

# **Title IV-E Foster Care Program Federal Reimbursement for Pre-Petition Legal Representation**

Commission to Develop a Pilot Program to Provide Legal Representation  
to Families in the Child Protection System - **October 17, 2022**

## **Background**

Title IV-E of the Social Security Act authorizes federal funding of foster care, adoption assistance and other child welfare programs. The federal government reimburses States for a percentage of eligible costs of the state foster care program. The reimbursement percentage is referred to as the Federal Financial Participation (FFP) rate, or match rate. Title IV-E reimbursement is available for several categories of foster care program costs (foster care maintenance payments, trainings, etc.), including:

- **Foster Care Administrative Costs:** “Federal financial participation is available at the rate of fifty percent (50%) for administrative expenditures necessary for the proper and efficient administration of the Title IV-E Plan.”<sup>i</sup> FFP for administrative costs under Title IV-E is contingent on an approved **Public Assistance Cost Allocation Plan (PACAP)** that outlines the procedures to identify, measure and allocate costs to all programs administered or supervised by the State agency.<sup>ii</sup>

In 2019, the Children’s Bureau within the U.S. Department of Health and Human Services, Administration for Children and Families newly allowed Title IV-E agencies to be reimbursed at the 50% rate for administrative costs for independent legal representation provided to parents and children.<sup>iii</sup>

## **Restrictions applicable to Title IV-E reimbursement for independent legal representation**

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<b>Client</b>	Title IV-E reimbursement is available only for independent legal representation of: <sup>iv</sup> <ul style="list-style-type: none"><li>• <b>Post-petition:</b> Children in Title IV-E foster care or their parents: Title IV-E eligibility is determined based on a series of statutory requirements including, but not limited to, requirements relating to the removal of the child from the home (e.g., whether there is a judicial finding that reasonable efforts were made before removal, where required); the type of foster care placement (e.g., licensing requirements), and income eligibility (e.g., child would have been eligible for aid under AFDC requirements in effect in 1996).<sup>v</sup></li><li>• <b>Pre-petition:</b> Children who are candidates for title IV-E foster care or their parents. A “candidate” for foster care is a child “who is potentially eligible” for Title IV-E foster care (see test above), “who is at serious risk of removal from the home,” and for whom the Title IV-E agency’s involvement is “for the specific purpose of either removing the child from the home or satisfying the reasonable efforts requirement with regard to preventing removal.” <b>★ Key restriction—investigation insufficient:</b> The mere investigation of a report of abuse or neglect is insufficient to satisfy the candidacy test; instead, the Title IV-E agency must have either initiated removal proceedings or “made a decision that the child should be placed in foster care unless preventive services are effective.”<sup>vi</sup></li></ul>
<b>Professional</b>	Reimbursement for independent legal representation is available for the costs of: <sup>vii</sup> <ul style="list-style-type: none"><li>• Attorneys; and</li><li>• Paralegals, investigators, peer partners or social workers to the extent their services are “necessary to support an attorney providing independent legal representation.”</li></ul>
<b>Type of service provided</b>	The advocacy must help the qualifying child or parent of the qualifying child “prepare for and participate in all stages of foster care proceedings.” <ul style="list-style-type: none"><li>• Examples of “allowable administrative activities”: 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;</li></ul>

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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>viii</sup>

**★ Key restriction—ancillary civil legal services:** Although the Children’s Bureau encourages<sup>ix</sup> Title IV-E agencies “to consider using state, local and tribal funds, including title IV-E reimbursement dollars” to provide legal advocacy to address ancillary civil legal issues — *e.g.*, housing or domestic violence issues — the administrative cost of civil legal advocacy that is not directly related to preparing for or participating in all stages of foster care legal proceedings does not qualify for Title IV-E administrative cost reimbursement.<sup>x</sup>

**Potential policy change:** The Children’s Bureau is considering proposing an amendment to its federal regulations that would “allow a title IV-E agency to claim Federal financial participation for the administrative cost of” both pre-petition and post-petition independent legal representation in “related civil legal proceedings.”<sup>xi</sup>

**Required procedural steps**

- **Contract or MOU with independent legal provider:** Only the state Title IV-E agency may claim federal reimbursement for Title IV-E administrative costs, including the costs of independent legal representation. The Title IV-E agency may arrange for independent legal representation services to be delivered by another entity through a contract or memorandum of understanding.<sup>xii</sup>
- **PACAP amendment:** The Title IV-E agency must amend its PACAP to include independent legal representation, identifying the type of clients for whom legal representation costs will be incurred (*e.g.*, parents of children in foster care or candidates for foster care) and describe the measures that it will employ to identify, measure and allocate those costs.<sup>xiii</sup>

**Allocation methods**

- **Option 1: Identify eligible clients:** Theoretically, a state could identify and document that every client served is a child or parent of a child eligible for Title IV-E foster care (post-petition) or qualifies as a candidate for Title IV-E foster care (pre-petition).
- **Option 2: Allocation:** But, if a state provides independent legal representation without direct reference to the child’s Title IV-E foster care eligibility (or candidacy), the state must employ an allocation method to assure that IV-E funds are claimed for only the proportionate share of costs. The state’s proportion of children in foster care who are IV-E eligible (known variously as the “coverage,” “penetration” or “participation” rate) may be used to allocate the costs of independent legal representation, including pre-petition legal representation.<sup>xiv</sup> In Maine, the penetration rate was 48% in FY’20 and 46% in FY’21.<sup>xv</sup>

**★ Key restriction—reimbursement calculation:**

Cost to state of pre-petition legal representation	X	50% (FFP rate)	X	Approx. 46 - 48 % (Maine’s penetration rate)
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**Source of state matching funds**

The non-federal share of the cost of independent legal representation must derive from state or local appropriated funds or donated funds but may not derive from any federal funds or from third-party in-kind contributions or expenditures. A state may not use attorney *pro bono* services as a source of the state match, but might be able to consider the salary of an attorney funded by a public interest fellowship as a source of the state match.<sup>xvi</sup>

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## **Pathways to Title IV-E funding for pre-petition legal representation**

- **Option 1: Seek Title IV-E administrative cost FFP for the costs of providing pre-petition legal representation.** The federal guidance documents cited in this memorandum suggests a Title IV-E agency may enter into a contract or memorandum of understanding (MOU) with an entity to provide pre-petition independent legal representation to candidates for foster care or their parents, submit a PACAP amendment, and seek Title IV-E administrative cost reimbursement for the expense of the pre-petition legal representation, as long as the independent legal representation meets all of the legal and administrative requirements briefly summarized in this memorandum.
  - ★ **Important restrictions (from above):**
    - It may be inadvisable to design the pilot project to serve families whose children are subject to an investigation of suspected abuse or neglect (rather than limiting the project to children with open services cases) as these children do not qualify as “candidates for foster care.”
    - Title IV-E reimbursement is not currently available for ancillary civil legal services.
    - Federal reimbursement for covered services will be approximately 23% to 24% of the cost of those services (based on the 50% match rate and Maine’s ~ 46 - 48% penetration rate). The remaining program costs must be funded with state, local or private (not *pro bono*) funds.
  - ★ **Key observation:** Legislative staff have not been able to locate any program that currently claims Title IV-E reimbursement for pre-petition independent legal representation. According to national experts, Title IV-E agencies and pre-petition legal representation programs have not yet pursued this option likely because the process (administrative requirements, including billing and documentation requirements) for submitting such claims is not yet clear. The potential audit and financial penalty risks for submitting inappropriate claims may also have led to caution in this area, especially given the relatively low level of federal reimbursement (match rate X penetration rate) and the fact that reimbursement is not available for the cost of providing ancillary civil legal services, which are a hallmark of many pre-petition legal representation projects.<sup>xvii</sup>
- **Option 2: Use Title IV-E reimbursement funds from the provision of post-petition legal representation to fund pre-petition legal representation programs.** Approximately 23 states currently receive Title IV-E administrative cost reimbursement for providing post-petition independent legal representation to parents and children in child protection proceedings by entering into contracts or MOUs with post-petition legal services providers, submitting PACAP amendments and adhering to the applicable legal and administrative requirements briefly summarized in this memorandum.<sup>xviii</sup> A state is not restricted in the manner in which it utilizes the federal reimbursement dollars received after submitting these claims. Several states, including Iowa and Colorado, use the Title IV-E reimbursement dollars they obtain from providing post-petition legal representation to fund distinct pre-petition legal representation programs.
  - ★ **Key observations:**
    - If this option is pursued, the pre-petition legal representation program may be 100% federally funded (no state match is required); it is not necessary to design the program to serve “candidates for foster care”; and the program may provide ancillary civil legal services.
    - The amount of Title IV-E federal reimbursement dollars for post-petition legal representation that might be available to fund a pre-petition pilot program depends on multiple factors. In calendar year 2021, the Maine Commission on Indigent Legal Services (MCILS) approved vouchers totaling ~\$5 million for post-petition legal representation of indigent parents.<sup>xix</sup> Multiplying this figure by the FFP (50%) rate and Maine’s FY2021 penetration rate (46%), yields approximately \$1 million in potential federal Title IV-E reimbursement dollars. However, to the extent any of the state funds spent by MCILS on post-petition legal representation are used as a state match or as maintenance of effort dollars for other federal

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funds (such as TANF), these expenditures would not be available to use as a basis for Title IV-E reimbursement. In addition, the cost of additional staff resources, either within MCILS or DHHS (or both), required to claim the Title IV-E reimbursement for post-petition legal representation to indigent parents would reduce the amount of Title IV-E reimbursement dollars that would remain available to spend on a pre-petition pilot program.

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- <sup>i</sup> 45 C.F.R. §2356.60(c), at <https://www.ecfr.gov/current/title-45/subtitle-B/chapter-XIII/subchapter-G/part-1356>.
- <sup>ii</sup> 45 C.F.R. §1356.60(c), at <https://www.ecfr.gov/current/title-45/subtitle-B/chapter-XIII/subchapter-G/part-1356>, *see also id.* Part 95, Subpart E, at <https://www.ecfr.gov/current/title-45/subtitle-A/subchapter-A/part-95/subpart-E/section-95.505>.
- <sup>iii</sup> Children’s Bureau, ACYF-CB-IM-21-06 at 3, 10-11 (Jan. 14, 2021), at <https://www.acf.hhs.gov/sites/default/files/documents/cb/im2106.pdf>; *see also* Children’s Bureau, Child Welfare Policy Manual, §8.1B: Title IV-E, Administrative Functions/Costs, Allowable Costs - Foster Care Maintenance Payments Program, questions 30-32 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).
- <sup>iv</sup> Child Welfare Policy Manual, §8.1B, *supra* note iii at questions 30-32.
- <sup>v</sup> 42 U.S.C. §672, at <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title42-section672&num=0&edition=prelim>.
- <sup>vi</sup> 42 U.S.C. §672(i)(2), *supra* note v; Children’s Bureau, Child Welfare Policy Manual, §8.1D; Title IV-E, Candidates for title IV-E foster care, questions 2, 5, 6, 9 and 10, 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).
- <sup>vii</sup> ACYF-CB-IM-21-06, *supra* note iii at 3; Child Welfare Policy Manual, §8.1B, *supra* note iii at question 32.
- <sup>viii</sup> Child Welfare Policy Manual, §8.1B, *supra* note iii at question 30; Children’s Bureau, Technical Bulletin, *Frequently Asked Questions: Independent Legal Representation* at 3 (July 20, 2020), at <https://www.acf.hhs.gov/cb/training-technical-assistance/technical-bulletin-faqs-independent-legal-representation>; ACYF-CB-IM-21-06, *supra* note iii at 11.
- <sup>ix</sup> ACYF-CB-IM-21-06, *supra* note iii at 12-13.
- <sup>x</sup> Email correspondence from Bob Cavanaugh, Region 1 Program Manager, Children’s Bureau (Sept. 13, 2022).
- <sup>xi</sup> *See* U.S. Dept. of Health & Human Servs., Proposed Rule, Foster Care Legal Representation, RIN 0970-AC89 (Spring 2022), at <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202204&RIN=0970-AC89>. This proposed rule has not yet been formally proposed in the Federal Register, but appears in the federal government’s Spring 2022 Unified Agenda of Regulatory and Deregulatory Actions, available here: <https://www.reginfo.gov/public/do/eAgendaMain>.
- <sup>xii</sup> Technical Bulletin, *supra* note viii, at 7.
- <sup>xiii</sup> For more detail on the PACAP amendment requirements and the Children’s Bureau’s suggestions developing the PACAP amendment, *see* Technical Bulletin, *supra* note viii, at 4-5, 8; ACYF-CB-IM-21-06, *supra* note iii at 13-14. According to the Children’s Bureau, a title IV-E State Plan amendment, is *not* required, however. *See* Technical Bulletin, *supra* note viii, at 6.
- <sup>xiv</sup> Technical Bulletin, *supra* note viii, at 4.
- <sup>xv</sup> *See* Todd A. Landry, Director, Maine Dept. of Health & Hum. Servs., Child & Family Servs., *Memorandum: Overview of Title IV-E Funding* (Augusta 18, 2022), at <https://legislature.maine.gov/doc/8783>.
- <sup>xvi</sup> Technical Bulletin, *supra* note viii, at 6; Children’s Bureau, Child Welfare Policy Manual, §8.1F; Title IV-E, Administrative Functions/Costs, Match Requirements, question 2 at [https://www.acf.hhs.gov/cwpm/public\\_html/programs/cb/laws\\_policies/laws/cwpm/policy\\_dsp.jsp?citID=35](https://www.acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=35).
- <sup>xvii</sup> Zoom conversation on Sept. 1, 2022 with Vivek Sankaran, Esq., Director, Child Advocacy Law Clinic and Child Welfare Appellate Clinic, University of Michigan Law School and Emilie Taylor Cook, Preventative Legal Advocacy Fellow, Barton Child Law & Policy Center, Emory University School of Law; Zoom conversation on Sept. 22, 2022 with Emilie Taylor Cook and Melissa Carter, Executive Director, Barton Child Law & Policy Center, Emory University School of Law.
- <sup>xviii</sup> Children’s Bureau, FY 2021 Title IV-E Foster Care Claims and Caseload (Data Reported as of July 14, 2022) (Column AG: In-Plac. Legal Representation - Child or Parent FFP”), available at <https://www.acf.hhs.gov/cb/report/report/programs-expenditure-caseload-data-2021>.
- <sup>xix</sup> *See* Annual Report of the Maine Commission on Indigent Legal Services at p.5 (Jan. 14, 2022), at <https://legislature.maine.gov/doc/7944> (this figure was calculated by adding the attorney voucher totals for the following case types: “child protection petition”, “petition for termination of parental rights” and “review of child protective order”).