

MEMORANDUM

TO: Susan Elsen
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FROM: Emilie Cook
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DATE: March 24, 2023

RE: Availability of Title IV-E Funding for Preventive Legal Advocacy and Pre-Petition Legal Services

Question Presented

Whether the 2019 changes to the Child Welfare Policy Manual §8.1B on Allowable Costs for Foster Care Maintenance Payments allow state agencies to claim direct Title IV-E reimbursement for the costs associated with what we commonly refer to as preventive legal advocacy and Pre-Petition representation?

Brief Answer

Yes, but only with respect to Pre-Petition representation and only where the agency has satisfied necessary prerequisites for reimbursement and adopted procedures for early notification to parent and children's counsel.

Discussion

As an initial matter, a discussion of the availability of Title IV-E funding in the preventive legal advocacy and Pre-Petition context requires an explanation of two important distinctions: the first being the distinction between preventive legal advocacy and Pre-Petition legal representation, and the second being the distinction between what we commonly refer to as "direct" and "indirect" Title IV-E funding.

First, with respect to the distinction between preventive legal advocacy and Pre-Petition representation, the former serves as an umbrella term for all efforts to resolve upstream civil legal issues that, if left unresolved, can lead to unnecessary child welfare system involvement. Pre-Petition legal representation, on the other hand, is but one type of preventive legal advocacy. Pre-Petition representation focuses its efforts on preventing an immediate threat of removal and/or the agency's filing of a formal petition for custody through the use of timely legal interventions.

Where preventive legal advocacy may be utilized to assist families facing destabilizing civil legal issues such as eviction and public benefits cessation, even where those families are yet

unknown to the agency or are otherwise not facing an immediate threat of removal, Pre-Petition representation is generally used to describe legal services provided in the face of ongoing CPS investigations or some other acute threat of removal.

The whole of preventive legal advocacy is considered an “upstream” intervention in that it aims to make legal services available to clients prior to the filing of formal child welfare proceedings, and yet the distinction between preventive legal advocacy and Pre-Petition representation ultimately turns on the question of just how early these services are provided. From an academic standpoint, the distinction between preventive legal advocacy and Pre-Petition representation may be of limited significance. But, as it relates to the question of Title IV-E funding, this proximity to, and more importantly, the likelihood of removal, is effectively the determining factor in whether the legal services being provided are eligible for “direct” Title IV-E reimbursement.

This brings us to the issue of “indirect” vs. “direct” Title IV-E funding. In 2019 CB issued revised and new policies that allow title IV-E agencies to claim federal financial participation (FFP) for administrative costs of independent legal representation provided by attorneys representing children in title IV-E foster care, children who are candidates for title IV-E foster care, and their parents for “preparation for and participation in judicial determinations” in all stages of foster care legal proceedings.¹

As it stands, about half of the states currently take advantage of the 2019 changes and pull-down Title IV-E funding for costs associated with traditional parent / child representation.² There are no restrictions on the use of Title IV-E monies once the funds are collected by the states. Accordingly, in most of these states, the money collected for parent / child representation costs is simply held with the rest of the state’s Title IV-E reimbursements and distributed according to the state budget.

Some states, however, such as Arizona and Michigan, have recently passed policies and procedures to ensure that new Title IV-E reimbursements now available for the costs of parent / child representation are set aside from the rest of the state’s Title IV reimbursements. Jurisdictions that set aside these funds generally require that all or some portion of the new Title IV legal representation reimbursements be made available to support and enhance the delivery of child and parent legal representation.³ Because of this, we’re seeing more and more states

¹ Section 474(a)(3) of the Act and federal regulations at 45 CFR 1356.60(c). In section 8.1B of the Child Welfare Policy Manual (CWPM), CB revised and issued Q/A #30 on January 7, 2019, issued #31 on July 29, 2019 and issued #32 on April 20, 2020.

² Prudence Beidler Carr, Allison Green & Nora Sydow, States Experience with Claiming Title IV-E, March 2022.

³ See e.g. Arizona’s plan <https://www.azcourts.gov/improve/Title-IV-E-Funding>

starting to utilize Title IV-E reimbursement monies to fund new preventive legal advocacy and Pre-Petition programs.

The Children's Bureau has repeatedly asserted support for this trend of utilizing Title IV-E reimbursements for traditional parent / child legal representation to fund preventive legal advocacy and Pre-Petition representation programs. For example, in its January 14, 2021 Memorandum, the Children's Bureau highlighted the importance of these efforts, stating:

Families that make contact with the child welfare system are often in the midst of or recovering from familial, health, or economic challenges or crises. This may include loss of employment, inadequate income, unstable housing or homelessness, food insecurity, mental health and/or substance misuse disorder, and intimate partner violence. Such obstacles and crisis can impede a family's ability to provide a safe and stable environment for their children and may increase the likelihood of contact with the child welfare system. Civil legal representation to address such issues can be preventative and serve as an effective tool to preserve family integrity and promote well-being.

Title IV-E agencies are encouraged to consider using state, local and tribal funds, including title IV-E reimbursement dollars received for independent legal representation to expand representation to include civil legal issues. Investing reimbursement dollars in civil legal advocacy is a strategy to expand the scope of independent legal representation beyond foster care proceedings. The replacement of funds currently sourced 100% from the state or tribe by title IV-E FFP for allowable costs related to foster care proceedings could be a source for kick starting such additional legal services.⁴

Regardless of whether the states' IV-E reimbursements are divided out based on the source of the original cost, the described process of utilizing realized Title IV-E reimbursements to fund preventive legal advocacy and Pre-Petition programs is what we would refer to as "indirect" Title IV-E funding. From a practical standpoint, every state has the ability to provide indirect Title IV-E funding for preventive legal advocacy and Pre-Petition programs, and the availability of claimed Title IV-E reimbursements to fund these programs is a matter of state policy.

This "indirect" form of Title IV-E funding for preventive legal advocacy and Pre-Petition representation is distinct from the issue of "direct" Title IV-E reimbursements for these programs. When we talk about "direct" Title IV-E funding for preventive legal advocacy and Pre-Petition programs, we're talking about the agency's ability to claim reimbursement for costs directly associated with the legal representation being provided by preventive legal advocacy and

⁴ ACYF-CB-IM-21-06

Pre-Petition attorneys and staff, as opposed to the simpler process discussed above of using funds already secured under Title IV-E to pay for the programs.

With respect to the agency's ability to claim costs associated with parent / child legal representation generally, Child Welfare Policy Manual §8.1B, Question 30 provides:

Previous policy prohibited the agency from claiming title IV-E administrative costs for legal services provided by an attorney representing a child or parent. This policy is revised to allow the title IV-E agency to claim title IV-E administrative costs of independent legal representation by an attorney for a child who is a candidate for title IV-E foster care or in foster care and his/her parent to prepare for and participate in all stages of foster care legal proceedings, such as court hearings related to a child's removal from the home.⁵

In January of 2021, ACF expounded on the availability of Title IV-E funding for what we would consider to be Pre-Petition representation, stating: "CB's policy clarification in 2019 made clear that title IV-E funds may be used for children who are candidates for title IV-E foster care and their parents and that court involvement is not required for a title IV-E agency to claim reimbursement."⁶ In that Memorandum, ACF outlined the steps necessary for claiming Title IV-E reimbursements for costs associated with legal services provided prior to and after the filing of a formal petition. Despite ACF's clear support for what it considers "preventive" legal services, a number of challenges remain for states hoping to secure "direct" reimbursement for preventive legal advocacy and Pre-Petition representation.

As an initial matter, any attempt to seek "direct" reimbursement for costs associated with the provision of legal services prior to the filing of a formal petition requires that the services are being provided to a family that the agency has determined is a "candidate for foster care."⁷ Candidacy in this respect is typically defined by the state in its Title IV-E plan. Candidacy definitions vary by state and in many cases, these definitions are so narrowly tailored that it would be nearly impossible to consider a child a "candidate for foster care" prior to actual entry into foster care. As a result, we've seen some states, such as Colorado for example, take steps to amend their candidacy definition in an attempt to broaden the pool of children who may be considered "candidates." In doing so, these states seek to broaden the opportunity for early identification, thereby increasing the agency's ability to claim reimbursements for associated legal costs.

⁵ Child Welfare Policy Manual §8.1B, Allowable Costs- Foster Care Maintenance Program, Question 30

⁶ ACYF-CB-IM-21-06, January 14, 2021

⁷ Child Welfare Policy Manual § 8.1D Candidates for title IV-e Foster Care, Question 1.

Even where states have successfully amended their Child and Family Services and Title IV-E plans to allow for reimbursement of parent / child legal representation costs and a broader definition of candidacy, we know that reimbursable costs are relegated to only those legal fees that are directly associated with various “stages of foster care legal proceedings, such as hearings related to a child’s removal from the home.”⁸ This means reimbursable Pre-Petition representation “presumably begins when the case is first brought to the attention of the parent or child’s attorney through the time the case is terminated following the child’s return home, adoption, guardianship, or aging out of the court process.”⁹ Accordingly, the point at which Pre-Petition legal services become reimbursable will inevitably be dictated by the agency, and any attempt to maximize funding will require comprehensive policies and procedures that provide for early notification to parent’s counsel.

Despite showing initial enthusiasm for the positive impacts of upstream civil legal advocacy, the Children’s Bureau remains firm in its position that agencies cannot seek reimbursement for the costs of legal services rendered in collateral civil legal matters.¹⁰ As a result, there is presently no opportunity to seek Title IV-E reimbursements for what we traditionally consider to be preventive legal advocacy, or the upstream provision of civil legal services, even where those services are provided in order to prevent further foster care involvement. There is a 2021 proposed regulation that seeks to expand the availability of Title IV-E funding for legal fees associated with other “civil proceedings,” but we have yet to see further movement on that proposal.¹¹

Conclusion

While the 2019 changes to the Child Welfare Policy Manual §8.1B do provide an opportunity for states to seek direct reimbursement for the costs of Pre-Petition legal representation provided to parents of children determined to be “candidates for foster care,”

⁸ Child Welfare Policy Manual §8.1B, Allowable Costs- Foster Care Maintenance Program, Question 30

⁹https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/january---december-2019/claiming-title-iv-e-funds-to-pay-for-parents-and-childrens-attor/

¹⁰ See e.g. Children’s Bureau Technical Bulletin, Frequently Asked Questions: Legal Representation, July 20, 2020, page 2-3, (discussing Title IV-E Administrative Costs and providing examples of “foster care legal proceedings”); see also Trowbridge, Scott, Child Welfare Program Specialist, Children’s Bureau. Email to Emilie Cook. 12 September, 2022. (In response to a question regarding the subject matter of reimbursable legal expenses, Trowbridge provides: “[o]ne thing we can say is that ‘what they are working on’ should be squarely on the IV-E case, the dependency case. That is a gap we very much recognize. We have a regulatory proposal out that would enlarge that to other civil legal matters. <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=0970-AC89>”)

¹¹ RIN: 0970-AC89

successful reimbursement requires a coordinated effort on the part of the agency. Not only must the agency be willing to conform its Child and Family Services Plan and Title IV-E Plan to allow for reimbursement of parent / child representation¹², but the agency must also ensure that its candidacy definition is broad enough to cover families in the Pre-Petition context. At this time, it does not appear that any state is currently pulling down direct Title IV-E reimbursement for Pre-Petition services. That said, these difficulties in no way foreclose states from utilizing realized Title IV-E reimbursements to fund preventive legal advocacy and Pre-Petition representation programs.

Looking ahead to the future, we know that Colorado is well poised to begin seeking direct reimbursement for Pre-Petition services. In addition to making the necessary amendments to its Title IV-E plan, Colorado has taken affirmative steps to centralize its parent representation system by instituting the Office of Repondent Parents' Counsel, which is responsible for overseeing all parent representation efforts in the state. Not only does ORPC provide a robust system for centralized billing, but ORPC has also launched a Pre-Petition representation pilot, making it likely that Colorado will be the first state to successfully pull-down Title IV-E funds for their Pre-Petition services.

Where promise lies ahead in seeking direct reimbursement for Pre-Petition representation, it is unlikely that we will see any expansion of Title IV-E to cover legal services for related civil matters in a preventive legal advocacy context until the Children's Bureau takes further action on proposed regulation RIN: 0970-AC89.

¹² Family Justice Initiative, "Questions and Answers: Federal IV-E reimbursement for high-quality legal representation for children and parents." <https://15ucklg5c821brpl4dycpk15-wpengine.netdna-ssl.com/wp-content/uploads/sites/48/2019/06/IVE-Questions-and-Answers-re-LegalRepresentation-FINAL-6-13-19.pdf>.