



On September 28, 2023, the Administration for Children and Families (ACF) within the U.S. Department of Health and Human Services (HHS) issued a [Notice of Proposed Rulemaking \(NPRM\) on Foster Care Legal Representation](#). This NPRM would amend 45 CFR 1356.60 to include “costs of legal representation” as a reimbursable expense necessary for the administration of a Title IV-E agency’s foster care program. The current regulatory language allows reimbursement for “preparation for and participation in judicial determinations,” but does not clarify which parties are covered or address associated reimbursable expenses.

Anyone interested in commenting on this proposed rule should submit materials by **November 27, 2023**. More information can be found on the [Federal Register site](#). The American Bar Association Center on Children and the Law has prepared the below summary of the NPRM to provide context for potential comments.

**Summary of Rule Content:**

Authority for this federal rulemaking derives from 42 U.S.C. 674(a)(3), which authorizes state and tribal IV-E agencies (agencies) to seek federal reimbursement for foster care program administrative costs that the agency finds necessary for the “proper and efficient administration” of the IV-E plan. Under the proposed rule, as part of those administrative costs agencies may choose to seek reimbursement for the costs of legal representation for a(n):

- Agency
- Child
- Child’s parent(s)
- Child’s relative caregiver(s), and
- Indian child’s tribe.

The proposed rule allows for reimbursement of the cost of legal representation in foster care proceedings as well as “other civil legal proceedings”. Covered civil proceedings may include those that address:

- Housing
- Paternity
- Orders of protection
- Education advocacy

- Health care
- Successful transition for older youth out of care
- Public benefits access

The rule provides for civil legal proceedings that may occur concurrently to foster care proceedings as well as those that happen before a removal petition has been filed.

The proposed rule acknowledges the many benefits of independent legal representation, including its ability to reduce the need for more formal child welfare system involvement, minimize unnecessary separation of children and their parents, expedite reunification and/or permanency, improve access to needed supports, and promote placement with extended family and other preferred placements. Additionally, this NPRM aligns with the administration's priority of advancing equity for those historically underserved and adversely affected by persistent poverty and inequality.

### **Significance of the NPRM in Relation to 2019 Policy Manual Changes**

Before 2019, the Child Welfare Policy Manual provided that agencies could only seek reimbursement for “preparation for and participation in judicial determinations” performed by attorneys for a child welfare agency or government. In January 2019, however, the Children’s Bureau [revised the Manual](#) to clarify reimbursement is available for an attorney providing legal representation to a child who is a candidate for foster care or in foster care, and for an attorney providing legal representation to a child’s parent, to prepare for and participate in all stages of foster care related legal proceedings.

Additionally, in 2020 the Children’s Bureau issued a [technical bulletin on independent legal representation](#) which clarified that allowable administrative activities could also include costs for paralegals, investigators, peer partners or social workers who support the provision of independent legal representation. To date, [26 states and three tribes](#) have received federal Title IV-E funding for child or parent legal representation as a part of this policy change. Of these 26 states, eleven states currently receive funding for costs of legal representation provided before a petition has been filed. Other states and tribes are in the process of implementing plans to receive parent and child legal representation funding as well. In the aggregate, the 2019 policy change has had an enormous impact in just four years - providing a critical avenue for reducing the use of foster care, increasing reunification rates and timeliness for children in care, and ensuring that parent and child constitutional rights are protected under law.

**This NPRM builds on the 2019 policy change in several important ways by:**

- Codifying the policy change as a rule, an important step to securing long-term stability in the administration of IV-E funds for legal representation.
- Extending reimbursement, consistent with the Indian Child Welfare Act, to Indian Tribes that elect to intervene in state court proceedings.
- Providing consistency with other recent [regulatory developments supporting kin](#) who care for children in foster care, by allowing agencies to seek reimbursement for the costs of legal representation for kin in certain instances.
- Clarifying that reimbursement may be sought for the provision of legal representation in both foster care proceedings and in “other civil legal proceedings,” which are not currently covered by the 2019 Policy Manual change.
- Codifying existing policy which allows reimbursable legal representation to include multidisciplinary team members such as paralegals, investigators, social workers and peer advocates. The proposed rule also broadens the scope of reimbursable expenses to include activities such as facilitating, arranging, brokering, advocating, or otherwise linking clients with providers and services, a more extensive list of covered activities than previously included, which are often provided by multidisciplinary team members.
- Confirming that reimbursement may be sought for legal services that occur before a petition has been filed. Although the prior Policy Manual change also covers some degree of “pre-petition” legal services provided during a child’s candidacy for foster care, the proposed rule extends this allowance by covering pre-petition representation that is related to foster care proceedings and other civil legal proceedings.

In the coming weeks, the ABA will issue additional guidance on potential areas for comment. Please do not hesitate to reach out with questions in the interim.

[Jey.Rajaraman@americanbar.org](mailto:Jey.Rajaraman@americanbar.org).