



441 G St. N.W.
Washington, DC 20548

B-336357

May 28, 2024

The Honorable Ron Wyden
Chairman
The Honorable Mike Crapo
Ranking Member
Committee on Finance
United States Senate

The Honorable Jason Smith
Chairman
The Honorable Richard Neal
Ranking Member
Committee on Ways and Means
House of Representatives

Subject: *Department of Health and Human Services, Administration for Children and Families:
Foster Care Legal Representation*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Health and Human Services, Administration for Children and Families (ACF) entitled “Foster Care Legal Representation” (RIN: 0970-AC89). We received the rule on April 30, 2024. It was published in the *Federal Register* as a final rule on May 10, 2024. 89 Fed. Reg. 40400. The effective date of the rule is July 9, 2024.

ACF states that the final rule allows title IV-E agencies under the Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (Aug. 14, 1935), to claim federal financial participation (FFP) for the administrative costs of: (1) legal representation in foster care proceedings provided by an attorney representing the title IV-E agency or any other public agency (including an Indian tribe) which has an agreement in effect under which the other agency has placement and care responsibility of a title IV-E eligible child; (2) 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 (hereafter, referred to as a child “who is eligible for title IV-E foster care”), the child’s parent(s), the child’s relative caregiver(s), and the child’s Indian custodian(s) in foster care and other civil legal proceedings as necessary to carry out the requirements in the title IV-E agency’s title IV-E foster care plan; and (3) legal representation provided by an attorney representing an Indian child’s tribe, or representation of an Indian child’s tribe provided by a non-attorney, when the child’s tribe participates or intervenes in any state court proceeding for the foster care placement or termination of parental rights (TPR) of an Indian child who is in title IV-E foster care or an Indian child who is a candidate for title IV-E foster care.

Enclosed is our assessment of ACF’s compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to

the subject matter of the rule, please contact Charlie McKiver, Assistant General Counsel, at (202) 512-5992.

A handwritten signature in black ink that reads "Shirley A. Jones". The signature is written in a cursive style with a large initial 'S' and 'J'.

Shirley A. Jones
Managing Associate General Counsel

Enclosure

cc: Samuel A. Shipley
Senior Regulatory & Policy Coordinator
Department of Health and Human Services

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF HEALTH AND HUMAN SERVICES,
ADMINISTRATION FOR CHILDREN AND FAMILIES
ENTITLED
“FOSTER CARE LEGAL REPRESENTATION”
(RIN: 0970-AC89)

(i) Cost-benefit analysis

The Department of Health and Human Services, Administration for Children and Families (ACF) provided an accounting statement regarding the effects of this final rule. At a discount rate of 7 percent, ACF estimated that the rule would result in annual federal budget transfers of \$76 million (2021 dollars) and annual other transfers of \$76 million (2021 dollars) from the federal government to children eligible for title IV-E foster care under the Social Security Act (SSA), Pub. L. No. 74-271, 49 Stat. 620 (Aug. 14, 1935), over a 10-year period. At a discount rate of 3 percent, ACF estimated that the rule would result in annual federal budget transfers of \$80 million (2021 dollars) and annual other transfers of \$80 million (2021 dollars) from the federal government to children eligible for title IV-E foster care under SSA, over a 10-year period.

(ii) Agency actions relevant to the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 603–605, 607, and 609

ACF stated that this final rule does not affect small entities because it is applicable only to state and tribal title IV-E agencies. Therefore, ACF stated that a regulatory flexibility analysis is not required for the rule.

(iii) Agency actions relevant to sections 202–205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532–1535

ACF stated that this final rule does not contain mandates that would impose spending costs on state, local, or tribal governments in the aggregate, or on the private sector, in excess of the threshold.

(iv) Agency actions relevant to the Administrative Pay-As-You-Go-Act of 2023, Pub. L. No. 118-5, div. B, title III, 137 Stat 31 (June 3, 2023)

Section 270 of the Administrative Pay-As-You-Go-Act of 2023 amended 5 U.S.C. § 801(a)(2)(A) to require GAO to assess agency compliance with the Act, which establishes requirements for administrative actions that affect direct spending, in GAO’s major rule reports. In guidance to Executive Branch agencies, issued on September 1, 2023, the Office of Management and Budget (OMB) instructed that agencies should include a statement explaining that either: “the Act does not apply to this rule because it does not increase direct spending; the Act does not apply to this rule because it meets one of the Act’s exemptions (and specifying the relevant exemption); the OMB Director granted a waiver of the Act’s requirements pursuant to section 265(a)(1) or (2) of the Act; or the agency has submitted a notice or written opinion to the OMB Director as required by section 263(a) or (b) of the Act” in their submissions of rules to

GAO under the Congressional Review Act. OMB, *Memorandum for the Heads of Executive Departments and Agencies*, Subject: Guidance for Implementation of the Administrative Pay-As-You-Go Act of 2023, M-23-21 (Sept. 1, 2023), at 11–12. OMB also states that directives in the memorandum that supplement the requirements in the Act do not apply to proposed rules that have already been submitted to the Office of Information and Regulatory Affairs, however agencies must comply with any applicable requirements of the Act before finalizing such rules.

This final rule does not discuss the Act. In its submission to us, ACF stated that it did not prepare a statement regarding compliance with the requirements of the Act.

(v) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

On September 28, 2023, ACF published a proposed rule. 88 Fed. Reg. 66769. ACF stated that it received 122 comments in response to the proposed rule, including from 4 title IV-E child welfare agencies, 17 state and local government agencies, 4 American Indian/Native American tribes, tribal consortia, tribal organizations, and entities representing tribal interests, 31 national advocacy, public interest, philanthropic and professional organizations, 26 providers of legal representation, and 40 individual and anonymous entities. ACF responded to comments in this final rule.

Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501–3520

ACF stated that there is no burden to the federal government or to title IV-E agencies due to this final rule. In its submission to us, ACF further clarified that the rule does not contain any collection of information requiring OMB approval under the Act.

Statutory authorization for the rule

ACF promulgated this final rule pursuant to sections 620 *et seq.*, 670 *et seq.*, and 1302 of title 42, United States Code.

Executive Order No. 12866 (Regulatory Planning and Review)

ACF stated that OMB had designated this final rule as a significant regulatory action under the Order. Accordingly, ACF stated that it had estimated the cost and transfer impacts of this final rule as required by the Order.

Executive Order No. 13132 (Federalism)

ACF stated that this final rule does not have federalism impact as defined in the Order.