



Administration for Children and Families

45 CFR Part 1356

RIN 0970-AC89

Foster Care Legal Representation

AGENCY: Children’s Bureau (CB), Administration on Children, Youth and Families (ACYF), Administration for Children and Families (ACF), Department of Health and Human Services (HHS).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: ACF proposes to allow a title IV-E agency to claim Federal financial participation (FFP) for the administrative cost of an attorney providing: legal representation in foster care proceedings of a title IV-E agency or any other public agency or tribe that has an agreement in effect under which the other agency has placement and care responsibility of a title IV-E eligible child; independent legal representation of a child who is either a candidate for title IV-E foster care, or in title IV-E foster care (hereafter, referred to as a child “who is eligible for title IV-E foster care”), the child’s parent(s), and the child’s relative caregiver(s) in foster care and other civil legal proceedings when such legal representation is found necessary by the Secretary to carry out the requirements in the title IV-E agency’s title IV-E foster care plan; and legal representation of an Indian child’s tribe, 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 IV-E foster care plan.

DATES: In order to be considered, ACF must receive written comments on this NPRM on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: ACF encourages the public to submit comments electronically to ensure they are received in a timely manner. Please be sure to include identifying information on any correspondence. To download an electronic version of the proposed rule, please go to <https://www.regulations.gov/>. You may submit comments, identified by docket number, by any of the following methods:

- Federal Rulemaking Portal: <https://www.regulations.gov/>. Follow the instructions for submitting comments.
- E-Mail: CBComments@acf.hhs.gov. Include [docket number and/or RIN number] in subject line of the message.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. All comments received will be posted without change to www.regulations.gov, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Kathleen McHugh, Director, Policy Division, Children’s Bureau, (202) 205-8618. Telecommunications Relay users may dial 711 first. Email inquiries to cbcomments@acf.hhs.gov.

SUPPLEMENTARY INFORMATION

Table of Contents

- I. Statutory Authority to Issue NPRM
- II. Background
- III. Section-by-Section Discussion of Proposed Regulatory Changes
- IV. Regulatory Process Matters
- V. Tribal Consultation Statement

I. Statutory Authority

This NPRM is published under the authority granted to the Secretary of Health and Human Services (the Secretary) by section 1102 of the Social Security Act (the Act), 42 U.S.C. 1302. Section 1102 of the Act authorizes the Secretary to publish regulations, not inconsistent

with the Act, as may be necessary for the efficient administration of the functions for which the Secretary is responsible under the Act. Section 474(a)(3) of the Act authorizes Federal reimbursement for title IV-E foster care program administrative costs, which are defined as costs “found necessary by the Secretary for the provision of child placement services and for the proper and efficient administration of the State [title IV-E] plan.” This authorization applies to an Indian tribe, tribal organization, or tribal consortium that has an approved title IV-E plan, in the same manner as it applies to states.

II. Background

Many families that come to the attention of a child welfare agency are in the midst of or recovering from familial, health, housing, or economic challenges or crises. These obstacles can impede a family’s ability to provide a safe and stable environment for their children. Access to independent legal representation can help stabilize families and reduce the need for more formal child welfare system involvement, including foster care. For families with children that have been placed in foster care, independent legal representation can expedite reunification and improve permanency or help provide access to needed supports for youth transitioning out of the child welfare system. For Indian children that have been placed in foster care, and their families, early representation of an Indian child’s tribe in foster care proceedings promotes stability for the child by minimizing unnecessary separation of children and their parents, and by maximizing placements of the child with extended family and other preferred placements.

The Indian Child Welfare Act (ICWA) and regulations allow an Indian child’s tribe to intervene in any state court proceeding for the foster care placement of, or termination of parental rights to, an Indian child (25. U.S.C. 1911(c)). “Indian child,” means any unmarried person who is under age eighteen and is either a member of an Indian tribe or is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe (25 U.S.C. 1903(4)). An “Indian child’s tribe” means the Indian tribe in which an Indian child is a member or eligible for membership or, in the case of an Indian child who is a member of or

eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts (25 U.S.C. 1903(5)).

The regulation at 45 CFR 1356.60(c) details cost-sharing requirements for the Federal and non-Federal share of title IV-E foster care program expenditures for the cost of administrative activities. A title IV-E agency may claim FFP at the rate of 50 percent for allowable title IV-E foster care administrative costs. A title IV-E agency may also claim FFP for allowable administrative costs incurred by any other public agency or 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. Another “public agency” is child placing agency authorized by state/tribal law to operate a program of services to children and families, with supervision by the title IV-E agency (CWPM 8.1G #1). Examples of other public agencies may be found in section G of the Child Welfare Policy Manual, and could include the state/tribal juvenile justice agency, a court, or state/tribal mental health agency. The regulation at § 1356.60(c)(2) provides examples of allowable title IV-E foster care administrative expenditures that are necessary for the administration of the title IV-E agency’s plan, such as preparation for and participation in judicial determinations, referral to services, development of the case plan, case reviews, and case management and supervision.

ACF policy historically allowed title IV-E agencies to claim FFP for the foster care administrative costs of “preparation for and participation in judicial determinations” as described in § 1356.60(c)(2)(ii), only for the title IV-E agency's (and if applicable, the tribe or other public agency's) legal representation. However, in 2019, ACF revised the policy to allow title IV-E agencies to also claim FFP for the administrative costs of independent legal representation provided by attorneys representing children who are candidates for title IV-E foster care, children who are in title IV-E foster care (hereafter, “child who is eligible for title IV-E foster care” refers to both a child who is a candidate and child who is in foster care), and the children’s parent(s) in all stages of foster care legal proceedings (Child Welfare Policy Manual [CWPM]

8.1B #30, 31, and 32). This policy was revised to ensure that reasonable efforts are made to prevent removal and finalize the permanency plan; and parents and youth are engaged in and complying with case plans. A “candidate” for title IV-E foster care is a child who is potentially eligible for title IV-E foster care maintenance payments and is at serious risk of removal from 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 (section 472(i) of the Act). Further, the agency must document the child’s candidacy for title IV-E foster care maintenance payments through one of the three acceptable methods identified in the Child Welfare Policy Manual, such as a case plan. (CWPM 8.1D #2) A child is not considered a candidate for title IV-E foster care when the title IV-E agency has no formal involvement with the child or simply because the child has been described as "at risk" due to circumstances such as social or interpersonal problems or a dysfunctional home environment (CWPM 8.1D). This policy change was well received and generated positive interest from title IV-E agencies and child welfare and legal stakeholders.

This NPRM proposes to codify and expand the policy in CWPM 8.1B #30, 31, and 32. Recent research, as described in the Section-by-Section, demonstrates that providing independent legal representation early in foster care proceedings and other civil legal proceedings can help prevent children from entering foster care, and for youth already in foster care, can improve the rate of reunification and result in more permanent outcomes for the child and the family. Therefore, this NPRM proposes that providing independent legal representation to 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 civil legal proceedings is an allowable administrative cost when necessary to carry out the requirements in the agency’s title IV-E foster care plan in accordance with section 471(a) of the Act.

III. Section-by-Section Discussion of Proposed Regulatory Changes

Section 1356.60

ACF proposes to revise § 1356.60(c) to add a new paragraph (4) providing examples of allowable administrative costs for legal representation and add a new paragraph (c)(2)(xi) to include a reference to paragraph (4).

In a new paragraph (4)(i), we propose to clarify that a title IV-E agency may claim administrative costs for legal representation when incurred by the title IV-E agency, or any other public agency or tribe that has an agreement with the title IV-E agency for placement and care responsibility of a title IV-E eligible child under section 472(a)(2)(B)(ii) of the Act in foster care proceedings. This proposal is not new as regulations currently allow this cost under the example of preparing for and participating in judicial determinations. We are specifying this type of legal representation for agency attorneys as a separate example of allowable costs and to make clear that it encompasses public agencies and tribes that have an agreement under section 472(a)(2)(B)(ii) of the Act with the title IV-E agency.

In a new paragraph (4)(ii), 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. Consistent with Children's Bureau policy, a title IV-E agency may claim title IV-E administrative costs of paralegals, investigators, peer partners or social workers that support an attorney providing such independent legal representation to the extent that they are necessary to support the attorney. Under title IV-E of the Act, the term "parent(s)" means a biological or adoptive parent(s) or legal guardian(s), as determined by applicable state or tribal law (section 475(2) of the Act). The term "legal guardianship" means a judicially created relationship between child and caretaker (legal

guardian) which is intended to be permanent and self-sustaining as evidenced by the transfer to the caretaker of the following parental rights with respect to the child: protection, education, care and control of the person, custody of the person, and decision making (section 475(7) of the Act). Therefore, this NPRM proposes that title IV-E agencies may claim allowable administrative costs of independent legal representation for a legal guardian(s) of a child eligible for title IV-E foster care, if state or tribal law considers a legal guardian(s) a parent(s), and consistent with Federal law, such legal guardian(s) is intended to be the permanent caretaker of the child.

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. For purposes of claiming the cost of independent legal representation provided to the relative caregiver of a child who is eligible for title IV-E foster care, the title IV-E agency may define the term "relative." For example, a title IV-E agency may define relative to include kin and "fictive-kin."

Finally, in paragraph (c)(2) we propose to add a new paragraph (xi) referencing the proposed new paragraph (4) to clarify that such legal representation is an allowable administrative cost.

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; does not accept compensation for representing a client from someone other than the client unless the client gives informed consent; and there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship.

Many families involved in the child welfare system encounter barriers to accessing services that can help them overcome family, health, or economic challenges or crises. Such challenges or crises may include loss of employment, inadequate income, unstable housing or homelessness, food insecurity, mental health and/or substance misuse disorders, and family violence. These crises can impede a family's ability to provide a safe and stable environment for their children (ACYF-CB-IM-21-02, p.2; ACYF-CB-IM-21-06 p. 12), which can lead to placement in foster care or delayed permanency when the family is not prepared for a child to return home. For example, of all children that entered foster care in Federal fiscal year (FY) 2021, 63 percent of removals were related to neglect (including failure to provide adequate food, clothing, shelter, and supervision or care by a person who is responsible for the child's welfare). Nine percent were experiencing housing issues at the time of removal (Adoption and Foster Care Analysis and Reporting System (AFCARS) FY 2021 Report). In 2020, a peer-reviewed journal article conducted a systematic search of peer-reviewed studies conducted in the U.S. regarding the association of housing stress with child maltreatment. The literature indicates that "housing stress is associated with an increased likelihood of caregiver or child self-reported maltreatment, child protective services (CPS) reports, investigated and substantiated CPS reports, out-of-home placements, and maltreatment death (Chandler CE, Austin AE, Shanahan ME. Association of Housing Stress With Child Maltreatment: A Systematic Review. *Trauma Violence Abuse*. 2022 Apr;23(2):639-659. doi: 10.1177/1524838020939136. Epub 2020 Jul 17. PMID: 32677550; PMCID: PMC7855012).

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 (Sankaran, Vivek. "Using Preventive Legal Advocacy to Keep Children from Entering Foster Care." *Wm. Mitchell L. Rev.* 40, (3): 1036-1047, 2014). A child who is at risk of entering foster care has better outcomes when they remain at home compared to when they are placed into

foster care (Joseph J. Doyle, Jr. “Causal Effects of Foster Care: An Instrumental Variables Approach.” *Children and Youth Services Review* 35(7): 1143-1151, 2013.).

Research demonstrates that providing independent legal representation in foster care and other civil legal proceedings can minimize some of these barriers that contribute to bringing families with children at risk of entering foster care in contact with the child welfare system and may help prevent children from entering foster care (Sankaran, Vivek. “Using Preventive Legal Advocacy to Keep Children from Entering Foster Care.” *Wm. Mitchell L. Rev.* 40, (3): 1036-1047, 2014). One recent study showed that when parents are represented by an interdisciplinary law office with legal specialists to assist with immigration, benefits, criminal, housing, or other concerns, children placed in foster care were safely returned to their families about 43 percent more often in the first year, children’s time in foster care was reduced by nearly four months, and families were no more likely to experience a subsequent substantiated report of maltreatment (Gerber, Lucas A., Pang, Yuk C., Ross, Timothy, Guggenheim, Martin, Pecora, Peter J., & Miller, Joel. “Effects of an interdisciplinary approach to parental representation in child welfare,” *Children and Youth Services Review*, Volume 102, 2019, Pages 42-55, ISSN 0190-7409, <https://doi.org/10.1016/j.childyouth.2019.04.022>).

Outcome data from legal service programs and pilot projects demonstrate that providing independent legal representation to address a family’s civil legal issues results in a high success rate for preventing children from entering foster care and for children who are in foster care, expediting permanency (American Bar Association Center on Children and the Law & National Council of Juvenile and Family Court Judges. *Supporting Early Legal Advocacy before Court Involvement in Child Welfare Cases* (March, 2021). For example:

- The Detroit Center for Family Advocacy conducted a pilot program to provide independent legal representation to address civil legal issues for families in which a child has been found abused or neglected. Typically, lawyers filed for a restraining order,

drafted a power of attorney, filed for a guardianship, applied for public benefits, or helped with special-education entitlements. Of the 55 families who were caring for 110 children served, none of the children entered foster care. (Detroit Center for Family Advocacy Pilot Evaluation report July 2009-June 2012; Sankaran, Vivek. Case Closed: Addressing Unmet Legal Needs and Stabilizing Families. M. L. Raimon, co-author. Center for the Study of Social Policy [2014] [Detroit model project])

- Iowa Legal Aid is piloting an early representation program for parents before petitions are filed. The program assists with private guardianship, custody, protective orders, landlord/tenant disputes, and appeals of denials of public benefits. Outcome data from 2018 show the program, in four counties, prevented over 100 children from becoming court involved (Family Justice Initiative. Implementing FJI System Attributes, Attribute 4: Timing of Appointment, 2020.; Iowa Legal Aid. Parent Representation Project, undated.).
- Legal Services of New Jersey has operated a pre-petition representation program since 2018. The cases are referred by the child welfare agency and typically involve representation around public benefits and access to affordable housing, child support and custody issues, and school-related issues. Outcome data indicate that by 2020, the program had prevented 200 removals (Implementing FJI System Attributes, Attribute 4: Timing of Appointment, 2020.).
- The Washington Family Intervention Response to Stop Trauma Clinic provides pre-petition representation to parents of substance-exposed infants. The program often works with the parent to identify and obtain temporary custody with relatives or others. Attorneys also advocate around services for parents with substance use disorders, including for programs that allow continued placement of the child with the parent. While this is a small and relatively new program, initial outcome data suggests the majority of the parents working with the program can avoid a dependency filing and,

thus, prevent the removal of their children from the home (Family Justice Initiative, 2020; Wall, Tonya and Adam Ballout. “Using Legal Services to Keep Children in Families: The F.I.R.S.T. Clinic.” Children’s Rights Litigation, October 3, 2019.).

- The Vermont Parent Representation Center provides legal representation in civil matters in cases where a child faces a significant risk of being removed from his or her home. In 78 percent of cases, children did not enter foster care. In cases in which children entered foster care, 50 percent went home to their families expeditiously (*VPRC’s Performance Measures*, Vermont Parent Representation Center, Inc.) (*Why VPRC Is Important to Vermont Families*, Vermont Parent Representation Center, Inc.).
- Children’s Law Center of California (CLC) provides pre-court legal advocacy to expecting and parenting youth who have a dependency case. Case managers and attorneys address issues such as drug use, child trafficking and exploitation, mental health and domestic violence. The project has successfully prevented filings in cases involving domestic violence by counseling clients and helping them obtain restraining orders once a referral was triggered.
- Legal Aid Services of Oklahoma operates an early legal advocacy project. In cases where the state will not reunify a child in foster care because of domestic abuse, attorneys provide legal representation in divorce, guardianship and landlord tenant issues. The benefit of this early advocacy project is that it avoids removal of children.
- In New York, the Bronx Defenders provide legal representation for parents in abuse and neglect cases in Bronx Family Court, advocates for families during the child protection investigation before a legal case is filed and advises pregnant women who are at risk of child protection involvement. Attorneys advise parents of their rights, accompany them to meetings and conferences with the Administration for Children’s Services, refer them to community-based services, and work with parents to identify family supports.

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. For example, a family may need to secure safe and stable housing to prevent the unnecessary removal of a child from the home, or a youth aging out of foster care may need access to stable housing to finalize a case plan in support of their permanency goal as required by, respectively, sections 471(a)(15) and 475(5)(H) of the Act. Allowable civil legal representation may include preparing for or participating in a legal proceeding to advocate with a housing authority to help a family or a youth aging out of foster care secure a housing voucher, appealing a denial of a housing voucher, or suing a landlord whose housing has unsafe conditions in order to execute the child's case plan.

Additional examples of legal representation in civil legal proceedings that may be necessary to carry out the title IV-E foster care plan include:

- An attorney providing independent legal representation to an eligible child/parent to prepare for and participate in a legal proceeding to establish paternity when it is necessary to establish title IV-E eligibility or meet the requirement for the agency to file for termination of parental rights when a child has been in foster care for 15 of the most recent 22 months (section 475(5)(E) of the Act).
- An attorney providing independent legal representation to an eligible child/parent/relative caregiver to prepare for and participate in a legal proceeding to help a victim of family violence obtain an order of protection against the abuser to maintain or secure custody of their child(ren), secure stable housing, secure public benefits, or establish custody or guardianship, when it is necessary to meet the plan requirement to make reasonable efforts to prevent the unnecessary removal of a child from the home or to finalize a case plan in support of a child's permanency goal as required by section 471(a)(15) of the Act.

- An attorney providing independent legal representation to an eligible child/parent/relative caregiver to prepare for and participate in a legal proceeding to enroll a child in school or access education records when it is necessary to meet plan requirements to ensure the educational stability of the child while in foster care, taking into account the appropriateness of the current educational setting and the proximity to the school in which the child is enrolled at the time of placement in foster care; provide a copy of educational records to a child at no cost at the time the child leaves foster care; and ensure a child is enrolled in school per sections 471(a)(30) and 475(1)(G) and (5)(D) of the Act.
- An attorney providing independent legal representation to an eligible child to prepare for and participate in a proceeding to establish a health care power of attorney, health care proxy, or other similar document recognized under State law when it is necessary to meet the requirement to develop a transition plan in the 90-day period immediately prior to the date on which the child will age out of foster care, per section 475(5)(H) of the Act.
- An attorney providing independent legal representation to an eligible child/parent/relative caregiver to prepare for and participate in a proceeding to resolve inaccuracies in a youth's credit report when it is necessary to meet the plan requirement to provide a youth a copy of any consumer report each year until the child is discharged from care, and provide assistance (including, when feasible, from any court-appointed advocate for the child) in interpreting and resolving any inaccuracies in the report, per section 475(5)(I) of the Act.
- An attorney providing independent legal representation to an eligible child/parent/relative caregiver to prepare for and participate in a proceeding to help a child obtain, change, or correct official documentation when it is necessary to meet the plan requirements to provide youth discharged from foster care an

official or certified copy of the United States birth certificate of the child, a social security card issued by the Commissioner of Social Security, health insurance information, a copy of the child's medical records, and a driver's license or identification card issued by a State in accordance with the requirements of section 202 of the REAL ID Act of 2005, and any official documentation necessary to prove that the child was previously in foster care per sections 475(5)(I) and 471(a)(27) of the Act.

- An attorney providing independent legal representation to an eligible child/parent/relative caregiver to prepare for and participate in a proceeding to help a youth aging out of foster care access public benefits, housing, health insurance, and education when it is necessary to meet the plan requirement to develop a transition plan 90-days immediately prior to the date on which the child will age out of foster care, per section 475(5)(H) of the Act.

In a new paragraph (4)(iii), 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 IV-E state plan. The ICWA was passed by Congress in 1978 to address the long history of failing "to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." (25 U.S.C. 1901(5)). 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).

As one tribal leader told Congress, tribes cannot long survive as “self-governing” communities if they cannot pass their “heritage” on to the next generation. *Holyfield* at 34 (citation omitted). Congress thus recognized that, by severing that connection to future generations, the breakup of Indian families threatens “the continued existence and integrity of Indian tribes.” 25 U.S.C. 1901(3). The Federal Government has an interest in ensuring that Indian tribes, vested with a statutory right to intervene in state foster care placement proceedings in accordance with 25 U.S.C. 1911(c), have legal representation to preserve and protect the continued existence and integrity of Indian tribes. As the Supreme Court noted in a case interpreting ICWA, “Congress [] found that the breakup of Indian families harmed not only Indian children and their parents, but also their tribes.” *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 at 33-34 (1989).

This proposal supports the goal of tribal self-governance by supporting Indian families, both by minimizing unnecessary separations of Indian children from their parents and by maximizing their placement with extended family, other tribal members, or other tribal families when they cannot remain with their parents. It is well documented that for Indian children who have been placed in foster care, and their families, early representation of an Indian child’s tribe in foster care placement proceedings promotes stability for the child by minimizing unnecessary separation of children and their parents, and by maximizing placements of the child with extended family and other preferred placements (Frequently Asked Questions Bureau of Indian Affairs Final Rule: Indian Child Welfare Act (ICWA) Proceedings, June 17, 2016).

The information provided by the tribe’s attorney provides the cultural and social standards of the child’s tribe that are necessary for the court to make essential determinations that reasonable efforts were made as required under the title IV-E plan. For example, the Act

requires the court to determine whether the agency made reasonable efforts to finalize a permanency plan. The tribal attorney's representation of the cultural and social standards for family connection, reunification and what permanency looks like in the child's tribe, may be necessary to finalize the permanency plan for an Indian child. For example, if adoption is the permanency plan for an Indian child, the tribal attorney can provide information on customary adoption, which ensures "the same stability and permanence of traditional adoption without terminating parental rights." As with all allowable administrative costs, it is the option of the title IV-E agency with placement and care responsibility of the child whether or not to implement this option to claim FFP for this purpose.

ACF is making this proposal because legal representation provided by an attorney to an Indian child's tribe intervening in state court proceedings as described above, would be an allowable administrative cost necessary for the proper and efficient administration of the title IV-E plan when it fulfills a specific title IV-E plan requirement. Such representation also avoids unintended consequences adverse to a child's interests, such as loss of tribal membership and benefits (ICWA Compliance Task Force Report to the California Attorney General's Bureau of Children's Justice. 2017).

Equity Impact

This NPRM is consistent with the administration's priority of advancing equity for those historically underserved and adversely affected by persistent poverty and inequality (Executive Order 13985, *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government* [Jan. 20, 2021]). Research well-documented the overrepresentation of certain racial and ethnic groups in foster care relative to their representation in the general population. African American and American Indian or Alaska Native children are at greater risk than other children of being confirmed for maltreatment and placed in out-of-home care. They stay in foster care longer and have disparate outcomes. For example, they are less likely to reunify with their families (Child Welfare Information Gateway. (2021). Child welfare practice

to address racial disproportionality and disparity. U.S. Department of Health and Human Services, Administration for Children and Families, Children's Bureau.

<https://www.childwelfare.gov/pubs/issue-briefs/racialdisproportionality/>). Access to legal representation for an Indian child's tribe promotes equity for those historically and adversely affected by inequality by minimizing unnecessary separation of children and their parents, and by maximizing placements of the child with extended family, within the tribal community, and other preferred placements. Research also documents the overrepresentation of children and parents with disabilities in foster care relative to their representation in the general population. As many as 60 percent of children in foster care have disabilities. Parents with disabilities are more likely than nondisabled parents to have child welfare system involvement. Children with disabilities are institutionalized at higher rates and for longer periods of time. Children of parents with disabilities have higher out-of-home placement than other children. Studies have also found disabled parents have high rates of termination of parental rights (Albert SM, Powell RM. Supporting disabled parents and their families: perspectives and recommendations from parents, attorneys, and child welfare professionals. *J Public Child Welf.* 2020;15(5):529. doi: 10.1080/15548732.2020.1751771. PMID: 37220548; PMCID: PMC10202498.).

Access to independent legal representation early in foster care and other civil legal proceedings necessary to carry out the requirements in the agency's title IV-E foster care plan may prevent children of color from entering foster care. For children in foster care, it may increase the rate of reunification and provide a quicker timeframe for achieving permanency. For young adults aging out of foster care, such legal representation may provide access to services and supports needed to achieve permanency and long-term stability.

This proposed change can also help low-income families adversely affected by persistent poverty who are struggling with unemployment, inadequate income, unstable housing, evictions or homelessness, and food insecurity when confronted with potential removal of a child from the home, or when a relative is caring for a child in their home. According to a 2017 study, 71

percent of low-income households experienced at least one civil legal problem in the previous year, including problems with health care, housing conditions, disability access, veterans' benefits, and domestic violence. Of the low-income households reporting civil legal problems, 86 percent received inadequate or no legal help; ([Washington, D.C.: The University of Chicago for Legal Services Corporation, 2017](#)). As previously explained, studies also show that when a child is removed from the home, having access to legal representation not only for child welfare proceedings but also for other civil legal issues earlier in a case can improve the rate of reunification, halve the amount of time needed to secure legal guardianship or adoption, and result in more permanent outcomes for the child and the family (Thornton, Elizabeth, & Gwin, Betsy. *High-Quality Legal Representation for Parents in Child Welfare Cases Results in Improved Outcomes for Families and Potential Cost Savings*. 46 Fam. L. Q. 139 (2012)). That means that parents without independent legal representation in child welfare proceedings and in other civil legal proceedings are at a disadvantage in having their children returned to them. Therefore, providing families adversely affected by poverty with independent legal representation in foster care and other civil legal proceedings necessary to carry out the requirements in the agency's title IV-E foster care plan may improve outcomes related to reunification and permanency.

In addition, access to legal representation for an Indian child's tribe promotes equity for those historically and adversely affected by inequality by minimizing unnecessary separation of children and their parents, and by maximizing placements of the child with extended family, within the tribal community, and other preferred placements.

IV. Regulatory Process Matters

Regulatory Planning and Review Executive Order 12866 and Executive Order 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory

approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 is supplemental to, and reaffirms the principles, structures, and definitions governing regulatory review as established in E.O. 12866, as amended by Executive Order 14094, emphasizing the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

Section 3(f) of E.O. 12866, as modified by 14094, defines “a significant regulatory action” as an action that is likely to result in a rule (1) having an annual effect on the economy of \$200 million or more in any 1 year, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, and tribal governments or communities; (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising legal or policy issues for which centralized review would meaningfully further the President’s priorities, or the principles set forth in the Executive order. This proposed rule is a significant rule and the Regulatory Impact Analysis for this proposed rule identifies economic impacts that exceed the threshold for significance under section 3(f)(1) of Executive Order 12866. The estimated cost and transfer impacts of this regulatory proposal are provided below. As described in the Section-by-Section discussion above, providing legal representation in foster care proceedings and other civil legal proceedings minimize barriers that contribute to bringing families with children at risk of entering foster care in contact with the child welfare system and may help prevent children from entering foster care. For youth already in foster care, such legal representation can improve the rate of reunification resulting in more permanent outcomes for the child and the family. For young adults transitioning out of foster care, such legal representation may provide access to services and supports needed to achieve permanency and for long-term stability.

Alternatives Considered: In 2019, ACF revised the Child Welfare Policy Manual to allow title IV-E agencies to claim FFP for the administrative costs of independent legal representation provided by attorneys representing children who are candidates for title IV-E foster care, children who are in title IV-E foster care, and the children's parent(s) in all stages of foster care legal proceedings. As an alternative to this NPRM, we considered only codifying this policy (see CWPM 8.1B #30, 31, and 32). However, this alternative would not meet our goals for two reasons. First, the alternative would not allow an agency to claim such costs in non-foster care civil legal proceedings, meaning that an agency could only continue using state/tribal or local funds for legal representation in civil legal proceedings. As described in the Section-by-Section, allowing administrative costs for legal representation in civil legal proceedings can help prevent children from entering foster care, and for youth already in foster care, can improve the rate of reunification and result in more permanent outcomes for the child and the family. Second, the alternative would only allow independent legal representation for the child's parent(s) and not the child's relative caregiver(s) as proposed. However, such legal representation for the growing number of relative caregivers, who often lack advance preparation and struggle with similar legal barriers as a parent(s), will reduce the need for more formal child welfare system involvement. For children in foster care, providing legal representation to relative caregivers would minimize some of the barriers that prevent a child from being placed with a relative caregiver, enable more children to maintain family connections, stabilize placements and result in more permanent outcomes for the child and the family.

We also considered narrowly defining the activities an attorney may perform to prepare for and participate in civil legal proceedings for which a title IV-E agency may claim FFP. However, as described in the Section-by-Section, legal service programs and pilot projects that provided legal representation in a wide range of civil legal issues demonstrated a high success rate for preventing children from entering foster care and for children who are in foster care, expediting permanency. Therefore, the proposal broadens "preparation for and participation in

civil legal proceedings” to include facilitating, arranging, brokering, advocating, or otherwise linking clients with providers and services as identified in the child’s case plan.

We further considered whether the statute would permit the proposal to be mandatory for title IV-E agencies. However, title IV-E does not provide authority to require agencies to provide such representation or to claim FFP for administrative costs. This is because title IV-E agencies determine the costs necessary to administer the title IV-E Foster Care Program, and in turn, Federal reimbursement for allowable costs is permitted at 50 percent FFP.

Without this proposal codified, title IV-E agencies may continue to claim FFP for the administrative costs of independent legal representation provided by attorneys, representing children who are eligible for title IV-E foster care, and the children’s parent(s) only in foster care legal proceedings.

Finally, as an alternative to this NPRM, we considered continuing to not allow title IV-E agencies to claim FFP for the administrative cost of independent legal representation provide by an Indian child’s tribe when the tribe intervenes in state court child welfare proceedings. However, such legal representation promotes stability for the child by minimizing unnecessary separation of children and their parents, and by maximizing placements of the child with extended family, tribal community, and other preferred placements.

Regulatory Flexibility Analysis

The Regulatory Flexibility Act (RFA) (*see* 5 U.S.C. 605(b) as amended by the Small Business Regulatory Enforcement Fairness Act) requires Federal agencies to determine, to the extent feasible, a rule's impact on small entities, explore regulatory options for reducing any significant impact on a substantial number of such entities, and explain their regulatory approach. The term “small entities,” as defined in the RFA, comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. HHS considers a rule to have a significant impact on a substantial number of small entities if it has at least a 3

percent impact on revenue on at least 5 percent of small entities. However, the Secretary certifies, under 5 U.S.C. 605(b), as enacted by the RFA (Pub. L. 96–354), that this rulemaking will not result in a significant impact on a substantial number of small entities. This proposed rule does not affect small entities because it is applicable only to state and tribal title IV-E agencies. Therefore, an initial regulatory flexibility analysis is not required for this document.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4) was enacted to avoid imposing unfunded Federal mandates on state, local, and tribal governments, or on the private sector. Section 202 of UMRA requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of \$100 million in 1995 dollars, updated annually for inflation. In 2022, that threshold is approximately \$165 million. This rulemaking does not contain mandates that will impose spending costs on state, local, or tribal governments in the aggregate, or on the private sector, in excess of the threshold.

Congressional Review

The Congressional Review Act (CRA) allows Congress to review major rules issued by Federal agencies before the rules take effect (*see* 5 U.S.C. 801(a)(1)(A)). The CRA defines a “major rule” as one that has resulted, or is likely to result, in (1) an annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers; individual industries; Federal, State, or local government agencies; or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, or innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets (*see* 5 U.S.C. chapter 8). Based on our estimates of the impact of this rulemaking, the Office of Information and Regulatory Affairs (OIRA) in OMB anticipates that a final rule would be ‘major’ under the CRA.

Assessment of Federal Regulations and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act of 1999 requires Federal agencies to determine whether a policy or regulation may negatively affect family well-being. If the agency determines a policy or regulation negatively affects family well-being, then the agency must prepare an impact assessment addressing seven criteria specified in the law. ACF believes it is not necessary to prepare a family policymaking assessment, see Pub. L. 105-277, because the action it takes in this NPRM will not have any impact on the autonomy or integrity of the family as an institution.

Executive Order 13132

Executive Order 13132 requires Federal agencies to consult with state and local government officials if they develop regulatory policies with federalism implications. Federalism is rooted in the belief that issues that are not national in scope or significance are most appropriately addressed by the level of government close to the people. This rulemaking will not have substantial direct impact on the states, on the relationship between the Federal Government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this action does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Paperwork Reduction Act.

The Paperwork Reduction Act of 1995 (Pub. L. 104-13) seeks to minimize government-imposed burden from information collections on the public. In keeping with the notion that government information is a valuable asset, it also is intended to improve the practical utility, quality, and clarity of information collected, maintained, and disclosed.

The Paperwork Reduction Act defines “information” as any statement or estimate of fact or opinion, regardless of form or format, whether numerical, graphic, or narrative form, and whether oral or maintained on paper, electronic, or other media (5 C.F.R. § 1320.3(h)). This includes requests for information to be sent to the government, such as forms, written reports and surveys, recordkeeping requirements, and third-party or public disclosures (5 C.F.R. § 1320.3(c)). Collection requirements for title IV-E foster care administrative costs are currently authorized under OMB number 0970–0510 and include administrative costs for independent legal representation. This action does not include any new information collection requirements or changes to existing information collection requirements.

Annualized Cost to the Federal Government.

The Federal cost of the NPRM over ten fiscal years (2023-2032) is estimated to be \$2,936,285,160 (\$2,099,154,001 (foster care legal proceedings (FC)) + \$631,567,527 (civil legal proceedings) + \$205,563,632 (FC proceedings in which an Indian child’s tribe has intervened). The combined total for Federal and agency costs over ten fiscal years is estimated to be \$5,872,570,319 (\$4,198,308,001 for FC legal proceedings + \$1,263,135,054 for civil legal proceedings + \$411,127,264 for FC proceedings in which an Indian child’s tribe has intervened). It is optional for a title IV-E agency to claim the administrative cost of providing independent legal representation in foster care and civil legal proceedings to eligible children, their parents, and their relative caregivers, and for legal representation to an Indian child’s tribe that intervenes in state court proceedings for the foster care placement and termination of parental rights of an eligible child.

Assumptions: ACF made several assumptions when calculating title IV-E administrative costs:

- FY 2021 title IV-E foster care administrative cost claims are used as the base year amounts for projection purposes in this NPRM and were sourced from Form CB-496 FC part 1. These are actual claims, and not estimates. For the purposes of these burden

estimates, we will use the phrase “candidates” to refer to the number of children claimed as title IV-E candidates and “IV-E FC” for children who are in title IV-E foster care, the two populations of children (and their parents and relative caregivers) to which the costs of this NPRM apply.

- AFCARS data provides the number of title IV-E eligible children who identified as "American Indian\AK Native Alone Or In Combination." We assume that this population of children is potentially subject to ICWA requirements in state court foster care placement proceedings. We further assume that each such Indian child’s tribe will intervene in state court foster care placement proceedings.
- Title IV-E agencies may claim reimbursement for 50 percent of the administrative costs to provide legal representation in foster care proceedings, including those in which an Indian child’s tribe has intervened in state court foster care placement proceedings, and civil proceedings, and the title IV-E agency must pay its share with state or tribal funds. This non-Federal share will be an equal percentage of 50 percent because a title IV-E agency must match the same amount of funds for which it seeks Federal reimbursement.
- We assume an overall annual 1 percent caseload growth rate in the population of candidates for title IV-E foster care and IV-E FC for whom title IV-E administrative costs will be claimed in civil legal proceedings and in FC legal proceedings, including those in which an Indian child’s tribe has intervened in state court foster care placement proceedings. This is based on current title IV-E budgetary projections.
- We assume an annual FFP claims growth factor of 4.7 percent for FY 2023 and 2.3 percent from FY 2024 to FY 2032 for the administrative costs of independent legal representation in FC and in other civil legal proceedings. This is based on current title IV-E budgetary projections of the percentage of change in title IV-E administrative cost claims annually. We assume the calculated FY 2021 title IV-E foster care administration

eligibility rate for children classified as American Indian\AK Native Alone Or In Combination will remain unchanged for the ten FY (FYs 2023-2032) project period.

- An implementation level is used in the calculations for the chart below as an estimated projection for the growth in the number of children (either directly or on behalf of a parent or relative caregivers) receiving independent legal representation in foster care legal proceedings or civil legal proceedings. Similarly, an implementation level is used in the calculations for the chart below as an estimated projection for the growth in the number of children whose tribe is receiving legal representation in state foster care placement and termination of parental rights legal proceedings. The implementation level is different for the cost estimates for foster care legal proceedings and civil legal proceedings, and state court foster care placement legal proceedings in which an Indian child's tribe has intervened as explained below:
 - For independent legal representation in foster care legal proceedings, the implementation level is measured separately for children who are candidates and IV-E FC. The base year (FY 2021) implementation levels are calculated from Form CB-496 FC part 1 which identifies for each title IV-E agency on a quarterly basis the average monthly number of children where independent legal representation for foster care proceedings is being provided for a candidate or IV-E FC. For FY 2021, the independent legal representation for foster care proceedings implementation level is 15.4 percent for IV-E FC and 7.9 percent for candidates. For FYs 2023-2032, the implementation levels are derived from the experience observed in the reported caseload data between FY 2020 and FY 2021 where a 24 percent growth rate occurred for children in title IV-E foster care. We assume that the growth rate will peak in the year this NPRM is finalized and then

gradually diminish as more title IV-E agencies take up the option to claim for these costs, and more children are receiving this representation.

- For legal representation by an Indian child's tribe in state court foster care placement proceedings a single implementation level is measured for children who are candidates and in IV-E FC. The base year (FY 2021) implementation level is set at zero percent since Federal funding for this service will not be available until this NPRM is finalized. Although there is no known data on the extent to which we anticipate title IV-E agencies will begin providing legal representation by tribes to intervene in state court foster care placement proceedings, we anticipate that this administrative cost will be made available to 5 percent of potentially eligible children in FY 2023 and that most of the growth will occur in years 2 - 5 (FYs 2024 – 2027). In FY 2027 we anticipate 35 percent of potentially eligible tribes will receive legal representation. In subsequent FYs, the implementation rate growth will gradually diminish as more title IV-E agencies take up the option to claim for these costs, and more children on whose behalf a tribe is receiving this representation.
- For independent legal representation in civil legal proceedings, the implementation level presumes that administrative cost claims will be limited to those children on whose behalf independent legal representation in foster care legal proceedings are claimed. Not all children receiving legal representation in FC proceedings need representation related to civil matters because the reasons for child welfare involvement vary. Additionally, not all title IV-E agencies providing independent legal representation in foster care legal proceedings will opt to also provide such legal representation in civil proceedings. We have no estimate for FY 2021 costs for legal representation in civil legal proceedings as these will be new costs as a result of finalizing this NPRM. We assume that the

proportion of children receiving legal representation for civil legal proceedings (for both candidates and IV-E FC) will be derived from among those receiving representation for foster care legal proceedings. We estimate that the civil legal proceedings title IV-E caseload will grow gradually each FY from 20 percent in FY 2023, to 45 percent in FY 2027 and up to 56 percent in FY 2032 of the children on whose behalf representation is also being provided for foster care legal proceedings. While there is a great deal of interest in providing legal representation in civil legal proceedings, our projections take into account that, in most instances, new or revised protocols will need to be developed with various organizations to implement a final rule. There will also be a need to secure state or tribal funds for the non-Federal share of funding, which often requires legislative approvals.

Federal cost estimate for independent legal representation in foster care legal proceedings.

Here we describe the individual calculations by line that are in the following chart. All entries in the chart and the narrative below are rounded to the nearest whole number. The calculations to obtain these amounts, however, were performed without applying rounding to the involved factor(s).

Line 1. National number of children (candidates and IV-E FC) receiving legal representation in foster care legal proceedings. Line 1 of the table below provides that the actual number of children receiving independent legal representation in FC proceedings in FY 2021 (baseline) was 10,477 candidates and 26,092 IV-E FC. Line 1 also includes estimates of the annual number of children receiving independent legal representation in foster care proceedings in the following subsequent years: FYs 2023, 2024, 2025, 2027 and in 2032, the estimated number of children is 29,525 candidates and 73,530 IV-E FC.

Line 2. National average FFP claim per child (candidates and IV-E FC) for independent legal representation in foster care proceedings. Line 2 of the table below displays that in FY 2021, the actual average title IV-E administrative cost claim per child receiving independent legal representation in foster care legal proceedings was \$742 for title IV-E candidates and \$2,709 for children in title IV-E foster care. We also provide estimates of the average title IV-E claim per child in the following subsequent years: FYs 2023, 2024, 2025, 2027 and in 2032 the per child average claim is estimated at \$3,481 (IV-E FC) and \$954 (candidates).

Line 3. Average FFP claims for candidates and children in title IV-E foster care for independent legal representation in foster care legal proceedings. Line 3 of the table below displays that in FY 2021, the actual FFP for children receiving independent legal representation in foster care legal proceedings was \$7,777,621 for candidates and \$70,689,345 for children in IV-E FC. We also provide estimates of the average annual claims for these children in the following subsequent years: FYs 2023, 2024, 2025, 2027 and in 2032 the estimated cost is \$28,160,009 (candidates) and \$255,941,062 (IV-E FC).

Line 4. Total Federal costs for independent legal representation in foster care legal proceedings (candidates and IV-E FC). Line 4 of the table below provides that the actual total FFP in FY 2021 was \$78,466,966, which is the sum of the costs of independent legal representation in foster care legal proceedings for candidates and IV-E FC. We also provide estimates of the total FFP for these costs in the following subsequent years: FYs 2023, 2024, 2025, 2027 and in 2032 the estimated annual cost is \$284,101,071. The estimates for these subsequent FYs were calculated by multiplying line 1 by line 2 for candidates and IV-E FC.

Line 5. Non-Federal costs for independent legal representation in foster care legal proceedings.

Line 5 of the table below displays the total FY 2021 non-Federal costs of independent legal representation in foster care proceedings for candidates and IV-E FC was \$78,466,966. This number is the same as line 4 because the FFP rate used in these estimates is 50 percent, thus we estimate the costs for Federal and non-Federal to be the same. We also provide estimates of the total non-Federal costs of independent legal representation in foster care legal proceedings in the following subsequent years: FYs 2023, 2024, 2025, 2027 and in 2032 the estimated annual cost is \$284,101,071.

Line 6. Total Federal and non-Federal costs of independent legal representation in foster care

legal proceedings. Line 6 of the table below is the sum of lines 4 and 5 for the total Federal and non-Federal costs of independent legal representation in foster care legal proceedings for candidates and IV-E FC. The total FY 2021 costs were \$156,933,932. We also provide estimates of these total Federal and non-Federal costs in the following subsequent years: FYs 2023, 2024, 2025, 2027 and in 2032 the estimated annual cost is \$568,202,142.

Federal cost estimate of independent legal representation in other civil legal proceedings

Line 7. Number of children (candidates and IV-E FC) receiving independent legal

representation in civil legal proceedings. Line 7 of the table below displays the estimated number of children who will receive independent legal representation in civil legal proceedings either directly, or on behalf of a parent or relative caregiver in FY 2023 as 10,137 children.

There is no estimate for FY 2021 in the chart because these costs were not claimed; these will be new costs as a result of finalizing this NPRM. We also provide estimates for subsequent years: FYs 2024, 2025, 2027 and in 2032 the estimated number of children is 63,482. This is based on the implementation level which is the percentage of children receiving independent legal

representation in foster care legal proceedings who are projected to also receive independent legal representation in civil legal proceedings in the year.

Line 8. National average title IV-E administrative cost claim per child for independent legal representation in civil legal proceedings. Line 8 of the table below displays that in FY 2021, we assumed the average FFP claim per child (candidates and IV-E FC) receiving independent legal representation in civil proceedings to be \$1,262. We also provide estimates for these costs for the following subsequent years: FYs 2023, 2024, 2025, 2027 and in 2032, we estimate the average FFP claim per child to be \$1,621. These cost estimates were derived from data provided by the "Detroit Model" legal services program in which legal representation in civil issues for child welfare clients was calculated as an average yearly amount of \$2,524 gross (\$1,262 50 percent FFP title IV-E Federal share) per client. We used the Detroit model project because we do not have current title IV-E administrative cost claims reported on the Form CB-496 for civil proceedings that we can use for an estimate of the cost of providing independent legal representation in civil legal proceedings in this NPRM. This is the only program model known to us providing civil legal representation in pre-petition cases for which average cost data is available, thus the only way for us to estimate these costs (Detroit Center for Family Advocacy Pilot Evaluation report July 2009-June 2012; Sankaran, Vivek. Case Closed: Addressing Unmet Legal Needs and Stabilizing Families. M. L. Raimon, co-author. Center for the Study of Social Policy [2014] [Detroit model project]).

Pursuant to the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for HHS Awards, title IV-E agencies must, among other things, ensure costs are reasonable (45 CFR 1335.30(i) applying 45 CFR 75.404). A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost. The title IV-E agency must describe how the administrative costs of allowable legal representation are allocated

in a public assistance cost allocation plan that is reviewed and approved by HHS (45 CFR 1355.30(k) applying 45 CFR 95.507). To the extent that a title IV-E agency contracts with another public or private agency to provide or assist in title IV-E allowable activities, the title IV-E agency may claim reasonable costs consistent with their cost allocation plan and supported by a written agreement that, among other things, includes the specific service(s) being purchased, and the basis for billing (45 CFR 95.507(b)(6)). Many title IV-E agencies already have contracts with attorneys providing independent legal representation in foster care related hearings on behalf of children and their parent(s) where the child is either a candidate for or in foster care. Such agencies have experience identifying reasonable rates and appropriate categories of costs for allowable legal representation. We encourage title IV-E agencies to share comments on these experiences. We also specifically request comments from the public on what a prudent person under the circumstances would reasonably pay for attorney fees in civil legal proceedings.

Line 9. Federal costs of independent legal representation in civil legal proceedings. Line 9 of the table below provides the estimated Federal administrative costs at 50 percent FFP for independent legal representation in civil legal proceedings for candidates and IV-E FC. These costs were calculated by multiplying the expected average monthly caseload (line 7) by the expected average annual claim per child (line 8). We provide estimated Federal costs of \$13,393,972 for FY 2023 and in subsequent years: FYs 2024, 2025, 2027 and in 2032 the estimated Federal cost is \$102,928,630.

Line 10. Non-Federal costs of independent legal representation in civil legal proceedings. Line 10 provides the estimated non-Federal share of administrative costs for independent legal representation in civil legal proceedings for candidates and IV-E FC, which is 50 percent of the

total on line 11. This number is the same as line 9 because the FFP rate used in these estimates is 50 percent, thus we estimate the costs for Federal and non-Federal to be the same. We provide estimated non-Federal costs of \$13,393,972 beginning in FY 2023 and in subsequent FYs: 2024, 2025, 2027 and in 2032 the estimated non-Federal cost is \$102,928,630. There is no estimate for FY 2021 in the chart because these costs were not claimed; these will be new costs as a result of finalizing this NPRM.

Line 11. Total Federal and non-Federal cost of independent legal representation in civil legal proceedings. Line 11 displays the annual estimated total (Federal + non-Federal) costs for independent legal representation for candidates and IV-E FC in civil legal proceedings. This is the sum of lines 9 and 10. We estimate these total costs beginning in FY 2023 as \$26,787,943 and in subsequent FYs: 2024, 2025, 2027 and in 2032, the estimate is \$205,857,260. There is no estimate for FY 2021 in the chart because these costs were not claimed; these will be new costs as a result of finalizing this NPRM.

Line 12. Number of Indian children on whose behalf a tribe may receive legal representation in foster care legal proceedings (candidates and IV-E FC). Line 12 of the table below provides the estimated number of Indian children for whom legal representation may be received by their tribe in FC proceedings. In FY 2021 (baseline) candidates and IV-E FC are not listed since this administrative cost was not available. We estimate that the total number, beginning in 2023 and subsequent FYs 2024, 2025, 2027 and 2032 is 3,342 for candidates and 7,814 for IV-E FC.

Line 13. National average FFP claim per child (candidates and IV-E FC) for tribal representation in foster care legal proceedings. Line 13 of the table below provides the average title IV-E claim per child for the tribal representation in foster care proceedings. In FY 2021 (baseline), the average title IV-E administrative cost claim per child receiving legal

representation in foster care legal proceedings was \$1,262 (estimated) for title IV-E candidates and \$2,709 (actual) for children in title IV-E foster care. We estimate the total per child claim for subsequent FYs 2023, 2024, 2025, 2027, and 2032 is \$1,621(candidates) and \$3,481 (IV-E FC).

Line 14. *Average FFP for IV-E FC and candidate itemized for tribal representation in foster care legal proceedings.* Line 14 of the table below displays estimates for the average annual claims for children whose tribe is receiving legal representation. In FY 2021, there was no actual FFP for children receiving tribal legal representation in foster care legal proceedings. For subsequent FYs 2023, 2024, 2025, 2027 and 2032 the estimated cost is \$5,419,446 (candidates) and \$27,200,314 (IV-E FC).

Line 15. *Total FFP for tribal representation in foster care legal proceedings.* Line 15 of the table below provides the total FFP for tribal representation in foster care legal proceedings by multiplying line 12 for candidates by line 13 for IV-E FC. For FY 2021 (base year), there was no actual FFP for children receiving tribal legal representation in foster care legal proceedings. Estimates of the total annual FFP for these costs in FYs 2023, 2024, 2025, 2027 and 2032 is \$32,619,760.

Line 16. *Total non-Federal cost for tribal representation in foster care legal proceedings.* Line 16 provides the estimated non-Federal share of administrative costs for tribal legal representation in foster care legal proceedings for candidates and IV-E FC by multiplying line 1 by line 2, which is 50 percent of the total on line 17. This number is the same as line 15 because the FFP rate used in these estimates is 50 percent, therefore we estimate the costs for Federal and non-Federal to be the same. We provide estimated non-Federal costs of \$2,641,921 beginning in FY 2023 and in subsequent FYs 2024, 2025, 2027 and 2032, the estimated non-Federal cost is

\$32,619,760. There is no estimate for FY 2021 in the chart because these costs were not claimed; these will be new costs as a result of finalizing this NPRM.

Line 17. *Total cost for foster care legal proceedings.* Line 17 displays the annual estimated total Federal and non-Federal costs for tribal legal representation for candidates and IV-E FC in foster care legal proceedings. This is the sum of lines 15 and 16. We estimate these total costs beginning in FY 2023 as \$5,283,842 and in subsequent FYs 2024, 2025, 2027 and 2032, the estimate is \$65,239,520. There is no estimate for FY 2021 in the chart because these costs were not claimed; these will be new costs as a result of finalizing this NPRM.

ACF understands that representation for a child's tribe in foster care legal proceedings in practice may not always be by an attorney. Some states allow non-attorneys to represent a child's tribe if they are a member of and authorized to represent the child's tribe. We are considering allowing the cost of a non-attorney to represent a child's tribe when it is necessary for the administration of the title IVE plan. We are seeking comments on this proposal and are especially interested in any evidence that non-attorneys would effectively provide the information that courts need, and any recommendations for how ACF would ensure that non-attorneys adequately represent the child's tribe.

Year	2021 (Baseline)	2023	2024	2025	2027 (Year 5)	2032 (Year 10)
1. National number of children receiving legal representation in foster care legal proceedings (candidates and IV-E FC)	10,447 (candidates) 26,092 (IV-E FC)	13,201 (candidates) 32,876 (IV-E FC)	15,973 (candidates) 39,779 (IV-E FC)	19,328 (candidates) 48,133 (IV-E FC)	24,886 (candidates) 61,976 (IV-E FC)	29,525 (candidates) 73,530 (IV-E FC)
2. National average FFP claim per child (candidates and IV-E for foster care legal proceedings)	\$742 (candidates) \$2,709 (IV-E FC)	\$777 (candidates) \$2,837 (IV-E FC)	\$795 (candidates) \$2,902 (IV-E FC)	\$813 (candidates) \$2,969 (IV-E FC)	\$851 (candidates) \$3,107 (IV-E FC)	\$954 (candidates) \$3,481 (IV-E FC)
3. Average FFP for IV-E FC and candidate itemized for foster care legal proceedings	\$7,777,621 (candidates) \$70,689,345 (IV-E FC)	\$10,260,393 (candidates) \$93,254,798 (IV-E FC)	\$12,700,622 (candidates) \$115,433,586 (IV-E FC)	\$15,721,212 (candidates) \$142,887,156 (IV-E FC)	\$21,184,501 (candidates) \$192,541,977 (IV-E FC)	\$28,160,009 (candidates) \$255,941,062 (IV-E FC)
4. Total FFP (line 1 x line 2 for combined IV-E FC child and candidate) for foster care legal proceedings	\$78,466,966	\$103,515,191	\$128,134,209	\$158,608,368	\$213,726,479	\$284,101,071
5. Total non-Federal cost (line 1 x line 2 for combined IV-E FC and candidates) for foster	\$78,466,966	\$103,515,191	\$128,134,209	\$158,608,368	\$213,726,479	\$284,101,071

care legal proceedings						
6. Total cost for foster care legal proceedings (line 4 + line 5)	\$156,933,932	\$207,030,382	\$256,268,417	\$317,216,735	\$427,452,958	\$568,202,142
7. Number of children receiving legal representation in civil legal proceedings	N/A	10,137	18,398	25,972	42,997	63,482
8. National average FFP claim per child for civil legal proceedings	\$1,262 (baseline)	\$1,321	\$1,352a	\$1,383	\$1,447	\$1,621
9. Total FFP for civil legal proceedings (line 7 x line 8)	N/A	\$13,393,972	\$24,869,190	\$35,914,468	\$62,222,311	\$102,928,630
10. Total non-Federal costs for civil legal proceedings (line 7 x line 8)	N/A	\$13,393,972	\$24,869,190	\$35,914,468	\$62,222,311	\$102,928,630
11. Total Federal + non-Federal costs for civil legal proceedings (line 9 + line 10)	N/A	\$26,787,943	\$49,738,380	\$71,828,936	\$124,444,623	\$205,857,260
12. Number of children whose tribe may receive legal representation in foster care legal	N/A	332 (candidates) 777 (IV-E FC)	1,007 (candidates) 2,353 (IV-E FC)	1,694 (candidates) 3,961 (IV-E FC)	2,420 (candidates) 5,657 (IV-E FC)	3,342 (candidates) 7,814 (IV-E FC)

proceedings (candidates and IV-E FC)						
13. National average FFP claim per child (candidates and IV-E FC) for a tribe in foster care legal proceedings	N/A	\$1,321 (candidates) \$ 2,837 (IV-E FC)	\$1,352 (candidates) \$ 2,902 (IV-E FC)	\$1,383 (candidates) \$ 2,969 (IV-E FC)	\$1,447 (candidates) \$ 3,107 (IV-E FC)	\$1,621 (candidates) \$ 3,481 (IV-E FC)
14. Average FFP for IV-E FC and candidate itemized for a tribe in foster care legal proceedings	N/A	\$438,929 (candidates) \$2,202,993 (IV-E FC)	\$1,360,543 (candidates) \$6,828,594 (IV-E FC)	\$2,342,923 (candidates) \$11,759,180 (IV-E FC)	\$3,501,709 (candidates) \$17,575,152 (IV-E FC)	\$5,419,446 (candidates) \$27,200,314 (IV-E FC)
15. Total FFP (line 12 x line 13 for combined IV-E FC child and candidate) for a tribe in foster care legal proceedings	N/A	\$2,641,921	\$8,189,137	\$14,102,103	\$21,076,861	\$32,619,760
16. Total non-Federal cost (line 12 x line 13 for combined IV-E FC and candidates) for a tribe in foster care legal proceedings	N/A	\$2,641,921	\$8,189,137	\$14,102,103	\$21,076,861	\$32,619,760
17. Total cost for a tribe in foster care legal	N/A	\$5,283,842	\$16,378,274	\$28,204,206	\$42,153,722	\$65,239,520

proceedings (line 15 + line 16)						
---------------------------------------	--	--	--	--	--	--

Accounting Statement

From a society-wide perspective, many of the effects estimated above are transfers. We seek comment on estimation of the portion that represents new resource use attributable to the proposed rule. Preliminarily, as shown in the table below, the full amounts are categorized as transfers—from either the Federal Government or title IV-E agencies to title IV-E participants.

Category	Primary Estimate (millions)	Units		
		Year Dollars	Discount Rate	Period Covered
Federal Budget Transfers (annualized)	\$119	2021	7%	10 years
	\$98	2021	3%	10 years
From/To	From: Federal Government	To: children eligible for title IV-E foster care		
Other Transfers (annualized)	\$119	2021	7%	10 years
	\$98	2021	3%	10 years
From/To	From: Title IV-E agencies	To: children eligible for title IV-E foster care		

V. Tribal Consultation Statement

Executive Order 13175 *Consultation and Coordination With Indian Tribal Governments* requires agencies to consult with Indian tribes when regulations have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes and either impose substantial direct compliance costs on tribes or preempt state law.

Similarly, ACF’s Tribal Consultation Policy says that consultation is triggered for a new rule

adoption that significantly affects tribes, meaning the new rule adoption has substantial direct effects on one or more Indian Tribes, on the amount or duration of ACF program funding, on the delivery of ACF programs or services to one or more Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. This final rule does not meet either standard for consultation. Since it is the option of the tribal title IV-E agency whether or not to claim FFP for independent legal representation in foster care and other civil legal proceedings necessary to carry out the requirements in the agency's title IV-E foster care plan, Executive Order 13175 does not apply. However, we plan to conduct tribal consultation during the public comment period. We believe that tribes will have great interest in our proposal to claim FFP for the administrative costs of legal representation for an attorney representing an Indian child's tribe when the child's tribe intervenes in specified state court proceedings.

Jeff Hild, Acting Assistant Secretary of the Administration for Children & Families, approved this document on June 13, 2023.

List of Subjects in 45 CFR Part 1356

Administrative costs, Adoption and foster care, Child welfare, Fiscal requirements (title IV-E), Grant programs—social programs, Statewide information systems.

(Catalog of Federal Domestic Assistance Program Number 93.658, Foster Care Maintenance; 93.659, Adoption Assistance; 93.645, Child Welfare Services—State Grants).

Dated: September 21, 2023

Xavier Becerra,

Secretary,

Department of Health and Human Services.

For the reasons set forth in the preamble, ACF proposes to amend 45 CFR part 1356 as follows:

PART 1356—REQUIREMENTS APPLICABLE TO TITLE IV-E

1. The authority citation for part 1356 continues to read as follows:

Authority: 42 U.S.C. 620 et seq., 42 U.S.C. 670 et seq., 42 U.S.C. 1302.

2. Amend § 1356.60 by revising paragraphs (c)(2)(viii) and (x) and adding paragraphs (c)(2)(xi) and (c)(4) to read as follows:

§1356.60 Fiscal requirements (title IV-E).

* * * * *

(c) * * *

(2) * * *

(viii) Rate setting;

* * * * *

(x) Costs related to data collection and reporting; and

(xi) Costs related to legal representation described in paragraph (c)(4) of this section.

* * * * *

(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 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), and the child's relative caregiver 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)), 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.

* * * * *

[FR Doc. 2023-20932 Filed: 9/27/2023 8:45 am; Publication Date: 9/28/2023]