***Below please find a comment template to provide feedback to the federal government on the*** [***proposed rule regarding Foster Care Legal Representation***](https://www.federalregister.gov/documents/2023/09/28/2023-20932/foster-care-legal-representation)***. Comments are due by November 27, 2023 and can be submitted either:***

* ***Via email to*** [***CBComments@acf.hhs.gov***](mailto:CBComments@acf.hhs.gov) ***with subject line “Comment on RIN: 0970-AC89, Document #2023-20932” OR***
* ***Via the Federal Rulemaking Portal:*** [***https://www.regulations.gov***](https://www.regulations.gov/)***.***

***If you have questions about this template, please contact*** [***Jey.Rajaraman@americanbar.org***](mailto:Jey.Rajaraman@americanbar.org)***,*** [***Allison.Green@NACCchildlaw.org***](mailto:Allison.Green@NACCchildlaw.org)***, or*** [***JPokempner@ylc.org***](mailto:JPokempner@YLC.org)***.***

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November \_\_\_, 2023

Kathleen McHugh

Director, Policy Division

U.S. Department of Health and Human Services

Administration for Children and Families (ACF)

Washington, D.C.

Re: Foster Care Legal Representation NPRM

Document Number: 2023-20932

RIN: 0970-AC89

Dear Director McHugh:

Thank you for the opportunity to comment on the Notice of Proposed Rulemaking (NPRM) for Foster Care Legal Representation. We greatly appreciate the Children's Bureau’s overall support of high-quality legal representation for all parties[[1]](#footnote-1) and this opportunity, in particular, to codify federal funding under Title IV-E for legal services. Many jurisdictions are already utilizing this fiscal stream[[2]](#footnote-2) pursuant to the 2019 change to the Child Welfare Policy Manual.[[3]](#footnote-3) The proposed rule will strengthen, accelerate and further embed the important work of legal representation into state practice.

[Provide information on your organization and why it has an interest in commenting. If you are a legal services organization utilizing Title IV-E funding, explain how it has helped. AND/OR use the following text]

As the preamble to the proposed rule explains, facilitating legal representation for children, parents, kin and tribes helps Title IV-E grantees meet their mandate. Research has shown that legal counsel prevents unnecessary foster care placement[[4]](#footnote-4), expedites reunification and other permanency pathways[[5]](#footnote-5), promotes placement with kin[[6]](#footnote-6), and reduces unnecessary school disruptions.[[7]](#footnote-7) Moreover, providing legal counsel to parents and children in civil cases such as housing and benefits can prevent family separation and help swiftly stabilize and support youth, parents and families experiencing foster care court cases. In addition to these positive outcomes, attorney representation is endorsed by lived experience experts[[8]](#footnote-8) and has been recognized by the Children’s Bureau as a “powerful tool for parent and youth voice.”[[9]](#footnote-9)

Name of individual/ Organization writes to support this important rulemaking and also to seek clarification on several key points.

***Request to Clarify the Definition of Independent Legal Representation***

The NPRM includes a proposed definition of independent legal representation that would permit the Title IV-E agency to further define the term ‘independent.’ This is a concern because Title IV-E agencies do not and should not have authority to define the practice of law. To avoid a conflict with state law and practice, we strongly recommend that the finalized rule:

* Clearly state that the term “independent legal representation,” can only be defined by the state entity and sources of authority that regulate attorney practice, ex. state bar associations, rules of professional responsibility (including attorney-client privilege and confidentiality), pertinent ethical opinions, state statutes and courts.
* Strike the following clause from the current language: “...does not accept compensation for representing a client from someone other than the client unless the client gives informed consent;...” This clause does not reflect current practice, as funding for the representation of indigent clients typically does not come from the client but, rather, from a variety of federal, state, local government and philanthropic sources, delivered through the state judicial branch, executive branch, or private organizations. In every case in which Title IV-E monies would be used for child, parent, kinship, or tribal legal representation, the funding would necessarily originate from an entity other than the client. Requiring client education and consent to these systems-level funding arrangements at the outset of every attorney appointment is impractical and unnecessary.

[Provide any information about why this issue is important to your organization. For example, are you in a state where legal representation funding flows through a different branch of government? Or a state where lay advocacy is conflated with legal representation?]

***Request to Affirm the Types of Eligible Legal Services Eligible & Purpose of Funding***

The NPRM’s preamble provides an array of excellent examples of legal services that could be funded with IV-E administrative funds. We recommend that the Children’s Bureau clarify and affirm that each of the following phases of work are included under the finalized rule:

(1) preventative legal representation[[10]](#footnote-10) *prior to a petition being filed to* assist a parent, child, or kinship caregiver in *the course of a CPS investigation*;

(2) preventative legal services *prior to a petition being filed* to assist a parent, child, or kinship caregiver with *non-CPS civil legal needs*, such as housing, public benefits, intrafamily violence, special education, etc.;

(3) *post-petition* legal representation *in a dependency case* from the time a petition is filed through the entire trajectory of the case (including a youth’s time in extended foster care and appeals), for a child, parent, or intervening tribe;

(4) *post-petition* civil legal services for a child or parent to address ongoing ancillary civil legal aid needs;

(5) legal representation for youth in extended foster care both *in the dependency cas*e and in *ancillary civil legal matters* as they transition from foster care to adulthood.

[Describe any additional examples you recommend be included in the preamble. Describe their connection to preventing foster care placement, moving to permanency, and/or assisting a youth transition to adulthood. Provide any examples you have of this work and its impact.]

Finally, in announcing the finalized rule, the Children’s Bureau should remind states of the expectation that Title IV-E funding should be used to supplement, not supplant, state funding for legal services. The federal Court Improvement Program (CIP) requires grantees to maintain at least one initiative focused on Quality Legal Representation, so these projects and partners offer a common starting point for a discussion about reinvestment of funding for quality improvement.

Thank you for your leadership in ensuring high-quality legal representation is integrated into federal rules and funding streams.

Sincerely,

1. U.S. Department of Health and Human Services, Administration of Children and Families. (January 2017). *High Quality Legal Representation for All Parties in Child Welfare Proceedings, Log No: ACYF-CB-IM-17-02*. [↑](#footnote-ref-1)
2. Title IV-E Programs Expenditure and Caseload Data 2022. Available at <https://www.acf.hhs.gov/cb/report/programs-expenditure-caseload-data-2022> [↑](#footnote-ref-2)
3. Children’s Bureau Child Welfare Policy Manual, Section 8.1B, Questions #30, #31& #32. [↑](#footnote-ref-3)
4. Sankaran, Vivek. "Case Closed: Addressing Unmet Legal Needs and Stabilizing Families." M. L. Raimon, co-author. Center for the Study of Social Policy (2014). [↑](#footnote-ref-4)
5. Duquette, Donald N., How to Improve Legal Representation of Children in America's Child Welfare System (February 8, 2022). U of Michigan Public Law Research Paper No. 22-002, U of Michigan Law & Econ Research Paper No. 22-002; See also Zinn, A. E. & Slowriver, J. (2008) *Expediting Permanency: Legal Representation for Foster Children in Palm Beach County.* Chicago: Chapin Hall Center for Children at the University of Chicago. [↑](#footnote-ref-5)
6. Lucas A. Gerber, et al., Effects of an interdisciplinary approach to parental representation in child welfare, 102 Child. & Youth Services Rev. 42 (2019). [↑](#footnote-ref-6)
7. Washington State Center for Court Research, (2021) *Evaluation of the Washington State Dependent Child Legal Representation Program*. Olympia, WA: Administrative Office of the Courts. [↑](#footnote-ref-7)
8. “A Historic Opportunity to Reform the Child Welfare System: Youth & Alumni Priorities on Older Youth Successful Transition to Adulthood.” The National Foster Care Youth and Alumni Policy Council. December 2020. [↑](#footnote-ref-8)
9. U.S. Department of Health and Human Services, Administration of Children and Families. (August 2019). *Engaging, Empowering, and Utilizing Family Voice in All Aspects of Child Welfare to Drive Case planning and System Improvement, Log No: ACYF-CB-IM-19-03*. [↑](#footnote-ref-9)
10. “How is Pre-Petition Legal Representation Critical to the Continuum of Legal Advocacy?” Casey Family Programs. (August 2021). Available at https://www.casey.org/pre-petition-legal-advocacy/. [↑](#footnote-ref-10)