

November 17, 2023

Ms. Kathleen McHugh, Director  
Policy Division, Children's Bureau  
Administration for Children and Families  
U.S. Department of Health and Human Services  
330 C Street, SW  
Washington, DC 20201

Re: Comments Regarding Foster Care Legal Representation (RIN 0970-AC89) Published September 28, 2023, in the *Federal Register*

Please accept the comments of the National Indian Child Welfare Association (NICWA) regarding the Notice of Proposed Rulemaking (NPRM) published on September 28, 2023, in the *Federal Register* (RIN 0970-AC89). NICWA is a national American Indian/Alaska Native (AI/AN) nonprofit organization based in Portland, Oregon with an all-Native Board of Directors. NICWA has been a leader in the development of public policy that supports the well-being of AI/AN children and families and tribal self-determination in child welfare and social services for over 40 years. We have extensive knowledge and expertise in federal child welfare programming, including Administration for Children and Families (ACF) programs under Title IV-B and Title IV-E of the Social Security Act. NICWA frequently provides technical assistance and training to tribes and states and engages with tribal and state child welfare agencies in establishing policies and procedures that support tribal sovereignty and foster community-driven and culturally based solutions to child abuse and neglect, including the critical role of tribal intervention in state child custody proceedings under the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.). The Indian Child Welfare Act is the primary federal law that provides requirements for Indian children in state court proceedings and recognizes tribal nation's sovereign right to intervene in state child custody proceedings. Our comments focus on the impact of the NPRM on AI/AN children, families, and tribal nations.

## **Background**

We appreciate ACF's recognition of the impact that legal representation has on the ability of an AI/AN child's tribe to exercise their right to intervene in state child custody proceedings (as described under 25 U.S.C. § 1911(c)) and how intervention by the tribe can help minimize unnecessary separation of AI/AN children and families and maximize placement of AI/AN children with extended and tribal families. We also commend ACF for acknowledging the importance of independent legal representation in this proposed rule change. The NPRM proposes to provide reimbursement for legal representation for Title IV-E eligible children in foster care and children who are eligible for Title IV-E foster care, but not yet placed in out of home care, their parents, and their relative caregivers. Supporting children and families early is essential to preventing entry into foster care and ensuring that families have access to needed services that support reunification. These proposed rule changes recognize the need for ongoing support to and collaboration with tribal nations so they can exercise their rights to self-governance and self-determination, including the right to protect the best interests of their tribal children and families.

While tribal nations have the legal right to intervene in state child custody proceeding involving their children, in some cases, tribes are not represented by attorneys due to limited access to funding that can support legal services. Not having access to legal representation in ICWA cases can impact the timing of tribal intervention and contribute to delays and disruptions to the child's placement and access to culturally appropriate services for the family. If a tribe does not have access to legal representation early in an ICWA case, it could create a risk for delays in proceedings or having to redo proceedings that were out of compliance with ICWA.

As an effort to support tribes in accessing legal representation in state child custody proceedings, California recently authorized the use of state general funds to provide participating tribes with funds to support the costs for legal counsel to represent the tribe in state child custody proceedings in California.

[Assembly Bill 179](#) authorizes the California Department of Social Services to contract with tribes to provide funding to support a portion of the costs of legal representation in ICWA cases. This is providing a number of tribes the first opportunity to have attorneys represent their interests and the interests of their communities in ICWA cases. This state example underscores the need for greater financial support for legal representation this NPRM is proposing. Supporting funding for legal representation that is available to all tribal nations is necessary, including tribes that are not operating their own direct Title IV-E program or in a Title IV-E agreement with the state. Supporting legal representation for tribal nations recognizes that tribes have the authority to exercise sovereignty provided there are resources available to protect their children and families.

### **Proposed Regulation Changes**

*§ 1356.60(c)(4)(i) Legal representation for the Title IV-E agency or any other public agency in agreement under which the agency has placement and care responsibility of a Title IV-E eligible child*

The proposed rule change continues current regulatory language that allows Title IV-E agencies to seek reimbursement for costs related to preparing for and participating in judicial determinations, while specifying new language that attorney legal representation is an allowable cost and that it includes public agencies and tribes that have Title IV-E agreements with a state. The process for recovering eligible administrative costs for legal representation will be processed through Title IV-E's eligible administrative costs reimbursement formula and requirements. The Title IV-E administrative costs reimbursement system provides federal match or Federal Financial Participation (FFP) for eligible administrative costs and requires the state or tribal IV-E agency to contribute non-federal match as well. This means that for eligible administrative costs under Title IV-E, the state or tribal IV-E agency will only be able to recover a portion of the total cost for eligible administrative expenses, such as attorney fees in this example. Nonetheless, NICWA believes this NPRM provides new opportunities to seek financial support for the costs of legal representation in child welfare proceedings that was previously not available, but very much needed in both tribal and state child welfare proceedings involving Native children and families.

There are a few ways in which tribes could access funds for legal representation. A tribe could administer a Title IV-E plan directly from the federal government (currently 14 tribal nations have approved Title IV-E plans) and claim reimbursement for legal representation in foster care proceedings that occur in tribal court. A tribal nation could have a Title IV-E agreement with a state that would allow them to claim reimbursement through the state's plan for legal services in tribal court proceedings and possibly state court proceedings involving a tribal member child. A third possibility is if a state Title IV-E agency were to allow tribes that do not operate a Title IV-E program, either directly or through an agreement, the opportunity to seek reimbursement for legal services provided in state court proceedings for eligible parties (child, parent, relative caregiver, and tribe) and if the AI/AN child is Title IV-E eligible.

We also noticed the summary description of the proposed rule includes "tribe", but this language is not included in the proposed regulation change. We recommend that the proposed rule change include "tribe" after "other public agency" to read as follows: "Legal representation in foster care proceedings provided by an attorney representing the Title IV-E agency or any other public agency or tribe..." (§ 1356.60(c)(4)(i)).

*§ 1356.60(c)(4)(ii) Independent legal representation for foster children, the child's parents, and the child's relative caregiver*

We commend ACF for their work to support independent legal representation for foster children, their parents, and relative caregivers. Access to timely independent legal representation for AI/AN children, their parents, and relative caregivers is essential to preventing unnecessary removal, helping children stay connected to their families and tribes, and promoting ICWA compliance, including 25 U.S.C. § 1912(b) which recognizes the rights of the Indian child and their parents or Indian custodians to court-appointed counsel. We emphasize that child neglect is by far the most common form of child maltreatment that AI/AN children experience, which is often associated with structural barriers such as unstable housing or homelessness, food insecurity, unemployment, and lack of transportation and

educational opportunities. Substance use and mental health treatment services can also be in short supply for many of the tribal families where child neglect is present. These circumstances can create risk for AI/AN children, parents, and relative caregivers of becoming involved in civil legal proceedings, whether court or administrative based, which can have great impacts on their ability to provide a safe home and appropriately support the child in need of care.

The NPRM recognizes that children, parents, and relative caregivers may need legal assistance to improve access to needed services that help parents keep their children at home safely and support relative caregivers. However, in § 1356.60(c)(4)(ii) it does not identify tribes in the list of parties that can have their legal services reimbursed in preparation for or participation in foster care or other civil legal proceedings. Attorneys representing tribes may also be involved in these other types of civil legal proceedings to ensure ICWA requirements are being met and to support processes that help AI/AN children, parents, and relative caregivers access needed support services. Given that many tribal families would be considered indigent or unable to afford competent legal services and AI/AN parents may not be appointed separate legal counsel, attorneys working on behalf of tribal nations may be the only available legal counsel for these parties to advocate on their behalf in other civil legal proceedings. This is especially important for families accessing services or addressing other civil legal issues that are barriers to children and parents meeting their case plan goals. This legal representation is often pro bono and does not interfere with the tribe's interests, which are tied to protecting its tribal members, and may include court or administrative hearings regarding housing eviction, access to basic assistance like Supplemental Nutrition Assistance Program (SNAP) or Supplemental Security Income (SSI), tribal membership or assistance eligibility hearings, or securing a restraining order against individuals that pose a threat to the child or custodial parent. Anytime there is a legal determination that could negatively impact a child's ability to stay safely in their home or the ability of a parent or relative caregiver to support and protect a child, the lack of legal counsel should not be the reason for a failed effort. NICWA believes that ACF should provide the maximum opportunity for legal counsel to be available and supported, including the addition of attorneys that work on behalf of tribes to the list of parties that can have their legal services reimbursed in § 1356.60(c)(4)(ii).

The NPRM states that Title IV-E agencies may claim the cost of paralegals, investigators, peer partners or social workers that support an attorney providing independent legal representation to the extent that they are necessary to support the attorney. This is consistent with the Child Welfare Policy Manual at Section 8.1B Title IV-E, Administrative Functions/Costs, Allowable Costs - Foster Care Maintenance Payments Program, Question #32. However, the Child Welfare Policy Manual in this section and the NPRM do not identify the list of non-attorneys that represent tribes as eligible to submit claims for eligible administrative expenses. Many tribal attorneys work closely with non-attorneys, such as tribal social workers, to prepare for and participate effectively in legal proceedings, including legal civil proceedings outside of typical foster care proceedings. This could include tribal or state foster care proceedings or some of the legal civil proceedings identified in the paragraph above. While having an appropriately trained and barred attorney to provide legal counsel is preferable, ICWA does not require this and neither do some tribal and state courts (See, e.g., *J.P.H. v. Fla. Dep't of Children & Families*, 39 So.3d 560 (Fla. Dist. Ct. App.2010) (per curiam); *State v. Jennifer M. (In re Elias L.)*, 767 N.W.2d 98, 104 (Neb. 2009); *In re N.N.E.*, 752 N.W. 2d 1, 12 (Iowa 2008); *State ex rel. Juvenile Dep't of Lane Cty. v. Shuey*, 850 P.2d 378 (Or. Ct. App. 1993); see also SDCL § 26-8A-33 and BIA ICWA Guidelines § A.3.). As mentioned above, most tribes have very modest budgets and can't afford to send an attorney to every legal proceeding involving a tribal child, parent, or relative caregiver. Often tribal social workers will undergo training with attorneys to help them develop skills to advocate for the rights of tribal members in state court proceedings, including educating the court about ICWA requirements and the most effective ways to address the unique needs of tribal children, families, and relative caregivers. These non-attorney, tribal representatives also work with tribal attorneys to assess the need for appropriateness of case plans and treatment goals, out of home placement, preparation of Qualified Expert Witnesses, access to culturally appropriate services, and transfer of jurisdiction from state court to tribal court. Not specifically naming tribes in this part of the NPRM runs the risk of states that would otherwise be open to helping reimburse the activities of tribal non-attorneys in state court proceedings, feeling they can't pursue agreements with tribes to support these eligible claims and possibly negatively impact overall efforts by states to allow tribal non-attorney representation. Protecting the rights of AI/AN children, parents, and relative caregivers

is a critical element of being able to reverse decades of discrimination and poor outcomes. NICWA believes that every opportunity to expand legal advocacy for AI/AN people should be afforded tribes.

We also have concerns that the proposed rule allows Title IV-E agencies to define the term “relative” and gives them flexibility to include kin and “fictive-kin” in the definition. Under ICWA, extended family member is defined by the law or custom of an Indian child’s tribe (as defined in 25 U.S.C. § 1903(2)). ICWA’s definition of extended family is important because it recognizes that tribes are sovereign nations with the authority to define who is a relative based on their own traditions, customs, and policy. We recommend the NPRM add language that encourages the Title IV-E agency to define relative according to the definition of the Indian child’s tribe when an Indian child is covered under ICWA.

There is also no mention of Indian custodian in the proposed rule. We recommend that ACF include Indian custodian to § 1356.60(c)(4)(ii), which would read as follows: “Independent legal representation provided by an attorney representing a child in Title IV–E foster care, a child who is a candidate for Title IV–E foster care, the child’s parent(s) or Indian custodian(s)…”

*§ 1356.60(c)(4)(iii) Legal representation by an attorney representing an Indian child’s tribe (as defined by 25 U.S.C. § 1903(5))*

We support ACF’s proposal to allow state Title IV-E agencies to claim administrative costs of legal representation provided by an attorney representing an Indian child’s tribe (as defined by 25 U.S.C. § 1903(5)). Providing reimbursement for legal representation when an Indian child’s tribe intervenes in state child custody proceedings recognizes the rights of tribal nations to intervene in ICWA cases and assert the tribe’s interests in protecting the health, safety, and well-being of their children and families. State Title IV-E agencies should reimburse for legal representation to promote early engagement of the child’s tribe in state court proceedings, which supports the tribes right to intervene in any state child custody proceeding as defined in 25 U.S.C. § 1911(c). Intervention by a child’s tribe in state child custody proceedings is critical to protecting the best interest of AI/AN children as tribal members and preserving a child’s vital connections to family, community, and culture. For example, intervention by the child’s tribe can support identification of foster care placement preferences (25 U.S.C. § 1915(b); 25 C.F.R. § 23.131) and coordination of culturally appropriate remedial services and rehabilitative programs for the family (25 U.S.C. § 1915(b)). The tribe’s experience caring for their children and families, which is informed by tribal policy, customs, and traditions around family orientation, child rearing, and child safety, can help states engage with AI/AN children, their parents or Indian custodians, and extended family members in case planning that supports safe reunification. This rule change may also support early determination of jurisdiction and prevent potential violations of key provisions of ICWA that could delay reunification efforts or impact placement decisions and provision of services. The tribe’s attorney may also provide information about the social and cultural standards of the child’s tribe, such as reunification and permanency based on the tribe’s customs, which is information that may not be available if the tribe cannot afford to provide legal representation. By supporting the tribe’s access to legal representation, the court can hear a tribe’s perspective and make informed decisions regarding the safety, placement, and permanency of their children and families. These are life-altering decisions that can impact the course of an AI/AN child’s experience of safety, belonging, health, and resilience into adolescence and adulthood. Legal representation is an important step to improving ICWA implementation by ensuring that tribes have a voice in decisions that impact the lives of their children and families.

We also recommend adding a provision that would require states to consult with tribal governments regarding reimbursement for tribal legal counsel. As we discussed this issue with ICWA legal experts and reflected on our own experiences, we can see there are a number of ways in which a state could establish a system to support tribal legal representation in state proceedings. It could include contracting with tribes individually or as a collective group, integration with existing state legal services contract agencies, or utilizing a tribal organization. Each state has a different relationship with their tribal nations and different capacities and circumstances. We have witnessed other federal statutory requirements under Title IV-B and Title IV-E that require state consultation with tribal nations on child welfare matters

improve approaches and collaboration on services and policies that impact AI/AN children and families. We believe this is another state-tribal collaboration that could benefit from this type of guidance and help identify the best possible arrangements for both tribal nations and states.

## **Conclusion**

Improving access to legal representation for AI/AN children and families and tribal nations is necessary to ensure the rights of all parties involved are maintained and their voices heard in these often life changing circumstances. We recommend that ACF incorporate the following changes to the proposed rule to maximize access to legal services for Native children, parents, relative caregivers, and tribal nations: (1) explicitly include “tribe” after “other public agency” under § 1356.60(c)(4)(i); (2) add Indian custodian to read “the child’s parent(s) or Indian custodian(s)” under § 1356.60(c)(4)(ii); (3) add language to encourage the Title IV-E agency to define relative using the definition of the Indian child’s tribe when an Indian child is covered under ICWA; (4) add attorneys that work on behalf of tribes to the list of parties that can have their legal services reimbursed; (5) expand the list of non-attorneys to include tribal representatives; and (6) add language to require states to consult with tribal governments as a means to develop systems for reimbursement of tribal legal counsel. Considering the recent *Haaland v. Brackeen* decision, these are important steps to improving ICWA implementation and preventing the separation of AI/AN children from their families and tribal nations. We greatly appreciate the opportunity to provide comments on the proposed changes in this NPRM and the work that ACF has done to move this work forward. If you have any questions or comments, please contact NICWA’s Government Affairs and Community Development Specialist Mariah Meyerholz at [mariah@nicwa.org](mailto:mariah@nicwa.org). We look forward to continued partnership opportunities that support ICWA implementation, tribal self-governance, and the safety and well-being of AI/AN children and families.

## **References**

National Indian child Welfare Association. (2021). Disproportionality in child welfare fact sheet. <https://www.nicwa.org/foster-care-adoption/>