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Legislative Update:

New Title IV-E Dollars for Child and Parent Legal Representation Presents a Tremendous Opportunity to Improve Outcomes for Families

By: Christina Cullen

I. INTRODUCTION

In December 2018, the Children’s Bureau quietly released a revision to the Child Welfare Policy Manual regarding reimbursement of administrative costs under Title IV-E of the Social Security Act, a federal entitlement program for child welfare services. The change reversed a long-standing policy that specifically barred using Title IV-E funds to reimburse costs for legal representation of parents and children involved in the child welfare system. With this change, states and tribes can be reimbursed for up to 50% of legal representation costs for children who are either in foster care or are candidates for foster care and for their parents. The Children’s Bureau further clarified this policy change in April 2020 when it indicated that Title IV-E funds can also be used to support the costs of multidisciplinary legal representation, such as social workers and peer mentors.

Because the federal funds can only be claimed by a Title IV-E agency, in order to access these funds states and tribes must each set up systems to funnel the funds through the agency without sacrificing the independence of the legal counsel for children and parents. However, this process will be well worth the effort because it has the potential to open up millions of dollars in legal services funding for states and tribes. The increased funding presents an opportunity to expand and enhance legal representation for children and parents in the dependency system, and thereby improve outcomes for children by preventing removal and shortening time in foster care through quicker reunification and permanency.

II. THE CURRENT STATE OF LEGAL REPRESENTATION IN CHILD WELFARE PROCEEDINGS

In federal fiscal year 2017, child welfare agencies nationwide received four million estimated referrals of children suspected of being abused or neglected – 57% of which were investigated or assessed. About 17% of children investigated were found to be abused or neglected, which indicates that the majority of the parents investigated in 2017 were not found to have abused or neglected their children. Of the children who were determined to be maltreated, about 75% were victims of neglect, not physical or sexual abuse. That same fiscal year, there were more than 440,000 children already in foster care.

Despite the child welfare system’s impact on hundreds of thousands of families each year, the right to counsel for children and parents in child welfare proceedings is not guaranteed in every state. This variation among states is not surprising considering the lack

of federal law and Supreme Court holdings mandating counsel for either party. Although the Child Abuse Prevention and Treatment Act (CAPTA) requires states receiving grants to appoint guardian ad litem (GAL) to represent abused or neglected children in court, the GAL is not required to be an attorney. Further, while *In re Gault* established a right to counsel for children in delinquency proceedings, no such right has been found for children facing removal and permanent separation from their families. Parents facing allegations of abuse or neglect are in a similar situation. Federal law does not address the appointment of counsel for parents in child welfare cases at all. In 1981, the Supreme Court had the opportunity to rule on the right to counsel for indigent parents in *Lassiter v. Department of Social Services*. The Court held that parents, even those facing the most extreme child welfare proceedings, the termination of their parental rights, do not have a right to counsel.

This lack of federal law and guidance leaves child and parent representation up to states. A recent report entitled *A Children's Right to Counsel* found that only thirty-four states require legal representation for children in child welfare proceedings. A 2016 national survey found that parents have an absolute right to counsel in child protection proceedings in forty states plus the District of Columbia. In other states, the appointment of parent's counsel is either left to the court's discretion, triggered by the occurrence of some event, such as the agency seeking out-of-home placement for the child, or not provided for at all.

However, a right to counsel does not guarantee the quality of representation will be high, or even adequate for that matter. As *A Children's Right to Counsel* indicates, only about 20% of children are actually receiving adequate representation according to federal data. Parent representation is also inadequate in many jurisdictions. Whether attorneys represent children or parents, they commonly suffer from burnout due to high caseloads, low compensation, lack of training, and limited access to social workers and investigators. For example, although the National Association for the Counsel of Children recommends no more than 100 cases per attorney in dependency court proceedings, in some states the attorneys average more than 250 cases and in certain counties they exceed 400 cases. While this paints a grim picture, there is now an opportunity to transform the state of legal services for children and parents.

III. THE CHILD WELFARE POLICY MANUAL CHANGE

The change to federal funding for child and parent legal representation resulted not from an act of Congress, but from the Children's Bureau, an administrative agency, effecting policy change through the amendment of its policy manual. The Child Welfare Policy Manual was created by the Children's Bureau to provide guidance on the federal child welfare programs it operates, such as CAPTA, Title IV-B, and Title IV-E. The manual features policy information in a question and answer format. The three questions relevant to the new Title IV-E policy change are Questions 30, 31, and 32 in section 8.1B on Title IV-E administrative costs.

Question 30 asks whether a Title IV-E agency may claim administrative costs for legal representation for the agency, for a child who is a foster care candidate or is in foster care, and for the child's parents. The answer is now a resounding "Yes." While formerly only providing funding for agency representation, the manual specifies that the federal government will reimburse 50%¹ of costs required for the effective administration of the Title IV-E plan, including costs for independent legal representation of children and parents in foster care proceedings, from a child's removal up to the termination of parental rights.

In making this important change, the Children's Bureau acknowledged that legal representation for all parties in child welfare proceedings is necessary for the efficient functioning of the child welfare system. The manual indicates this is so for two main reasons: (1) it will help ensure that reasonable efforts to prevent removal and reunify families are actually being made, and (2) it will help parents and children engage and comply with case plans.

The Children's Bureau later added Question 31 to the manual, which specifies that tribes who have an agreement with a Title IV-E agency can also be reimbursed with Title IV-E funds for legal representation of children and parents in child welfare proceedings. Finally, in April 2020, the Children's Bureau added Question 32, stating that the Title IV-E funds can be used to cover the "costs of paralegals, investigators, peer partners or social workers" to "the extent that they are necessary to support an attorney in providing independent legal representation" for children and parents.

IV. IMPLEMENTATION OF THE POLICY CHANGE

The policy change may seem straightforward enough, but implementation will likely be complicated because the Title IV-E funds for legal representation must be disbursed through the child welfare agency, rather than directly to the legal organization or entity representing children or parents. To receive these funds, states must set up a process by which the Title IV-E funds are funneled through the agency to the programs incurring the legal service costs. This arrangement also raises an important concern: how to maintain the independence of parent and child attorneys if they are paid through the agency, an adverse party in child welfare proceedings.

¹ It is important to note that states and tribes will not be reimbursed 50% of their total legal representation costs for children and their parents but 50% of their total legal costs for the percentage of the state's foster children eligible for Title IV-E. Thus, the funding formula would look something like: [(State's total legal representation costs for eligible children and their parents) x (Percentage of state's foster children eligible for Title IV-E)] x 50% = Funding available for parent and child legal representation. The percentage of foster children eligible for Title IV-E differs from state to state but generally ranges from 25% to 75%. For more information, see Mark Hardin, *Claiming Title IV-E Funds to Pay for Parents' and Children's Attorneys: A Brief Technical Overview*, CHILD LAW PRAC. TODAY (2019), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/january---december-2019/claiming-title-iv-e-funds-to-pay-for-parents-and-childrens-attor/.

Fortunately, advisement from the Family Justice Initiative and other child welfare advocates has helped illuminate how states can implement the policy change. Specifically, courts or legal organizations providing representation to children and parents must work with the state child welfare agency to reach an agreement in which: (1) the courts or organizations report their legal representation costs to the agency, (2) the agency claims the funds from the federal government, and (3) the agency passes the federal funds onto the courts or organizations. This agreement can take the form of a memorandum of understanding or agreement that outlines what documentation the agency needs for reporting legal representation costs and how reimbursement of the courts or organizations will occur.

To address concerns about the independence of counsel, memorandums of understanding should also contain a conflict of interest agreement to ensure that the agency will not limit or infringe on the independence of parent or child attorneys. Further, the Family Justice Initiative notes that the policy change neither requires nor encourages the Title IV-E agency to play a role in administering the legal representation programs for children and parents.

An additional complication to receiving the new funds is that in some states the counties currently pay for legal representation of children and parents. Because the federal match is only available for state funds, counties may need to funnel their funds through the state agency to be eligible for the Title IV-E match. Such an arrangement could also take the form of a memorandum of understanding between the county and state agency, in which the county agrees to send the funds to the state agency, the agency agrees to pay for the representation costs in the county, and then the agency submits the representation costs to the federal government to receive the matching funds.

Navigating this somewhat tricky process is not stopping states from preparing to tap into the new Title IV-E funds for legal representation. The Chronicle of Social Change reported that California, Michigan, Minnesota, Wyoming, Washington, and Montana are already taking important steps forward. In hopes of bringing its extreme caseloads closer to recommended levels, California is boosting funding for dependency courts in anticipation of the new federal infusion of funds for parent and child legal representation. The state has also allocated a portion of its budget to cover the costs of additional staff to administer the new federal funds.

In Michigan, the Department of Health and Human Services has agreed to enter into a memorandum of agreement with counties interested in accessing the new Title IV-E funds. The counties must agree to continue their current funding for parent and child representation, which will result in a net increase in funding for counsel. However, the agency is restricting the funding to representation of parents who have a child in the care of the agency, potentially limiting the possibility of using legal counsel to prevent removals. Otherwise, the agency does not limit how the funds can be spent by the counties

and plans to educate counties on interdisciplinary parent representation models to encourage innovative approaches that improve permanency and reunification rates.

As Michigan demonstrates, figuring out how the legal representation programs will be able to access the federal funds match is only one part of the equation. The next step is to determine how these funds can be used to produce the biggest impact for children involved in the foster care system and their parents.

V. USING THE TITLE IV-E MATCH TO MOVE TOWARDS HIGH-QUALITY LEGAL REPRESENTATION

Legal representation for children and parents improves the function of the child welfare system and creates better outcomes for children and their families in a number of ways. First and foremost, adequate counsel ensures that the voices and wishes of children and parents are heard. It also helps provide judges with the information needed to make important decisions, from removal to the permanent severance of child and parent relationships. Studies have also found that competent counsel leads to greater engagement in case planning and services and to more family visitation time, both of which are strongly linked to reunification of families. Some studies have even found that providing counsel early enough to families can help prevent removal.

Further, research has found that high-quality multidisciplinary legal representation, which means including a social worker, parent or peer mentor, investigator, or other support staff on the legal team, leads to improved reunification rates and shorter time to permanency. These effects on reunification, permanency, and removal mean children spend less time in foster care, which is better not only for the well-being of children and families, but also for state budgets.

These studies strongly suggest that when states and tribes contemplate the best way to use the Title IV-E funds, they should plan for improvements not only to the quantity of representation but the quality, including considering multidisciplinary practice models. Moreover, the Children's Bureau has specifically called for collaboration among child welfare players to ensure that all parties in child welfare proceedings have high-quality legal representation.

What does "high quality" mean in the context of representing children and parents? The Family Justice Initiative has developed a list of both attorney-level and system-level attributes necessary for high-quality legal representation in child welfare cases. Individual attorney attributes include providing zealous and thorough legal advocacy both in court and outside of court, practicing cultural humility, and identifying and responding to additional legal needs of clients. A system seeking to provide high-quality legal representation should ensure adequate compensation and reasonable caseloads for attorneys; provide attorneys with access to interpreters, investigators, social workers, parent/youth advocates, and other professionals as needed; train attorneys on bias and

cultural humility; develop a diverse attorney workforce; appoint attorneys as early as possible; provide support and oversight to attorneys; and use data to continuously improve the system and its outcomes.

States and tribes interested in moving from abstract attributes to a more concrete understanding of high-quality representation can learn about and compare existing models in other cities and states. Some states, like Colorado and Washington, have established statewide systems for child and parent representation, while some cities and counties contract with multidisciplinary legal organizations, such as the Center for Family Representation in New York City or KidsVoice in Allegheny County, Pennsylvania. States, tribes, or counties may also consider funding pilot projects to test out new models. For example, the New Mexico Family Advocacy Program began as a pilot project in Bernalillo County but is now expanding to other jurisdictions in the state.

To make these key decisions about the use of new Title IV-E funds, states, tribes, and counties should work with their Court Improvement Program, courts, and other important child welfare stakeholders to develop a plan that will work best for the families in their jurisdiction.

VI. CONCLUSION

Allowing Title IV-E to help fund the legal representation of children and parents in foster care cases is one important step forward in reforming an overtaxed child welfare system. If these funds are thoughtfully used by states and tribes, it could lead to real change for families through quicker time to reunification and permanency, and the prevention of some removals from ever happening.

However, even with increased availability and quality of counsel for children and parents, the child welfare system may continue to hit a wall unless other system level and societal issues are addressed and tackled by states and Congress, such as racial disproportionality in foster care, high turnover among agency staff, an inadequate safety net for families, and the lack of affordable child care.

Historically, the pendulum has swung back and forth between protecting the child at the expense of the family and preserving the family at the expense of the child. With high-quality legal representation for all parties in child welfare proceedings combined with other important system reforms, maybe the pendulum will finally move towards equilibrium, offering the best protection to vulnerable children while preserving families whenever possible.

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