

MON. CODE ANN § 41-3-425

SHOULD BE AMENDED TO ALLOW FOR REPRESENTATION PRIOR TO FILING A PETITION IN COMPLIANCE WITH FFPSA

IN INVESTIGATIONS WHICH DO NOT WARRANT EMERGENCY REMOVALS, LEGAL ADVOCATES SHALL BE PROVIDED FOR FAMILIES OR CHILDREN TO ENSURE THAT PREVENTATIVE SERVICES ARE IN PLACE TO KEEP FAMILIES TOGETHER AND PROTECT THE BEST INTERESTS OF CHILDREN. THIS HELPS ENSURE COMPLIANCE WITH FEDERAL STATUTORY TIMELINES AND FAMILY FIRST PREVENTATIVE SERVICES ACT.

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.

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. This is intended to provide states, tribes and territories with a tool for preventing unnecessary and traumatic family separation. Accordingly, FFP is now available for an attorney to provide legal representation and advocacy on behalf of title IV-E foster care candidates and his/her parents. This may include allowable activities prior to court involvement, including prior to the filing of a petition to remove a child.

Section 472(i)(2) 2 of the federal Social Security Act authorizes states to seek administrative costs reimbursement for a: child who is potentially eligible for benefits under a State plan approved under this part and at imminent risk of removal from the home, only if– (A) reasonable efforts are being made in accordance with section 671(a)(15) of this title to prevent the need for, or if necessary to pursue, removal of the child from the home; and (B) the State agency has made, not less often than every 6 months, a determination (or redetermination) as to whether the child remains at imminent risk of removal from the home.

Montana has allowed for a SHOCKINGLY LOW rate of eligibility for benefits in the current state plan, that is authorized until 2025. Legislature should pay MUCH MORE ATTENTION to the children who are being deemed eligible for benefits in the next plan, as this will allow for a much higher reimbursement rate from the federal government for our child welfare services. Surrounding states are receiving much more federal assistance with the cost of child welfare (see Idaho with a 70% penetration rate and Colorado with a 66% penetration rate, while Montana has a 30% penetration rate). This means that while Montana continues to have the highest per capita rate of removal of children, the cost is coming mostly from state tax dollars.

Section 8.1D of the Children’s Bureau Child Welfare Policy Manual, provides:

Purpose of agency's involvement with the child: "A candidate for foster care is a child who is at serious risk of removal from the home. . . A child may not be considered a candidate for foster care solely because the title IV-E agency is involved with the child and his/her family. In order for the child to be considered a candidate for foster care, the title IV-E agency's involvement with the child and family must be for the specific purpose of either removing the child from the home or satisfying the reasonable efforts requirement with regard to preventing removal." (see U.S. Dept. of Health and Human Servs., Admin. for Children & Families, Children's Bureau, Child Welfare Policy Manual).

This means, without legal advocates ENSURING that preventative services are in place for our very most vulnerable populations in Montana, strategically selected from the lowest poverty rates for our qualifying candidates for Title IV-E reimbursements, the ONLY way the state of Montana can be reimbursed for involvement in their lives is by removing them from their homes and placing them in foster care - without this law being amended and legal advocates being allowed to assist them prior to a petition being formally filed in court.

Legal Practitioners are voicing concerns that audits of some regions in Montana will already fall short of the Federal policy requirements that DPHHS is required to implement once a child has been removed for an imminent risk of serious harm. Many removals are being improperly treated as imminent risk situations that legal advocacy could effectively mitigate at a 50% federal reimbursement rate. The legal oversight will also help effectuate compliance with the required 6 month reporting requirements and case plans that the federal government requires for preventative services plans.

Prepetition legal services and child and parent representation use of Title IV-E funds are being promoted by the Federal government for compliance with the Family First Preventative Services Act (see U.S. Dept. of Health and Human Servs., Admin. for Children & Families, Children's Bureau, ACYF-CB-IM-21- 06 at 3, 10-11 (Jan. 14, 2021), available at: <https://www.acf.hhs.gov/sites/default/files/documents/cb/im2106.pdf>):

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.

By statute, the Office of State Public Defender (OPD) provides that "Any party involved in a petition filed pursuant to 41-3-422 has the right to counsel in all proceedings held pursuant to the petition." 41-3-425, specifically for child protection cases. While (1) specifies that counsel is provided pursuant to a petition, (2) also separately articulates that the court shall immediately appoint the office of state public defender to assign counsel for: (a) any indigent parent, guardian, or other person having legal custody of a child or youth in a removal, placement, or termination proceeding pursuant to 41-3-422, pending a determination of eligibility pursuant to 47-1-111; (b) any child or youth involved in a proceeding under a petition filed pursuant to 41-3-422 when a guardian ad litem is not appointed for the child or youth; and (c) any party entitled to counsel at public expense under the federal Indian Child Welfare Act (emphasis added).

While subsection 2 points to the same statute outlining the filing of a petition, the separateness and immediacy of its language cannot be overlooked. This is because the government action of separation of a child from their family is of such significance that the need for legal representation cannot be more crucial for an indigent parent than at the time the State becomes involved with the child. 41-3-425.