

2016 AFCARS REGULATIONS – DATA RELATED TO INDIAN CHILDREN AND FAMILIES

The Adoption and Foster Care Analysis Reporting System (AFCARS) collects case-level information from state and tribal title IV-E agencies on all children in foster care and those who have been adopted with title IV-E agency involvement. On December 14, 2016, HHS issued new regulations regarding the data to be collected through the AFCARS. For the first time, the requirements include the collection of data relating to Indian Child Welfare Act (ICWA) compliance. The ICWA has been characterized as the gold standard in child welfare as it emphasizes keeping children safely with their parents, whenever possible, and keeping them connected with their extended families, cultures and community if it is necessary to remove a child from his or her parents. There has been limited national data on children subject to ICWA by which to assess the experience of American Indian/Alaska Native children in child welfare systems, although the data that we have suggests that compliance is a challenge for many jurisdictions. Some of the information that would need to be collected under the new regulations includes:

- Was there reason to know the child was an Indian child and, if so, when was this discovered?
- Did you ask the mother, the father, Indian custodian, extended family and child whether the child is Indian?
- Is the child domiciled on a reservation or in an Alaska Native village?
- Did the court decide that ICWA applies to this child and, if so, when?
- What are the child's potential tribes and what tribe did the court decide was the Indian child's tribe?
- Did the parent and tribe get timely notice and which tribes were sent notice?
- Was there a request to transfer to tribal court and, if so, was it granted or denied? If denied, what was the reason?
- Is the father or mother a member of an Indian tribe?
- If ICWA applies, was there a finding based on clear and convincing evidence (in the case of a foster care removal) or beyond a reasonable doubt (in the case of TPR), was there testimony from Qualified Expert Witnesses, and was there a finding on active efforts?
- Did the foster care, pre-adoptive or adoptive placement comply with the placement preferences? If not, was good cause determined and, if so, what was the basis for the good cause finding?
- What active efforts were made (includes a list based upon the ICWA regulations and asks for each one whether that particular effort was made)?

The new requirements take effect on October 1, 2019, but we have reason to suspect that the new Administration may propose scaling back the requirements in the 2016 regulations. Thus, it is important to let the Trump Administration know that this data is important and that the ICWA data provisions should not be disturbed. If this regulation is ultimately implemented, there will finally be some meaningful data on ICWA compliance nationally which will allow the federal government, states and tribes to target their efforts in those jurisdictions that are

struggling with ICWA compliance, thereby promoting the very best outcomes possible for Indian children and families.