



November 27, 2023

Administration for Children and Families
US Department of Health and Human Services
Attention: Kathleen McHugh, Director – Policy Division, Children’s Bureau
330 C Street SW
Washington, DC 20201

Submitted via: <https://www.regulations.gov/>

Re: **Foster Care Legal Representation NPRM**
Document Number: 2023-20932
RIN: 0970-AC89

Dear Director McHugh:

Thank you for the opportunity to comment on the Notice of Proposed Rulemaking (NPRM) for Foster Care Legal Representation. We greatly appreciate the Children's Bureau’s overall support of high-quality legal representation for all parties and this opportunity, in particular, to codify federal funding under Title IV-E for legal services.

CWLA is a coalition of hundreds of private and public agencies that since 1920 has worked to serve children and families who are vulnerable. Our expertise, leadership and innovation on policies, programs, and practices help improve the lives of millions of children across the country. Our impact is felt worldwide.

CWLA supports the proposed rule and commends the Administration for Children and Families for many of the provisions that will promote family preservation and facilitate faster reunification for families that have been separated. We also have additional recommendations and several questions for clarification in the final rule.

“This NPRM proposes to codify and expand the policy in CWPM 8.1B #30, 31, and 32.”

CWLA supports ACF’s NPRM to codify and strengthen previous guidance allowing states to claim Title IV-E Administrative costs for legal representation for children and/or their families in foster care. We believe the new NPRM and the more specific examples of instances when states may make claims for legal costs will provide needed clarity to states and regional ACF offices. We encourage ACF to continue efforts to expand this option since it is currently limited to just that portion of a state’s foster care caseload that qualifies under the 1996 AFDC eligibility standard.



We agree that greater legal representation can prevent the unnecessary separation of families and enhance efforts to reunify other families. Assuring that families have access to legal representation not just in dealing with the court and other legal challenges but also allowing or extending legal assistance in obtaining important human services such as housing, protections related to domestic violence services and supports and other human services can help families facing challenges and barriers that contribute to family separation.

“We propose that a title IV-E agency may claim FFP for administrative costs of independent legal representation provided by an attorney representing a child who is eligible for title IV-E foster care, their parent(s), and their relative caregiver(s), to prepare for and participate in foster care and other civil legal proceedings necessary to carry out the requirements in the agency’s title IV-E foster care plan. We are also proposing that legal representation in civil legal proceedings may include facilitating, arranging, brokering, advocating, or otherwise linking clients with providers and services as identified in the child’s case plan pursuant to section 475(1) of the Act.”

CWLA supports this allowance to use Title IV-E funds to link clients with providers and services. **CWLA inquires whether this allowance must be limited to those services identified in a child’s case plan**, which would be assistance in accessing services that would normally be conducted by a caseworker. Legal representation would be most helpful in addressing activities and services that would facilitate the completion of the case plan tasks and other needs may come to light during the course of the legal proceedings. For example, a case plan may say that the parent(s) should maintain stable housing, but it won’t specifically direct the family to access legal counsel to represent them in housing court - would this be an allowable claim?

“Under this proposal, title IV-E agencies will also be allowed to claim administrative costs for independent legal representation provided to relative caregivers, even when those relative caregivers are not a foster child’s legal guardian.”

CWLA has long supported and promoted kinship care as an important permanency option for children and families, as is evidenced in our history of research, practice standards, and advocacy for policies that support relative caregivers. We appreciate that ACF has specifically included kinship and relative caregivers in this proposed rule. We do, however, recognize that there is potential for conflict between parents and relative caregivers, particularly when a parent is seeking to regain custody of their child or children. We see this type of conflict arise most often in cases of substance misuse, when a parent is pursuing recovery and wants to reclaim custody of their child against the judgment and wishes of the relative caregiver.

CWLA recommends that ACF include clarifying language that specifies the types of services that can be claimed for legal representation provided to a relative caregiver and guidance to avoid situations where the parent is trying to regain custody while the relative caregiver is wanting the child(ren) to remain with them. We recommend that this be focused



on support that benefits the child, such as legal assistance to access services like school and other education assistance, access to health care, housing services, etc.

There is also the potential for conflict with relative caregivers in Indian child welfare cases involving American Indian and Alaska Native (AI/AN) children. The Indian Child Welfare Act (ICWA) protects the “best interests of Indian children and promotes the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.” (25 U.S.C. 1902).

There are, of course, nuances to consider when determining the appropriate right to counsel for relative caregivers where ICWA cases are concerned. There are instances in which one parent of a child is a member of a tribe and the other is not, and when the child is removed from his or her parents, the relatives of the non-tribal parent may be willing and eager to provide care for the child. This sort of situation has the potential to be difficult to resolve, especially if the relative caregiver seeks legal guardianship or adoption and is afforded legal counsel.

CWLA recommends that the Title IV-E agency should not be able to claim Title IV-E funds for legal representation for relative caregivers when there is a potential conflict with ICWA standards.

“This NPRM proposes that the title IV -E agency may determine what ‘independent’ means for purposes of providing such legal representation. However, at a minimum, such legal representation should be provided by an attorney who: does not have a concurrent conflict of interest, such as when the representation of one client will be directly adverse to the lawyer’s responsibilities to another client, a former client or a third person.”

CWLA supports this clarification that an attorney cannot have a conflict of interest in representing two or more clients in the same case.

“Under the revision proposed in this NPRM, we specify that allowable administrative costs of an attorney providing independent legal representation in other civil legal proceedings may include facilitating, arranging, brokering, advocating, or otherwise linking clients with providers and services as identified in the child’s case plan.”

CWLA supports the specific examples that ACF has outlined. We believe the proposed rule will provide clarity to states and regional offices of specific uses of this expanded funding. We would encourage ACF to add additional examples and areas of coverage:

Educational stability to assist children to remain in the same school, in addition to the other education assistance examples given. Some children in foster care will be placed outside of their



school district and may need assistance to remain in their school when it is in their best interest, which is consistent with Federal law.

SSI eligibility determination for children and potential caretakers. A 2012 Congressional Research Service (CRS) report indicated that a disproportionate share of children in foster care would be eligible for SSI disability (Title XVI).¹ Referencing a study and survey CRS indicated, “The study...compared eligibility for SSI across age, race and ethnicity, locality, and gender. Of the sample of children in out of home care, the estimated rate of SSI eligibility was significantly higher among those ages 6 through 10 (compared to children younger than age 6 and older than age 10) and those in rural settings (compared to urban settings)...it is possible that at least some foster children who would be eligible for SSI are not receiving benefits...all children in foster care may have been screened for SSI eligibility...”

In light of this report, there may be a significant share of the child population, particularly those between the ages of six through ten, that could benefit from such legal services. Qualifying for childhood disability under SSI can be challenging—especially for families. For the general population there are instances where an attorney is helpful in navigating the eligibility and appeal process through the Social Security Administration. SSI could benefit these children and their families especially once that child is reunified or separation has been prevented.

Eligibility for Special Immigrant Juvenile Status (SIJS). Some youth in foster care may need legal assistance in obtaining legal immigrant status before exiting foster care. This has been a concern for CWLA for many years. A young person in care with an immigrant status will need this protection before exiting the child welfare system. This does not always occur through the child welfare agency and a young person in care holding an immigrant status is unlikely to know how to apply for this important status. There is a significant amount of documentation that is necessary to complete this process, which is time-consuming and expensive. **CWLA asks ACF to clarify whether administrative costs for processing documentation are an allowable expense for this type of legal service.**

Clarity to states in expanding Title IV-E eligibility for youth in care age 18 to age 21. As was explained in initial guidance to states in 2010 in the implementation of the 2008 Fostering Connections to Success ACT (PL 110-351)² and included in a more recent GAO report,³ a young person continuing in foster care beyond age 18 in states that do extend care beyond age 18, can have their AFDC eligibility redetermined administratively. This could potentially expand federal Title IV-E funding to most or all of youth in care between from age 18 to age 21. In turn this would encourage states to expand legal representation to all young people in foster care. We encourage ACF to include this guidance through this NPRM on how IV-E coverage can be

¹ Child Welfare: Social Security and Supplemental Security Income (SSI) Benefits for Children in Foster Care, Updated September 28, 2012

² ACYF-CB-PI-10-11, Guidance on Fostering Connections to Success and Increasing Adoptions Act of 2008, ACF U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, July 9, 2010

³ States with Approval to Extend Care Provide Independent Living Options for Youth up to Age 21: GAO-19-411, Report to the Subcommittee on Worker and Family Support, Committee on Ways and Means, House of Representatives; May, 2019



expanded in this way. In turn this can lead to greater access to youth in care during a vital transition time from foster care to adulthood.

Young people in care can face a series of legal needs, some of which are included in the examples already listed. Youth exiting foster care have extended access to Medicaid to the age of 26. They need to be able to document their previous time in foster care to establish this ongoing Medicaid coverage. There is a need to ensure that a young person's credit reports are accurate and any identity theft issues are addressed, and that youth have potential access to housing assistance, education vouchers, higher education and vocational education assistance. **CWLA asks ACF to include in the final NPRM this example of how states can extend Title IV-E coverage to older youth in extended foster care and further guide states to provide these legal services to all who are determined eligible;** this clarification and example could potentially strengthen an array of services to all youth exiting foster care to independence.

“ACF proposes that a title IV-E agency with placement and care responsibility for an Indian child may claim FFP for administrative costs of legal representation provided by an attorney representing an Indian child’s tribe (as defined by 25 U.S.C. 1903(5)), when the child’s tribe 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 when such legal representation is found necessary by the Secretary to carry out the requirements in the title IV-E agency’s title IVE state plan.”

CWLA commends ACF for the inclusion of this provision in the proposed rule. We have long been supporters of ICWA and celebrated the *Brackeen v. Haaland* decision that upheld this important federal law that protects AI/AN families and children. We support the clarification that Title IV-E funds can be claimed for legal representation for a child's tribe that intervenes in any state court proceeding.

Additional Considerations

Prevention Begins Outside of Child Welfare

CWLA supports and affirms the need for legal representation for children, parents, caregivers, and tribes when a child has come to the attention of the child welfare agency; as noted in the background of the proposed rule, “Access to independent legal representation can help stabilize families and reduce the need for more formal child welfare system involvement, including foster care.” Preventing children from entering foster care is a worthwhile goal because, as the proposed rule also states, “preventing a child from being removed from their home is critical to a child's well-being because removal, even for a short period of time, exposes the child to a range of trauma and stress.”

However, if our goal is to prevent children and families from ever becoming involved in the child welfare system in the first place, it is imperative that we move services further upstream, including legal aid services. The provision of legal representation hinges on the child's



candidacy and/or eligibility for Title IV-E foster care services, but CWLA would like to see legal representation available before this eligibility is determined, as to keep children that are not truly experiencing maltreatment or neglect out of the child welfare system.

Additionally, we are cognizant that each time a service is made available exclusively for families in the child welfare system, there is an unintended consequence of children and families being pushed into child welfare involvement to access that service. This phenomenon is seen most prominently in the provision of mental and behavioral health services and intellectual and developmental disability services but is also true for access to other types of services and resources. We are concerned that continued expansion of legal representation only for families involved with child welfare will end up pushing families to the door of child welfare to receive this service.

Finally, we recognize that neither the child welfare system nor the court system can solve all the problems that drive children and families to child welfare. Legal representation can help families navigate and access other resources, but it cannot solve the lack of affordable housing, lack of affordable healthcare, an overly complex and punitive immigration system, and the other systemic and widespread barriers facing children and families.

CWLA strongly encourages HHS to be working with its counterparts across housing, education, healthcare, behavioral health, early care, prevention of child abuse and neglect, and other family serving systems to better address the systemic issues that push children and families to child welfare's door and to create additional opportunities for families to access legal representation prior to child welfare involvement.

Equity and Access for all Families

Access to legal representation under current practice and in the proposed rule hinges on a child being deemed a candidate for or eligible for Title IV-E services. **We encourage both HHS and the Congress to examine an effective way to address the on-going link to the 1996 AFDC eligibility standard.** These proposed NPRM changes will help in some instances, but eligibility for Title IV-E services will continue to be based on the AFDC income and standards applied to that child's home of removal. According to the Title IV-E Expenditure and Caseload data, approximately 38 percent of children in foster care were eligible for federal funding under Title IV-E in 2022.⁴ Without addressing this link, federal funding will continue to disappear despite these proposed changes, creating a bifurcated system under which some families will be able to access legal representation but many families, including those with low incomes or economic needs, will not. To truly address equity, these services must be available for every child and family with child welfare involvement that needs them.

⁴ Title IV-E Programs Expenditure and Caseload Data 2022. Available at <https://www.acf.hhs.gov/cb/report/programs-expenditure-caseload-data-2022>



Conclusion

We thank HHS for the opportunity to offer these comments and questions in response to the Notice of Proposed Rulemaking regarding legal representation for children, parents, caregivers, and tribes. As the nation's oldest and largest membership coalition of child welfare service providers, and as a national advocacy and standard-setting organization, CWLA supports the effort to strengthen services in this area to prevent foster care placement and to facilitate faster and more successful reunification. We look forward to working with the relevant federal, state, and local partners in implementing meaningful reform to better serve children and families.