



FEDS FINALIZE NEW RULE ON FOSTER CARE LEGAL REPRESENTATION

By Allison Green, JD, CWLS

Last month, the Administration for Children and Families (ACF) published a finalized regulation on [Foster Care Legal Representation](#). The new rule, which goes into effect on July 9, 2024, after a period of congressional review, codifies and expands federal funding for legal services that prevent and address foster care involvement.

FOUNDATION OF FEDERAL SUPPORT

The finalized rule is the latest and most authoritative step in the federal government's continuing support for high-quality legal representation (HQLR). In 2017, the U.S. Children's Bureau released a key [Information Memorandum](#) summarizing related research, sharing best practices, and strongly encouraging states to implement HQLR for all parties.

Two years later, the Bureau reaffirmed its commitment by opening up new federal funds to incentivize this work. Specifically, the agency updated its responses to [Child Welfare Policy Manual \(CWPM\) Questions 8.1B #30, 31 and #32](#) to permit matching funds available through Title IV-E of the Social Security Act to be utilized for legal representation of parents and children in foster care legal proceedings. Whereas previously only attorney representation of child welfare agencies was eligible for this match, this update balanced funding opportunities for all parties. It also confirmed that the funding covers all costs of legal representation, including attorney work, the multidisciplinary teams (peer partners, social workers, investigators, and paralegals) that support them, and overhead.

Since that historic announcement, federal support for this policy has continually grown. A June 2020 [Presidential Executive Order](#) urged use of "[f]ederal funds to support and encourage high-quality legal representation for parents and children." The Children's Bureau later released a [Technical Bulletin](#) to facilitate implementation by addressing frequently asked questions from the field. In January 2021, two additional Information Memorandums were published: [The first](#) provided guidance on the value of preventative

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legal services; the second supplied new research findings and provided implementation suggestions.

Another Presidential Memorandum released later that same year opined that the ideal of justice “hinges on an individual’s ability to meaningfully access the legal system.” These actions have spanned six years and two Presidential Administrations, revealing the bipartisan and enduring nature of this reform.

GROWING BODY OF RESEARCH

The federal government’s policy shift rests on a strong body of research demonstrating the impact of high-quality legal representation. A 2008 study found that children represented by legal counsel benefited from more individualized case plans and experienced higher rates of permanency, while not decreasing rates of reunification. Similarly, a six-year randomized control trial (QIC-ChildRep) found that children represented by specially trained attorneys were 40% more likely to experience permanency within six months. Most recently, a 2021 Washington State study positively correlated attorney representation with greater school stability, placement stability and reunification rates.

Research on HQLR for parents is similarly persuasive. “Studies show that when children are removed from the home, having access to legal representation earlier in a case can improve the rate of reunification, nearly double the speed¹ to legal guardianship or adoption, and result in more permanent outcomes for children and families.”² Multidisciplinary models of legal representation are particularly effective.

In addition to case outcomes, attorney representation also enhances the child welfare court process. For both children and parents, attorney appointment improves parties’ understanding, engagement, and perception of fairness in court proceedings, otherwise known as procedural justice. Time and time again, research shows that attorney representation makes a positive difference, a finding that comports with constitutional principles and general sensibilities about justice and due process.

NOTICE OF PROPOSED RULEMAKING

Against this backdrop, ACF released a Notice of Proposed Rulemaking (NPRM) in September 2023, explaining its intent to codify the 2019 Title IV-E funding policy shift into regulation and to further expand states’ opportunities to draw down matching funds. The NPRM was accompanied by a lengthy preamble, equity analysis, and cost assessment.

Over a 60-day public comment period, the agency received 122 comments in response to the proposed rule. The overwhelming majority of these submissions articulated support for the change while recommending tweaks or clarifications to the final language. Opposition to the rulemaking was minimal, although several individuals did express concern based on their personally negative experiences of attorney representation, an important reminder that expanding access to legal counsel is just as important as ensuring the quality of counsel.

1 Mark E. Courtney & Jennifer L. Hook (2012), Evaluation of the Impact of Enhanced Parental Legal Representation on the Timing of Permanency Outcomes for Children in Foster Care, available at <https://partnersforourchildren.org>

2 Civil Legal Advocacy to Promote Child and Family Well-being, Address the Social Determinants of Health, and Enhance Community Resilience. ACYF-CB-IM-21-02. (2021) Available at <https://www.acf.hhs.gov/sites/default/files/documents/cb/im2102.pdf>



CODIFICATION OF EXISTING MATCH FUNDING

The new rule amends 45 CFR § 1356.60 to include independent legal representation for children and parents in foster care legal proceedings. This change imbeds the 2019 reform into more permanent legal authority, a heartening step for those who were concerned that the CWPM update could be too easily undone. According to the most recent available [public report](#), 26 states and three tribes are already leveraging this opportunity. Due to long lag times in the release of public data, this information is nearly two years old; thus, it is likely that far more jurisdictions are participating at this time. A [map](#) and [report](#) generated from qualitative survey data will also be updated in the months to come.

The Title IV-E policy entitles states to a 50% match for costs *in eligible cases*. Eligibility is not universal, but rather involves a relatively complex [fiscal analysis](#) typically conducted by finance staff within the child welfare or social services agency. The percent of eligible families – otherwise known as its “IV-E penetration rate” – varies widely between states. For example, research from [Child Trends](#) shows these numbers ranging from 18% (Nebraska) to 76% (Ohio) of the child welfare population. You can learn more about your state’s penetration rate [here](#) or by inquiring with local stakeholders such as agency and Court Improvement Program leaders.

Effective July 9, 2024, the Code of Federal Regulations will read as follows:

45 CFR § 1356.60 Fiscal requirements (title IV-E)

(c)(4) The following are allowable administrative costs of legal representation:

- (i) Legal representation in foster care proceedings provided by an attorney representing the title IV-E agency or any other public agency (including an Indian tribe) which has an agreement in effect under which the other agency has placement and care responsibility of a title IV-E eligible child pursuant to 472(a)(2)(B)(ii) of the Act;
- (ii) Independent legal representation provided by an attorney representing a child in title IV-E foster care, a child who is a candidate for title IV-E foster care, the child’s parent(s), the child’s relative caregiver(s), and the child’s Indian custodian(s) in foster care and other civil legal proceedings as necessary to carry out the requirements in the agency’s title IV-E foster care plan. Independent legal representation in civil proceedings includes facilitating, arranging, brokering, advocating, or otherwise linking clients with providers and services as identified in the child’s case plan pursuant to sections 422, 471(a)(16), and 475 of the Act; and
- (iii) Legal representation provided by an attorney representing an Indian child’s tribe (as defined by 25 U.S.C.1903(5)), or representation of an Indian child’s tribe provided by a non-attorney, when the child’s tribe participates or intervenes in any state court proceeding for the foster care placement or termination of parental rights of an Indian child who is in title IV-E foster care or an Indian child who is a candidate for title IV-E foster care.



EXPANSION TO TRIBES AND INDIAN CUSTODIANS

In addition to codifying the prior policy to permit reimbursement for child and parent legal representation within foster care court proceedings, the new regulation also expands the opportunity for federal matching funds in three ways. First, it broadens the scope of federal matching to encompass legal representation of tribes in these matters. ACF explains that attorneys for tribes play a critical role ensuring compliance with the Indian Child Welfare Act (ICWA) and providing the cultural and social context needed for courts to make sound reasonable efforts and permanency determinations. The finalized rule clarifies that this funding is available even if a tribe opts not to formally intervene in the court proceedings, but still “participates” in “key decision points” such as placement and service meetings.

The regulation permits tribes — and only tribes — to use the funding to secure representation by non-attorneys. This exception was responsive to public feedback regarding the fiscal and workforce challenges of retaining tribal attorneys who are knowledgeable in this specialized area of law. Acknowledging this, ACF linked this decision to the overarching goal to “honor tribal sovereignty and self-determination.” The exception does not apply to representation of any other party in the case, such as the child or parent.

Additionally, the promulgated rule adds legal representation of an “Indian custodian” as another category of client eligible for Title IV-E reimbursement. The term mirrors the language of ICWA, which defines “custodian” as distinct from “parent” or relative caregiver. “Indian custodian” describes an Indian person who has legal custody of a child under tribal law or custom or to whom temporary physical care, custody and control has been transferred by the parent of such child.³

EXPANSION TO RELATIVE CAREGIVERS

The second expansion of the funding opportunity is for the independent legal representation of relative caregivers. Kinship advocacy previously had very limited funding available, for example through Clearinghouse-approved Kinship Navigator Programs⁴ or through capped funding for non-recurring expenses associated with adoption⁵ or guardianship.⁶ This evolution is aligned with ACF’s overall support for kinship placements, such as other recent rulemaking to permit more flexible licensing standards for these caregivers.

Although many public commentors requested clarity and parameters around this addition, ACF declined to provide such, instead deferring to states to design implementation as they choose. This flexibility is helpful given the varied landscape of relative caregiver rights across jurisdictions. State law varies regarding when relative caregivers may obtain party status, intervene in dependency matters, or file certain actions. The Title IV-E regulation is a funding rule that does not alter these state statutes, but merely authorizes matching funds to be used for legal representation within the contours of the state’s

³ 25 USC 1903(e); 25 CFR 23.2.

⁴ See, e.g., Utilizing Title IV-E Funding to Support High Quality Legal Representation for Children and Youth who are in Foster Care, Candidates for Foster Care and their Parents and to Promote Child and Family Well-being. ACYF-CB-IM-21-06. (2021) Available at <https://www.acf.hhs.gov/sites/default/files/documents/cb/im2106.pdf>. Pages 4-5.

⁵ 45 CFR 1356.41(f)(i).

⁶ 42 USC 673(d)(1)(B)(iv).



framework. ACF's published rulemaking highlighted the expectations that attorneys and legal services organizations will assess and abide by pertinent conflict of interest protocols when assessing whether to take on representation of a kinship caregiver.

EXPANSION TO CIVIL LEGAL AID WORK

The third and potentially largest expansion of funding is for civil legal aid services outside of the dependency case "necessary to carry out the requirements in the agency's title IV-E foster care plan." This applies to civil legal representation of a child/youth, their parent, their relative caregiver, or their Indian custodian. Like the rest of the regulation, this expansion is supported by a substantial body of research. The NPRM cited numerous studies and promising practices from across the country demonstrating that value of preventative legal advocacy. For the purposes of this rule, civil legal aid proceedings include administrative actions "for public benefit eligibility determinations, denials and appeals." Criminal defense and immigration work are not covered.

Related civil legal aid needs may arise in the course of dependency proceedings, for example if housing advocacy is needed to facilitate reunification, or if public benefits appeals are needed to ensure a successful transition to adulthood for an older youth. Importantly, the civil legal aid funding is also available earlier if a child is a 'candidate' for foster care. According to the preamble of the new rule, a candidate "is a child who is potentially eligible for title IV-E foster care maintenance payments and is at serious risk of removal from their home as evidenced by the title IV-E agency either pursuing the child's removal from the home or making reasonable efforts to prevent such removal." This can be demonstrated through a case plan, eligibility form, or court document. A hotline call alone is not sufficient to be considered a candidate; there must be formal

DID YOU KNOW?

LIVED EXPERIENCE EXPERTS HAVE REPEATEDLY ENDORSED LEGAL REPRESENTATION AS A KEY STRATEGY. HERE ARE A FEW EXAMPLES:

Raising Our Voices: Recommendations for Policy Makers to Support Well-Being for Children and Youth in Foster Care (2023)

How Foster Youth Can Secure Their Future (2023)

Well-Being in Action: Expanding Equitable Access to Comprehensive Supports for Foster Youth (2022)

Legal Representation for Foster Youth Can Make a Difference (2021)

A Historic Opportunity to Reform the Child Welfare System: Youth & Alumni Priorities on Older Youth Successful Transition to Adulthood (2020)



child welfare agency involvement. Other federal sources of legal aid funding exist to serve families farther upstream, such as VOCA grants, LSC funding, and more.⁷

INDEPENDENT LEGAL REPRESENTATION

Each of the funding opportunities covered by this new federal rule applies to ‘independent legal representation’ — a term coined through the initial Child Welfare Policy Manual change. This phrasing does not supersede the rules of professional conduct, ethics opinions, and other authorities that govern attorney practice at the state level. Rather, it is a fiscal eligibility term of art, to be considered when crafting and executing agreements for Title IV-E reimbursement of legal services. The costs of paralegals, investigators, peer partners, and social workers are also covered when needed to support the attorney’s independent legal representation.

The finalized rule defines “independent legal representation” expansively, to encompass both in- and out-of-court advocacy strategies such as “facilitating, arranging, brokering, advocating, or otherwise linking clients with providers and services as identified in the child’s case plan.” The rule’s preamble provides other useful instruction, explaining that independence, at minimum, means “[n]ot subject to control or influence by other parties, interested persons, nor the title IV-E agency.” This language is a helpful guidepost for stakeholders negotiating these agreements to ensure there is adequate distance from child welfare agency influence. ACF reiterates that the CB-496 form, and its related instructions explain the federal reporting requirements. The information required is quite basic and does not require any confidential case information to be shared with the child welfare agency.

NEXT STEPS FOR IMPLEMENTATION

After the rule goes into effect on July 9, 2024, it will be up to state-level leaders to ensure its successful implementation. Child welfare agencies are not required to draw down these matching funds, it is simply an available option to them if they so choose. Thus, it is incumbent on legal advocates to approach these agreements with a spirit of collaboration, partnership, and innovation. Convening stakeholders and educating them on this opportunity is a common starting point. From there, jurisdictions may look to peer states for examples and best practices to get started. Building in evaluation methods may also help — to demonstrate your success and contribute to the field’s growing body of research. The National Association of Counsel for Children is available to provide technical assistance as you embark on this journey; please reach out to Policy@NACCchildlaw.org! ■

⁷ See, *supra*, fn 1 (“Civil Legal Advocacy to Promote Child and Family Well-being”); See also Appendix A of “Seen, Heard and Represented: A Policymaker’s Guide to Counsel for Kids.” (<https://counselforkids.org/wp-content/uploads/2024/02/C4K-SHR-Policymakers-Guide-202311.pdf>).