

## Pre-Petition Legal Representation Reimbursement - Federal & State Guidance

Commission to Develop a Pilot Program to Provide Legal Representation to Families in CPS

August 22, 2022

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### I. Availability of Title IV-E funds for independent legal representation of children and parents, including pre-petition legal representation

Prior to 2019, federal policy prevented child welfare agencies from claiming Title IV-E administrative costs for legal services provided by an attorney for a child or parent, however as a Children’s Bureau Information Bulletin recently explained: <sup>1</sup>

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.

### II. Who is an eligible “candidate” for foster care?

Section 472(i)(2) <sup>2</sup> 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.

Section 8.1D of the Children’s Bureau *Child Welfare Policy Manual*, provides: <sup>3</sup>

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<sup>1</sup> 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>.

<sup>2</sup> 42 U.S.C. §672(i)(2), available at <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title42-section672&num=0&edition=prelim>.

<sup>3</sup> U.S. Dept. of Health and Human Servs., Admin. for Children & Families, Children’s Bureau, Child Welfare Policy Manual, §8.1D: Candidates for title IV-E foster care, at questions 2, 5, 6, 9 and 10, available at: [https://www.acf.hhs.gov/cwpm/public\\_html/programs/cb/laws\\_policies/laws/cwpm/policy\\_dsp.jsp?citID=79](https://www.acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=79), last visited Aug. 18, 2022.

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---

- ***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.”
- ***Report of abuse or neglect insufficient:*** “The fact that a child is the subject of a child abuse/neglect report falls far short of establishing that the child is at serious risk of placement in foster care and thus of becoming eligible for IV-E assistance.” Instead, a child becomes a candidate for foster care “at a point when the state has initiated efforts to actually remove a child from his or her home or at the point the state has made a decision that the child should be placed in foster care unless preventive services are effective.”
- ***Documenting candidacy:*** Federal policy requires the Title IV-E agency to make the foster care candidacy determination and stipulates three acceptable methods for documenting a child's candidacy for title IV-E foster maintenance payments:

***1) A defined case plan which clearly indicates that, absent effective preventive services, foster care is the planned arrangement for the child.***

The decision to remove a child from home is a significant legal and practice issue that is not entered into lightly. Therefore, a case plan that sets foster care as the goal for the child absent effective preventive services is an indication that the child is at serious risk of removal from his/her home because the title IV-E agency believes that a plan of action is needed to prevent that removal.

***2) An eligibility determination form which has been completed to establish the child's eligibility for title IV-E foster care maintenance payments.***

Completing the documentation to establish a child's title IV-E eligibility is an indication that the title IV-E agency is anticipating the child's entry into foster care and that s/he is at serious risk of removal from home. Eligibility forms used to document a child's candidacy for foster care should include evidence that the child is at serious risk of removal from home. Evidence of AFDC eligibility in and of itself is insufficient to establish a child's candidacy for foster care.

***3) Evidence of court proceedings in relation to the removal of the child from the home, in the form of a petition to the court, a court order or a transcript of the court proceedings.***

Clearly, if the title IV-E agency has initiated court proceedings to effect the child's removal from home, s/he is at serious risk of removal from the home.

- ***Periodic Reviews:*** If a child is not removed from the home, the Title IV-E agency must redetermine at least every six months that (1) the child remains at imminent (serious) risk of removal from the home; and (2) either the agency is making reasonable efforts to prevent the child's removal from the home or the agency is pursuing removal of the child through a court action.

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- **Note regarding Family First:** The federal candidacy definition used to determine whether a Title IV-E agency may claim administrative costs of independent legal representation is separate and distinct from the definition of “candidate for foster care” that Maine has adopted to determine eligibility for prevention services under the Family First prevention Services Act (FFPSA).<sup>4</sup>

### III. What types of pre-petition legal services are reimbursable?

- **Attorney advocacy related to the child welfare case.** Section 8.1B of the *Child Welfare Policy Manual* provides that the Title IV-E agency may “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.”<sup>5</sup>

The Children’s Bureau’s Technical Bulletin, *Frequently Asked Questions Independent Legal Representation*, lists examples of “allowable administrative activities” for independent attorneys preparing for and participating in all stages of foster care legal proceedings, including: independently investigating the facts of the case; meeting with clients; home or school visits; attending case planning meetings; preparing briefs, memos and pleadings; obtaining transcripts; interviewing and preparing clients and witnesses; maintaining files; presenting the case at the hearing; appellate work; and supervising other attorneys, paralegals, investigators, peer partners or social workers who are supporting the independent attorney in preparing for the foster care legal proceedings.<sup>6</sup>

- **Multidisciplinary team:** Section 8.1B of the *Child Welfare Policy Manual* also authorizes a Title IV-E agency to claim Title IV-E administrative costs of paralegals, investigators, peer partners or social workers to the extent that those professionals’ services are “necessary to support an attorney providing independent legal representation” as described above.<sup>7</sup>
- **Ancillary civil legal advocacy:** A recent Children’s Bureau Information Bulletin suggests that the Title IV-E agency may also be able to claim FFP for administrative costs of independent legal

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<sup>4</sup> The definition of a “candidate for foster care” that the Office of Child and Family Services within the Maine Department of Health and Human Services has developed for purposes of the Family First Prevention Services Act (FFPSA) is available online here: <https://www.maine.gov/dhhs/ocfs/data-reports-initiatives/system-improvements-initiatives/families-first-prevention-act/candidacy>.

<sup>5</sup> U.S. Dept. of Health and Human Servs., Admin. for Children & Families, Children’s Bureau, *Child Welfare Policy Manual*, §8.1B: Administrative Functions/Costs, Allowable Costs - Foster Care Maintenance Payments Program, at question 30, available at [https://www.acf.hhs.gov/cwpm/public\\_html/programs/cb/laws\\_policies/laws/cwpm/policy\\_dsp.jsp?citID=36](https://www.acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=36), last visited Aug. 18, 2022.

<sup>6</sup> U.S. Dept. of Health and Human Servs., Admin. for Children & Families, Children’s Bureau, Technical Bulletin, *Frequently Asked Questions: Independent Legal Representation* at 3 (July 20, 2020), available at, <https://www.acf.hhs.gov/cb/training-technical-assistance/technical-bulletin-faqs-independent-legal-representation>.

<sup>7</sup> *Child Welfare Policy Manual*, §8.1B: Administrative Functions/Costs, Allowable Costs - Foster Care Maintenance Payments Program, supra note 5, at question 32.

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representation for children who are candidates for foster care and their parents regarding civil legal issues that help preserve family integrity:<sup>8</sup>

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 IVE FFP for allowable costs related to foster care proceedings could be a source for kick starting such additional legal services.

#### IV. Non-federal question: May MCILS provide legal services pre-petition?

By statute, the Maine Commission on Indigent Legal Services (MCILS) “shall work to ensure the delivery of *indigent legal services* by qualified and competent counsel,” [4 M.R.S. §1801](#) (emphasis added), including in child protection cases, and MCILS’s executive director shall “administer and coordinate delivery of *indigent legal services*,” [§1805\(3\)](#) (emphasis added). MCILS’s enabling legislation defines “indigent legal services” to include “legal representation provided to . . . [a]n indigent party in a civil case in which the United State Constitution or the Constitution of Maine or federal or state law requires that the State provide representation.” [§1802\(4\)](#).

Under Maine’s Child and Family Services and Child Protection Act, indigent parents enjoy a limited right to counsel at state expense in child protection proceedings, all of which occur after DHHS files a child protection petition (with or without an *ex parte* request for a preliminary protection order):

Parents and custodians are entitled to legal counsel in child protection proceedings, except a request for a preliminary protection order under section 4034 or a petition for a medical treatment order under section 4071, but including hearings on those orders. They may request the court to appoint legal counsel for them. The court, if it finds them indigent, shall appoint and pay the reasonable costs and expenses of their legal counsel.

[22 M.R.S. §4005\(2\)](#); *see also* [22 M.R.S. §4002\(3\)](#) (defining “child protection proceeding” to include only proceedings subsequent to the filing in court of a child protection petition, petition to terminate a parent’s rights or a medical treatment petition).

Accordingly, it would be necessary to “notwithstanding” the restrictions in Title 4 in any legislation proposing to implement a pre-petition legal representation program within MCILS.

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<sup>8</sup> ACYF-CB-IM-21-06, *supra* note 1, at 12-13.