing data-driven TA to child welfare agencies and evaluating child welfare data practices that promote equity, we offer recommendations about how to approach collecting data to promote data quality and prioritize data elements that can offer the most insight into the experiences of Native children and families:

- **Encourage state Title IV-E agencies to obtain certain data through data exchanges with courts to ensure high-quality data.**

- **Prioritize data elements that provide the most value in better understanding the experiences of Native children and families.**

Next, we provide more detail on these recommendations.

Recommendation: To ensure high-quality data, encourage state Title IV-E agencies to obtain certain data through data exchanges with courts. Court records and court administrative data typically capture several of these proposed data elements. For those data elements, when at all possible, we recommend obtaining these data elements through data exchanges between state or local Title IV-E agencies and the courts. This approach to data collection will ensure the data's quality and reduce data collection burden on child welfare agency staff. These data elements follow, and we have included some recommendations specific to certain data elements in this list:

- *Request to transfer to Tribal court.* In addition to the data elements proposed in this section, we believe it would also be useful to require state Title IV-E agencies to report the date a case is transferred to Tribal court, in the event the request to transfer to Tribal court is approved.
- *Involuntary termination or modification of parental rights under ICWA*
- *Voluntary termination or modification of parental rights under ICWA*

Removals under ICWA. If data exchanges are not possible, we still recommend ACF require state Title IV-E agencies to report the information listed earlier. In this case, agencies should build these data fields into their existing data system's legal modules, and these agencies could benefit from tailored TA related to developing a data system and collecting data. ACF could also encourage states to use federal Comprehensive Child Welfare Information System (CCWIS) resources to establish data exchanges with courts and enhance data fields in their data systems.

These proposed data elements offer more insight into the experiences of state Title IV-E agencies' implementing court-related ICWA processes, rather than insight into the experiences of Native children and families involved with state child welfare systems. From our expertise providing data-driven TA to child welfare agencies, these data elements would be useful to understand how agencies implemented ICWA, including better understanding to what extent state Title IV-E agencies demonstrate active efforts to prevent the separation of Native families and the extent to which these Native families receive the procedural protections under ICWA throughout the court process.

Recommendation: Prioritize data elements that provide the most value in better understanding the experiences of Native children and families. Should ACF opt not to include all these proposed data elements in the final rule, ACF should prioritize data elements that provide the most value in better understanding the experiences of Native children and families and how state IV-E agencies can best serve them. We identify seven high-priority data elements and have included some data collection recommendations specific to certain data elements this list:

1. *Available ICWA foster care and pre-adoptive placement preferences*
2. *Foster care and pre-adoptive placement preferences under ICWA*
3. *Good cause under ICWA and basis for good cause, foster care.* Court records most likely capture the first data element specified in this section. To promote data quality, we recommend obtaining this data element through legal data exchanges between state Title IV-E agencies and the courts.
4. *Active efforts*

5. *Available ICWA adoptive placements*
6. *Adoption placement preferences under ICWA*
7. *Good cause under ICWA and basis for good cause, adoption.* Court records most likely capture the first data element specified in this section. To promote data quality, we recommend obtaining this data element through legal data exchanges between state Title IV-E agencies and the courts.

These data elements would be useful in examining disproportionality for Native children and families in child welfare systems and identifying the mechanisms that most often contribute to the separation of Native families. In addition, these data elements could offer federal and state Title IV-E agencies meaningful insight into the array and availability of placements that meet ICWA preferences; the need for tailored recruitment efforts for certain ICWA-preferred placements types; how often Native youth have foster care, pre-adoptive, and adoptive placements outside of ICWA's preferences; and the primary reasons why some Native children have out-of-home placements that diverge from ICWA placement preferences. For example, these data could help determine whether most placements that diverge from ICWA's preferences result from, for example, ICWA-preferred placement array challenges, responding to the requests of Native families or children, or responding to children's individual needs for specialized treatment services.

VI. Regulatory Impact Analysis

Costs and benefits

The data elements included in this proposed rulemaking for AFCARS would support collecting robust ICWA-related data and inform decision-making and programmatic approaches for federal, state, and Tribal agencies alike. In addition to direct programmatic support, the proposed elements would offer several major and supportive benefits for Native families, state and Tribal child welfare agencies, and policymakers. To reiterate, the benefits stated in the Request for Public Comment offer several advantages:

- Enabling ACF to better understand the underlying reasons for the disproportionality of Native children's involvement in the welfare system
- Promoting more **comprehensive understanding of interactions between ICWA and Title IV-E and Title IV-B** in practice for Native children and families for policymakers and federal agencies
- Elevating **opportunities for targeted TA** to improve child welfare outcomes

In addition to these benefits, the proposed braiding of ICWA-related data requirements into AFCARS would create meaningful opportunities to center Native children and their experiences in child welfare processes, equip state and Tribal agencies with critical data, and promote equity in the child welfare system. Based on our work with Tribal and state child welfare agencies and efforts to improve the quality of federal data collection, we have identified several additional benefits:

- **Detailed information about ICWA processes.** The proposed data elements would provide more detailed information about how state agencies put ICWA protections into operation to support Native children and families.
- **Increased transparency about the application of ICWA requirements.** The proposed data elements would help ACF and other federal agencies better understand how to apply ICWA requirements to child welfare cases.

- **Increased understanding of state implementation of ICWA.** Ensuring state compliance with ICWA protocols is not an explicit ACF priority, but the proposed standard requirements outline a stronger adherence to the intent and desired outcomes of ICWA than the status quo. Making detailed requirements more explicit and robust through the proposed changes will create a foundation for long-term, standard data collection about cases involving Native children.
- **Promote inclusive research to support Native families and the agencies that serve them.** As the only case-level data set about children in out-of-home care of its kind, AFCARS is a critical data source for research that aims to understand and evaluate outcomes for children in out-of-home contexts. Due to the unique circumstances of ICWA and its interaction with Title IV-E, a dearth of nuanced data about Native children in out-of-home care is missing from existing knowledge bases. The proposed requirements and elements would make more specific, targeted data available about child welfare outcomes for Native children, creating a foundation for equitable research and recommendations that promote action.
- **Identify training and TA needs.** The proposed data elements would support ACF and other federal agencies to identify the most urgent needs of child welfare agencies and courts to implement ICWA effectively and equitably for the families they serve.
- **Provide opportunity for improved data exchanges.** Improving the exchange of data between Tribal Nations and state courts for ICWA cases is critical to increase the transparency of placement proceedings, support collaborative child welfare information system processes, and promote Tribal sovereignty. In addition, the proposed data elements would complement existing efforts by certain states and Tribal Nations to develop or improve CCWIS data exchanges.
- **Support systematic inquiries of ICWA eligibility.** The proposed requirements would likely prompt increased systemic inquiries of ICWA eligibility across child welfare cases. This would more accurately identify Native children in out-of-home care who are likely undercounted in the status quo. Supporting systemic inquiries of eligibility affirms the intent of ICWA beyond the status quo.
- **Equip states with greater Native populations on their caseloads with better data.** States with the highest ICWA caseloads and Native populations will have more data to better understand equity in child welfare processes, implementation of ICWA, and the experiences of Native children in their states. With additional support and TA, the improved depth of data about the experiences of Native children can equip states to make evidence-driven decisions and promote equity for Native communities in their child welfare systems.

Alongside the stated benefits, we recognize that implementing the proposed changes could pose challenges to some involved parties, particularly state Title IV-E agencies. In addition to the costs associated with increased data reporting stated in the request for comment, we have identified the following potential challenges:

- **Concern with availability and quality of increased data.** Implementing new or more robust data reporting elements can be challenging transitions for state agencies, particularly for those that have larger populations of Native children and ICWA cases. Ensuring consistent quality and availability of the requested data elements will require providing training, TA, and ongoing support to state agencies to help them improve over time.
- **Inconsistencies with information collection timing.** If ACF embeds the proposed changes into the existing AFCARS infrastructure, then the primary context of the requirements will be in the foster care system. However, many states inquire about ICWA eligibility at the time of report

or during initial investigations—much sooner than foster care placement. Continuing to support ICWA eligibility inquiries earlier in the out-of-home assessment process would relay information about cases involving Native children to Tribal Nations as soon as possible.

Despite these potential challenges, we affirm that not collecting these data poses great costs to Native children and families, Tribal Nations, ACF, state agencies, and policymakers.

Alternatives considered

We support the decision not to pursue alternatives regarding the expansion of ICWA-related data elements in AFCARS.

- ACF proposes to reject the status quo—leaving the requirements in place—because the current system does not provide sufficiently robust data to understand the experiences of Native children and families in the foster care system. The **streamlined requirements in the 2020 final rule**, although an improvement, still **fall short of providing the comprehensive data necessary for making informed decisions and developing policy**.
- ACF also proposes to expand AFCARS requirements, rather than implementing a separate process to monitor ICWA’s procedural protections outside AFCARS, because establishing a separate process would result in less comprehensive national data. **Requiring state Title IV-E agencies to collect and report detailed information** related to ICWA’s procedural protections via AFCARS **ensures comprehensive national data that are reliable and consistent over time and among multiple jurisdictions, examines state experiences implementing ICWA requirements, and improves outcomes for Native children in the child welfare system**.

VII. Tribal Consultation Statement

We recognize that ACF is not required to conduct consultation with Tribal Nations regarding these proposed changes to AFCARS processes because the proposals do not ask Tribal Nations to report additional data. However, based on our experience working with Tribal agencies and other agencies that serve Native communities, we recommend that ACF still consult Tribal Nations outside the request for comment period.

The information shared by ACF at the Secretary’s Tribal Advisory Council invited initial engagement and the request for comment provides an opportunity for Tribal Nations and Tribal agencies to respond to explicit requests. However, the implications of these proposed changes constitute additional, authentic consultation with Tribal Nations, including the elevation of desired benefits for Tribes and community assurances. Although ACF has not asked Tribal agencies to report additional data, the proposed changes invoke Tribal Nations’ sovereign rights to understand the health, well-being, and development of their children and families. In addition, the proposed data elements have implications for government-to-government data-sharing processes and data sovereignty of Tribal Nations. These proposed changes will affect Tribal Nations’ inherent rights to support their children, manage data about their communities, and protect the stability and security of their families. In light of these implications, we strongly recommend that ACF consider further Tribal consultation.

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