

Statement Urging New York State to Claim Federal Matching Funds Under Title IV-E of the Social Security Act for Independent Legal Representation for Children and Parents in Child Welfare Matters

COMMITTEE ON FAMILIES AND THE LAW

Families #1

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As of January 2019, states can receive federal matching funds for legal representation for children and their parents in child welfare matters.¹ Previously, federal funding for child welfare legal representation was available only for expenses of local department of social services agency attorneys but not for children's or parent's attorneys.² Policy changes to the federal Child Welfare Policy Manual now allow uncapped federal child welfare entitlement funds for attorneys, as well as social workers, parent or child advocates and case investigators to support an attorney providing independent legal counsel to parents and children.³

As of August, 2020 at least 10 states have started to draw down these funds including Arizona; California; Colorado; Louisiana; Maryland; Michigan; Montana; Utah; Washington; and Wisconsin. New York State has not yet set in place a protocol for drawing down these funds, foregoing millions of dollars in much-needed federal funding earmarked to prevent removal of children from their families and to support and strengthen families. The Children's Bureau has emphasized that high quality legal representation "is key to keeping families together and promoting the well-being and safety of children and parents alike."⁴

¹ U.S. Department of Health & Human Services, Administration for Children & Families, Children's Bureau, *8.1B TITLE IV-E, Administrative Functions/Costs, Allowable Costs - Foster Care Maintenance Payments Program*, Child Welfare Policy Manual, https://www.acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=36

² Mark Hardin, "Claiming Title IV-E Funds to Pay for Parents' and Children's Attorneys: A Brief Technical Overview," Child Law Practice Online, January 30, 2109, <https://15ucklg5c821brpl4dycpk15-wpengine.netdna-ssl.com/wp-content/uploads/sites/48/2019/05/Memo-IV-E-to-Attys-Tech-Issues-Final.pdf>

³ See e.g., Marty Guggenheim, *New Study Shows Providing Parents With Multidisciplinary Legal Representation in Child Welfare Cases Furthers Everyone's Interests*, Children's Bureau Express, , Vol. 21, No. 5 (June 2020), <https://cbexpress.acf.hhs.gov/index.cfm?event=website.viewArticles&issueid=217§ionid=2&articleid=5595>;

⁴ David Kelly and Jerry Milner, *High-Quality Legal Representation is Critical to Creating a Better Child Welfare System*, Child Law Practice Today, American Bar Association (July 17, 2019), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/january---december-2019/high-quality-legal-representation-is-critical-to-creating-a-bett/.

The New York State Bar Association Committee on Families and the Law (the Committee) strongly urges OCFS to immediately take all necessary steps to access these funds. Obtaining this funding is also a high priority for Chief Judge Janet DiFiore's Commission on Parental Legal Representation (Hon. Karen Peters, Chair) and the Statewide Committee on Attorneys for Children (Hon. Ruth Balkin, Chair) and the judiciary-funded attorneys for children programs.

This funding opportunity presents a major opportunity for New York State to defray the costs of providing constitutionally required effective assistance of counsel for child welfare involved children and their parents. It represents a significant pillar of the federal government's acknowledgment that a well-functioning child welfare system requires that all parties – the child welfare agency, children, and their parents - receive high quality legal representation at every stage of a child welfare agency's intervention into a family.⁵ As explained by the Children's Bureau leaders, this policy change was made "because we know that without high-quality representation, families and children often experience a system where their voices are not fully heard and their needs go unarticulated and unmet. High-quality legal representation is key to keeping families together and promoting the well-being and safety of children and parents alike."⁶

In light of the current COVID-19 pandemic and its inevitable impact on the finances of the state, the need to pursue this funding is even more urgent and imperative. As stressed by Children's Bureau Associate Commissioner Jerry Milner in a March 27, 2020 Letter to Child Welfare Legal and Judicial Leaders:⁷

⁵ E.g., Health and Human Services, Administration for Children and Families, Children's Bureau, *High Quality Legal Representation for All Parties in Child Welfare Proceedings*, ACYF-CB-IM-17-02, <https://www.acf.hhs.gov/sites/default/files/cb/im1702.pdf>; John Kelley, *New Funding Rule Aims to Boost Effectiveness of Legal Counsel in Dependency Cases*, Chronicle of Social Change, April 27, 2020, <https://chronicleofsocialchange.org/child-welfare-2/childrens-bureau-expands-federal-funding-parent-child-counsel/42892>; See also White House Executive Order on Strengthening the Child Welfare System for America's Children, June 24, 2020, directing, the Secretary of the Administration for Children and Families to, among other things "provide guidance to States regarding flexibility in the use of Federal funds to support and encourage high-quality legal representation for parents and children, including pre-petition representation, in their efforts to prevent the removal of children from their families, safely reunify children and parents, finalize permanency, and ensure that their voices are heard and their rights are protected."), <https://www.whitehouse.gov/presidential-actions/executive-order-strengthening-child-welfare-system-americas-children/>

⁶ David Kelly and Jerry Milner, *High-Quality Legal Representation is Critical to Creating a Better Child Welfare System*, Child Law Practice Today, American Bar Association (July 17, 2019), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/january---december-2019/high-quality-legal-representation-is-critical-to-creating-a-bett/; See also *Technical Bulletin: Frequently Asked Questions – Independent Legal Representation*, Children's Bureau (July 20, 2020), <https://www.acf.hhs.gov/cb/resource/technical-bulletin-faqs-legal-representation>

⁷ *Letter from Jerry Milner to Child Welfare Legal and Judicial Leaders*. Children's Bureau Express, April 2020, Vol. 21, No. 3, <https://cbexpress.acf.hhs.gov/index.cfm?event=website.viewArticles&issueid=215§ionid=1&articleid=5544>

Despite the public health crisis that exists, it is critical that child welfare agencies and courts work together to ensure that the requisite judicial proceedings continue during this time of uncertainty . . . Therefore, we urge all attorneys, courts, Court Improvement Programs (CIPs) and administrative offices of the courts to work together to ensure that parents, children, and youth are well represented and able to participate in all proceedings in which judicial determinations are made . . . “.

The Committee therefore calls upon OCFS and the Executive to institute a process for concluding all necessary agreements to facilitate implementation. Other states, such as Colorado and Louisiana instituted regularly scheduled meetings with all relevant stakeholders to identify and address barriers and opportunities to implementation. In addition to the foundational step already taken of including the necessary statutory language for the State to access federal appropriations for this purpose, OCFS should similarly call together stakeholders – including representatives from the Office of Court Administration, the Office of Indigent Legal Services, and other interested entities to conclude the necessary agreements quickly.
