



FosterClub

November 27, 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

Submitted via Federal eRulemaking Portal: <https://www.regulations.gov>.

Dear Director McHugh:

On behalf of FosterClub, the national network for young people in foster care, we submit these comments on the Notice of Proposed Rulemaking (NPRM) for Foster Care Legal Representation. For the past two decades, our lived experience leaders have developed collective recommendations for improving the foster care system. The provision of high-quality legal representation has been and continues to be a central element of our collective recommendations.¹ Thank you for the opportunity to provide our input.

We write in strong support of the proposed rule and center on three main points:

1. High-quality legal representation provides us with an increased opportunity to be heard and participate in decisions about ourselves and our families lives.
2. Engage with us to provide further guidance, technical assistance and support to jurisdictions to successfully put high-quality legal representation into practice.
3. Increase opportunities for legal representation models that include peer-delivered services or peer support components, particularly for children and youth.

We also ask for clarification in two specific areas of the proposed rule:

1. Clarify the definition of independent legal representation.

¹ "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.

2. Affirm the types of legal services eligible & purpose of funding.

FosterClub believes when young people have the support they need and opportunity to drive change in their life, they become self-determined and do better. We also believe when the system listens to young people, it does better. We are grateful for the Children's Bureau's overall support of high-quality legal representation and this opportunity, in particular, to codify federal funding under Title IV-E for legal services. Many of our peers in care are already benefiting from the 2019 change to the Child Welfare Policy Manual.² The proposed rule will ensure that more of us who are still in foster care can receive the high-quality representation we deserve and need.

Too often, we go through our foster care experience without being heard by the adults making decisions about our lives, our families and our future. We know that high-quality legal representation can increase our input into these decisions, and that input will lead to meeting the goals that child welfare promised when we were removed - permanency, safety and well-being.

“Without an attorney, big pieces of my life were being decided without me. I wasn’t being asked if I wanted to attend court. I wasn’t asked about returning home, about whether there were family members who could care for me.” - Emilio, experienced foster care in Nevada

“I was lacking tools I needed to be successful and given tools that were not relevant to both my medical diagnoses and education needs. If I had a legal representative to stand up for me in court, I feel my education journey would have been significantly different. As a young person I was lingering around in care for almost 18 years because I did not have a proper legal representation. If young people have proper legal representation they would be more likely to have a plan that benefits them that goes with their permanency plan.” - Joshua Christian Oswald, experienced foster care in Indiana

“As a former youth in care who had no visitation with my family or biological parents because the courts had left it at my discretion, it is imperative that attorneys are pushing those issues, are trauma-informed and are advocating for the rights of the youth. At no time was it explained to me that I was the factor regarding the lack of visits, and there was no one having conversations to help me understand the circumstance.” - Ashley, experienced foster care in Illinois

² Children’s Bureau Child Welfare Policy Manual, Section 8.1B, Questions #30, #31& #32.

We affirm the Children’s Bureau’s recognition of legal counsel as a “powerful tool for parent and youth voice.”³ We know from both research and lived experience that legal counsel prevents unnecessary foster care placement⁴, expedites reunification and other permanency pathways⁵, promotes placement with kin⁶, and reduces unnecessary school disruptions.⁷ Further, providing legal counsel to parents and children in civil cases such as housing and benefits can prevent family separation or removal and help swiftly stabilize and support youth, parents and families experiencing foster care court cases.

“My mom didn’t have legal representation. She wasn’t provided information on how to attend court, when court was happening, before her rights were terminated. Without representation, she couldn’t get the resources she needed to get us back.” - Emilio, experienced foster care in Nevada

Legal counsel provided to transition-age youth can support a continued focus on permanency along with access needed resources and services. We know high-quality legal representation can also support addressing unique needs specific young people may have while in care, such as addressing immigration status⁸.

Only when young people have quality legal representation can they trust:

- *Their voices are heard regarding their lives, dreams, plans, and particularly in court*
- *They gain access to legal documentation (such as identification, birth certificate, school records, etc.)*
- *They are assured of oversight regarding health needs and assessments (including assessments used to determine entry into Quality Residential Treatment Programs) and concerns regarding over-medication and long-term medical concerns, and vaccination records.*

³ 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.

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).

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.

⁶ Lucas A. Gerber, et al., Effects of an interdisciplinary approach to parental representation in child welfare, 102 *Child. & Youth Services Rev.* 42 (2019).

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.

⁸ “Supporting Immigrant Children & Youth in Foster Care” National Foster Care Youth & Alumni Policy Council. December 2022.

- *Their education needs are met, including considerations of educational stability resulting from multiple moves. Support young people in sharing their needs and how to best support them - including whether an Individualized Education Plan (IEP) is appropriate.*⁹

Specific areas addressed in NPRM that we strongly support

We are pleased to see the clear inclusion of support for tribal legal representation, which serve to further uphold the adherence to the Indian Child Welfare Act (ICWA). We know these supports will help ensure those of us who are Native have our family, tribal, cultural and relational connections.¹⁰

We believe that successful implementation of high-quality legal representation will require partnership with organizations, networks and individuals with lived experience. We urge the Children’s Bureau to include specific language in the final rule encouraging jurisdictions to establish or expand these partnerships when looking to implement or utilize this federal support.

We are excited to see the explicit inclusion of peers as a part of an independent legal team, continuing the 2019 changes from the Child Welfare Policy Manual. We are encouraged to see jurisdictions looking to include peers as part of independent legal teams and hope to see further expansion once this rule is implemented. We hope to see a continued increase of and investment in peer supporters in delivering services to young people in foster care. We ask that language encouraging the inclusion of peers as part of an independent legal team be placed in the final rule.

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.’ Our concern is twofold: 1) Title IV-E agencies do not and should not have authority to define or interpret the practice of law, and 2) definitions that vary from agency to agency make it difficult or impossible to effectively educate youth and family members regarding the type of legal representation they are entitled to. To avoid a conflict with state law and practice and confusion for young people, we strongly recommend that the finalized rule:

⁹ “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.

¹⁰ Lived Experience Leaders tell the United States Supreme Court to #ProtectICWA in Amicus Brief. (August 2022). FosterClub.

- 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 young people to receive education on and consent to these systems-level funding arrangements at the outset of every attorney appointment is impractical and unnecessary.
- Urge the agencies to provide youth and family friendly language to describe the independent legal representation they can receive, how they can access the representation, the scope and role of the representation, and the standards that independent legal representation must uphold in representing them. This language should be developed and reviewed in partnership with the legal community and those of us with lived experience.

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

In order for young people to be able to advocate for the legal representation they need, it is important they have a clear understanding regarding the types of legal services they are eligible for. 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 representation¹¹ *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;

¹¹ “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/>.

- (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 case* and in *ancillary civil legal matters* as they transition from foster care to adulthood.

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. This is important to us as young people, to ensure that funding supports *more* of our peers who are still in care (and our families) accessing this needed representation.

Thank you for your leadership in responding directly to our concerns and in ensuring high-quality legal representation is integrated into federal rules and funding streams. We know this will continue to make a difference for our peers in care, and our families.

Please contact Angel Petite at systemchange@fosterclub.com with any questions or follow-up.

Sincerely,

A handwritten signature in black ink, appearing to read 'Celeste Bodner', with a stylized, cursive script.

Celeste Bodner
Executive Director