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# The Regulation of Foster Care:

*Using Federal Rulemaking to*

*Update Foster Care Licensing Standards*

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## ABSTRACT

The US foster care system is stretched far beyond its capacity due to a lack of funding, limited permanent foster child placement options, and outdated foster care guidelines. To address several of these issues, the Administration for Children and Families (ACF) enacted a rule in November 2023 to change the legal definition of “foster family home” in the Social Security Act to more closely align the foster care system with best practices. This paper explores how the ACF used federal rulemaking to modify foster family licensing standards, the implications for the foster care system, and additional recommendations that the ACF may consider to maximize the rule’s impact.

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## INTRODUCTION

The US federal foster care system is responsible for some of the most vulnerable youth in the country, supporting over 400,000 children at any time (The Policy Circle 2023). The system intends to provide secure and stable out-of-home care for children whose parents cannot care for them until they are safely returned home, placed with adoptive families, or placed in other planned permanency arrangements. Children are not meant to stay in the foster care system permanently, but due to a lack of funding, resources, and permanent placement options, many remain in foster care much longer than the system initially intended for them to be. For the foster children who stay in the system the longest, this means bearing the brunt of these limitations and not receiving the care and support that the system is meant to provide. Child welfare advocates and stakeholders recognize the problems created by the system's lack of capacity, but issues persist as foster care regulations and guidelines have not been revised to reflect more recent research that shows better outcomes for foster children placed with kinship foster families. To address the gap between the current laws and statutes and today's best practices for caring for foster children, the Administration for Children and Families (ACF) of the Department of Health and Human Services (HHS) turned to federal rulemaking to modernize the federal foster care system.

This paper examines how the ACF's modifications to the legal definition of "foster family home" in the Social Security Act through federal rulemaking address several ongoing issues in the federal foster care system. First, the paper describes the outdated nature of current foster family licensing standards, which do not reflect recent research emphasizing the importance of placing foster children with relatives. Then, it outlines the new legal definition of "foster family home," which ACF changed through a federal rulemaking effort that went into effect in November 2023. This change allows for varied licensing standards based on the emotional significance of the relationship between the foster family and the foster child. The paper then explores alternative approaches that ACF could have taken to update foster family licensing standards, examining the possible consequences of each. A regulatory analysis assesses the rule's costs, benefits, and distributional effects on foster families. The analysis concludes with additional considerations for ACF to support a better balance between updating licensing standards and ensuring the welfare of children in the system.

## GAPS IN CURRENT FOSTER FAMILY LICENSING STANDARDS

Foster care licensure or approval plays a crucial role in ensuring foster families receive adequate financial support. State and tribal Title IV-E agencies license or approve foster family homes so that families can qualify for government aid to financially support their foster children. According to the Code of Federal Regulations, which governs the federal foster care system, a child is considered to be in foster care when a Title IV-E agency removes them from their parent's home and places them in 24-hour substitute care (Administration for Children and Families 2023a, 9412). Thus, a child is in foster care regardless of whether

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the placement has a license or approval and regardless of whether the state or tribe receives payment for the child's upkeep. Licensure and approval are vital for foster family homes because they allow families to obtain financial support for their foster child/children through foster care maintenance payments (FCMPs) (Casey Family Programs 2020). A family must also be licensed or approved to be eligible for the Title IV-E Guardianship Assistance Program. This program offers longer-term financial support and benefits to guardians who provide permanent homes for children who are unable to safely return home (Administration for Children and Families 2023c).

Title IV-E agencies prefer placing foster children with relatives and kin – also known as kinship care – rather than non-relative foster families when possible. This preference stems from a growing shortage of qualified foster parents. It is also the result of research indicating that foster children placed with relatives have fewer adverse experiences in foster care compared to those placed with non-relative foster families (The Policy Circle 2023; Casey Family Programs 2020). Agencies created the current licensing and approval standards for foster family homes before research showed that kinship care is often the best choice for children in foster care. As such, they developed regulations to safeguard the safety of children living with strangers. However, for children being placed with relatives or family, the lack of applicability due to their preexisting familiarity renders these standards an additional burden to obtain licensure or approval. Agencies have yet to update the existing regulations to reflect current research on the value of kinship foster family placement.

Foster children are often placed with kin and relative caregivers in emergencies. In these instances, families are unlikely to have obtained a license or approval before assuming responsibility for the child. These caregivers rarely acquire approval or a license afterward, and irrelevant licensing and approval standards make the licensing process even more difficult. Without a license or approval, these families do not receive FCMPs and other resources that could support them in caring for their foster children. This lack of financial support often exacerbates obstacles faced by prospective relative caregivers with low incomes, some of whom are disqualified from providing care due to not meeting income and other standards established for licensing or approving foster family homes. Furthermore, many of the disqualified are families of color or members of other underserved communities, which exacerbates existing inequities in the foster care system.

## OVERVIEW OF ACF'S RULE

In 2023, ACF proposed a rule revising the definition of “foster family home.” The notice of proposed rulemaking (NPRM) was published in the Federal Register on February 14, 2023, with a public comment period extended until April 17, 2023 (Administration for Children and Families 2023a, 9411). The final rule was issued on September 28, 2023, and is in effect as of November 27, 2023 (Office of the Federal Register, National Archives and Records Administration 2023, 66670). The Federal Foster Care Program is authorized under Title IV-E of the Social Security Act, as amended, and is implemented by 45 CFR parts 1355, 1356,

and 1357 (Administration for Children and Families 2023b, 1). Thus, the NPRM proposed revising the definition of "foster family home" in section 1355.20 of the Act so that Title IV-E agencies can establish different standards for the two types of foster families -- kinship care and non-kinship care (Administration for Children and Families 2023a, 9413).

The rule allows foster family licensing and approval standards to vary between kinship guardians and non-relative caregivers. Prior to this rule taking effect, the regulation regarding licensing standards prohibited Title IV-E agencies from adopting separate foster family home licensing or approval standards for relative or kinship caregivers. While all foster family homes must meet the requirements specified by Title IV-E of the Social Security Act, this rule change enables agencies to remove certain requirements, such as the foster parent's age or the foster child's bedroom size for kinship foster family homes that have emotionally significant relationships with their foster children. Separate licensing standards make it easier for kinship foster families to meet the necessary requirements of licensure or approval to receive FCMPs, which significantly eases the financial burden of caring for foster youth.

The rule also modified section 1356.21(m) of the Act, requiring Title IV-E agencies to examine the access to and amount of financial support provided to kinship foster families through FCMPs (Administration for Children and Families 2023a, 9415). The new rule guarantees equal financial support through FCMPs for both licensed or approved kinship foster family homes and non-relative foster family homes. FCMPs are defined by the price of the services and supplies given to the foster child rather than the child's connection with the foster parent; however, kinship foster families are less likely than non-relative foster families to receive FCMPs due to a lack of licensure or approval (Children's Bureau 2023).

In addition, ACF wants to ensure that, even if the licensing requirements differ for the two types of foster families, both receive equivalent types and amounts of financial assistance (Administration for Children and Families 2023a, 9415). Thus, the rule requires one payment schedule for all licensed or approved foster family homes, regardless of the existence of a kin relationship. This rule also codifies the Supreme Court's decision in *Miller v. Youakim* (1979), which determined that children placed in relative foster homes that complied with a state's foster home licensing requirements are full participants in the Title IV-E program.

The rule also codifies that agencies should provide additional support to low-income prospective relative caregivers. Most of these caregivers come from families of color, underserved rural areas, or other communities where long-term systemic issues such as poverty impede intergenerational advancement among families. The rule does not further detail what or how this support will be, leaving this determination to the discretion of the Title IV-E agencies.

## ALTERNATIVE APPROACHES TO ACF'S RULE

The primary alternative proposal ACF considered to address the issue of licensure or approval for kinship foster families was to create a federal definition of relative and kinship by revising the Social Security Act itself. A federal definition of these terms would enable Title IV-E agencies to apply kinship or relative standards to only those individuals who meet the federal definition of a specific term, as opposed to a state or tribe definition of the same term. However, the agency concluded that Title IV-E agencies should continue to define family and kin, as a federal definition might impede the objective to license more kinship foster families and offer more FCMPs for foster children as some states and tribes may have more comprehensive definitions to provide better access to FCMPs (Administration for Children and Families 2023a, 9416). Moreover, a federal definition of kinship and relative caregivers would burden states and tribes by requiring them to amend their definitions in statutes and regulations.

Another alternative involves revising the licensing and approval standards defined in Title IV-E of the Act to reflect new developments in child welfare research. However, this approach would require Congress to amend the statute, transferring the authority to determine and implement revisions from ACF to Congress. Like the other alternative, this option would burden Title IV-E agencies, states, and tribes, who would need to spend significant time revising their policies to match Title IV-E standards.

## POSSIBLE CONSEQUENCES OF EACH APPROACH

As previously mentioned, introducing distinctions in the licensing or approval process for foster families based on their relation to the foster child they intend to care for could have further implications for more than just the foster families that immediately benefit. Regardless of ACF's chosen approach, Title IV-E agencies would require additional time and personnel to determine which standards apply to all foster families and which exclusively to non-kinship foster families. Implementing these changes would require further resources and would involve eliminating non-safety-related licensing and approval standards, such as the age and marital status of the foster parents, the size of the home, and the location of the foster child's bedroom. These changes would result in a distinct and more streamlined licensure or approval process for kinship foster families, while non-kinship foster families would remain subject to the same procedures as before the rule.

Ultimately, this would increase the number of licensed kinship foster family homes and the country's total number of licensed foster families. With more licensed foster families, the federal government would issue more FCMPs, incurring higher costs. Thanks to their increased chances of obtaining licensure, kinship foster families would be more likely to receive FCMPs, decreasing the financial burden of caring for their foster children. Because financial responsibility is a major factor deterring potential relative foster families, increased financial support would likely make relatives more willing to become foster parents and

seek licensure or approval. Improving access to FCMPs would also enhance equity in the foster care system by increasing the financial capacity of minority families and families with low income to care for foster children.

Foster youth also benefit from increased opportunities to be placed with kinship foster families. Research suggests that placing foster youth with kinship foster families leads to better experiences and outcomes for the children. Foster children in kinship foster family homes experience greater stability and reduced exposure to trauma, thanks to their familiarity with their foster families and smoother transitions during placements (Administration for Children and Families 2023a, 9414). Kinship foster families also help foster youth maintain their familial and emotionally significant relationships, which offer support and stability during a difficult period of their lives.

The potential consequences of the proposal and the alternatives are similar. However, the two suggested alternatives would be more time-consuming and costly to implement than the rule ACF implemented. Unlike the final rule, both alternatives would change federal law, requiring states and tribal agencies to revise their guidelines and regulations. This added requirement would impose a burden on Title IV-E agencies, exacerbating the already increased time and personnel needed compared to what the ACF had proposed. Some states and tribes already use broader definitions of “foster family home” than the federal government. Changing their laws to comply with federal law may be exclusionary, disqualifying some foster families that met the state or tribe’s requirements prior to any legal changes (Administration for Children and Families 2023a, 9416).

## REGULATORY ANALYSIS OF ACF'S RULE COST-BENEFIT ANALYSIS

The NPRM does not include an official cost-benefit analysis of the regulations, but its preamble does provide the estimated costs of the rule for the first year and first ten years. ACF estimates that improving the licensure or approval process for kinship foster families will increase the number of kinship foster families and placements. This, in turn, will increase the federal costs associated with FCMPs, foster care administration, and Title IV-E programs (Administration for Children and Families 2023a, 9417). ACF’s cost calculations assume that the number of kinship foster families would increase regardless of the rule, as the agency has seen this trend in recent years. However, the anticipated rise would be less than it would be with the rule. The federal government would also expect to issue fewer FCMPs because fewer kinship foster families would be licensed.

Using 2019 data as the base year to exclude any anomalies caused by the COVID-19 pandemic, ACF estimates that, without the rule, the federal government would spend \$351.7 million on FCMPs and \$491.3 million on administrative costs in one year (Administration for Children and Families 2023a, 9419). Over ten years, the federal government would spend \$4.07 billion on FCMPs and \$5.64 billion on administrative costs. With the rule in

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effect, ACF approximates that its regulatory changes will cost the federal government an additional \$28.8 million in the first year. Over ten years, the proposal will cost the federal government an additional \$3.09 billion. Additionally, it is expected that state and tribal Title IV-E agencies will be reimbursed with federal funds for the additional costs of allocating time and personnel to determine which licensing or approval standards are relevant for kinship foster families (Administration for Children and Families 2023a, 9419).

One criticism regarding these cost estimations is that ACF determined the rate at which kinship foster family placements may increase under the rule by using the number of projected caseloads. However, depending on the state and individual circumstances, biological siblings in the foster care system may be considered one or multiple cases since siblings can be separated and reunified at different points while in the system (Administration for Children and Families 2010, 22-23). The inconsistency across states and tribes of counting siblings as either one or multiple cases may skew ACF's predicted number of kinship foster families and, therefore, its estimates on the costs of the rule, particularly the increase in FCMP costs. ACF should consider alternative methods to more accurately estimate the rate at which kinship foster family placements will increase under the rule.

Another concern is the caseload growth rate ACF used to calculate these costs. According to the Office of Management and Budget's Circular A-4 primer, ACF should "present both a central 'best estimate,' which reflects the expected value of the benefits and costs of the rule, as well as a description of the ranges of plausible values for benefits, costs, and net benefits, which informs decision-makers and the public of the degree of uncertainty associated with the regulatory decision" (Office of Management and Budget 2011, 14). In the NPRM, ACF states that it used a varying growth rate of "5 percent in year 1, 15 percent in year 2, 25 percent in year 3, 45 percent in year 5" (Administration for Children and Families 2023a, 9418). However, ACF does not justify why it selected this varying growth rate, nor does it explain why it offered precise estimations for the rule's costs rather than a range of estimated costs for FCMPs and administrative expenses.

ACF's chosen caseload growth rate changes the estimated costs of implementing this regulation. For example, if the AFC calculated costs with an initial growth rate of 2.5 percent and the rate were to increase by 2.5 percent each year, the FCMPs' cost over ten years would be \$893.6 million, administrative costs would be \$1.25 billion, and the total cost would be \$2.14 billion. This is approximately one billion dollars less than what the NPRM estimates. Likewise, if the AFC calculated costs with a higher growth rate, such as six percent, and the rate were to increase by an additional six percent each year, the costs over ten years would be \$4.79 billion in FCMPs and \$6.69 billion in administrative costs, resulting in a total of \$11.48 billion spent on this rule over ten years—approximately eight billion dollars more than what ACF has estimated. The caseload growth rate clearly impacts government costs, so ACF should conduct a more rigorous sensitivity analysis on its key assumption for cost calculations to estimate the costs of implementing this rule better.



The benefits of this rule are not as quantifiable as its costs. While foster families will benefit from this regulation, technically, no benefits can be directly attributed to this rule. Foster families will likely benefit from federal income tax funds that the government will use to support them (Administration for Children and Families 2023a, 9419). ACF will distribute these funds to kinship foster families through resources and financial support, which should lead to better health, behavioral outcomes, and placements for foster children. Relative and kin guardianships also help preserve foster children's cultural identities, which can increase their self-esteem, decrease their levels of depression, and increase their rates of higher education. While the costs of this rule do not translate into financial benefits of an equivalent value for foster families, ACF should consider evaluating alternative non-financial measures that can demonstrate if and how this rule improves the foster care system. This will be addressed in further detail in the section entitled "Retrospective Review."

## DISTRIBUTIONAL EFFECTS

Given that the rule's purpose is to improve kinship foster families' ability to obtain licensure and thus receive FCMPs, the costs and benefits of the rule are borne by different stakeholders. The federal government alone will bear the costs associated with the rule, which consist of FCMPs and administrative costs. However, the rule benefits kinship foster families and the foster youth placed with them. The benefits will impact minority kinship foster families and families with low income more than others. The current foster care system treats kinship and non-relative foster family homes equally, putting all kinship foster families at a disadvantage, particularly those from minority backgrounds or with low income. The increased financial responsibility associated with taking in a foster child is one major obstacle that inhibits relatives from fostering a child they know is in the foster care system (Casey Family Programs 2020). Improved access to FCMPs should help address this issue, making it likely that more low-income and minority families will become licensed foster families.

## OTHER CONSIDERATIONS RECOMMENDATIONS

ACF's regulation to offer separate licensing or approval standards based on the foster family's relationship with a foster child is an important step in the right direction to improve the foster care system, but supporting kin placements cannot come at the expense of foster children's welfare or limit foster family opportunities. To address this, ACF may consider incorporating the following recommendations into the rule's implementation to ensure that its primary priority is the welfare of foster children.

First, ACF needs to ensure that Title IV-E agencies consider whether the relationship between a foster child and their potential kin foster family is emotionally significant and ensure that placing the child with that family will not harm the child. Title IV-E agencies should not simply place a foster child with a kinship foster family just because research

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shows relative placements to be better than those with non-relatives. Before deciding upon placement, agencies should evaluate the foster child's circumstances and relationship to their potential kinship foster family.

Then, ACF could add a stipulation to the rule concerning the allotment of time that all Title IV-E agencies receive to exhaust all kin foster family placement options for a foster child before shifting to non-kin placements. This would decrease the chances of foster children living in unstable environments, where they are placed and removed from multiple homes in a short period while a Title IV-E agency works to finalize their long-term placement. Research shows that removing a child from a place to which they have acclimatized and which they now consider "home" can do more harm than good, causing attachment disorders and potentially leading to other behavioral health issues (Hong et al. 2011, 865; Rubin et al. 2007, 341). By providing Title IV-E agencies with a time limit to identify all kinship foster family possibilities, ACF can better protect foster children from experiencing instability in the system.

Additionally, ACF should ensure that, while the rule allows Title IV-E agencies to remove barriers to licensing or approval for kinship families, it does not simultaneously create additional barriers for non-kinship foster families to seek licensure or approval. ACF's regulation aims to make the licensure and approval process easier for kinship foster families so that more of those families seek licensure or approval. At a time when the country is experiencing a nationwide shortage of foster families, ACF should work to increase the overall number of licensed foster families, not just kinship foster families. The agency cannot afford to help some foster families gain licensure at the expense of others. ACF should take care with the implementation of its rule so that new non-kin foster families do not endure more difficulties in obtaining licensure or approval.

## RESTROSPECTIVE REVIEW

As previously stated, ACF needs to determine a method for measuring how this regulation impacts foster children. Historically, the government has taken years or even decades to identify, let alone address, issues within the foster care system, so collecting data and conducting retrospective analysis is essential for ACF to be timely in identifying and solving problems in the system (The Policy Circle 2023). Neither the NPRM nor the final rule offer any plan for retrospective analysis or data collection regarding how ACF's new rule will affect foster care experiences or how the impacted foster children will fare as adults after they age out of the system. With little information available regarding outcomes, it is difficult to assess if any changes in the foster care system are improving the care foster children receive. Therefore, ACF should consider conducting a retrospective review using regulatory outcome measures to determine whether the regulation positively impacts the foster care system, especially foster children, and to measure the magnitude of that impact.

Researchers have found it more effective to focus on long-term rather than short-term

outcome measures because of the difficulty in determining how the foster care system has affected foster children with recent experiences in the system. Foster children often experience trauma and instability in their youth, but the ramifications of those experiences may not manifest until adulthood. Thus, most research on the foster care system examines adult outcomes of foster children who have aged out of the system. Adult outcomes can indicate how well or poorly the system prepared foster children for success in adulthood and to what extent the experience of being in foster care has harmed or helped foster children as they have grown up. The impact of foster care on adulthood is particularly evident when examining mental health issues such as post-traumatic stress disorder, depression, and anxiety, which current and former foster children experience at higher-than-average rates (National Conference of State Legislatures 2019). Since some indicators of childhood trauma and instability may take time to become evident, it is better to use measures extending at least ten to twenty into the future to see the true impact of the agency's new regulation.

To better understand the impact of the new rule, ACF should consider the following two regulatory outcomes in addition to others. The first potential outcome measure is the percentage of foster youth who have successfully prepared transition plans when they age out of foster care. The transition process of aging out of foster care and entering adulthood is typically challenging for foster youth (Child Welfare Information Gateway 2018, 1-2). Transition plans are meant to help foster children prepare to leave the system and to live independently as they enter adulthood. It is reasonable to assume that, by being placed in a foster family home where they have an emotionally significant relationship, these foster youth would have access to stronger support systems, experience greater stability, and be better prepared for adulthood. A broad and present support system would offer guidance and supervision to a foster child, along with a transition plan that is better tailored to the child's individual goals and interests. A personalized transition plan may increase the likelihood that the foster child will follow through with their plan as they leave the system.

The second proposed outcome measure that ACF should consider is the percentage of foster youth who experience homelessness after aging out of foster care. Many of the young adults experiencing homelessness have been in the system at some point in their lives (Dworsky et al. 2019, 6-7). With the new regulation, it is expected that foster children placed with a kinship foster family would have a more engaged support system of adults even after they age out of foster care. A better support system makes it more likely that a foster child who has aged out of the system and is facing homelessness or housing insecurity will receive intervention. It also suggests that, in being better prepared for adulthood, these foster children would be more financially independent and secure as adults, decreasing the probability that they may experience housing insecurity or homelessness.

## CONCLUSION

By using federal rulemaking to update the foster care system rule, ACF has demonstrated that it understands the need to update the current regulations on licensing standards to

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reflect recent research findings that kinship foster family placements, when possible, may best benefit foster children. While ACF may need to be more critical of how it implements this rule, its intention to better protect and care for foster children is worthwhile and necessary.

Given that there are no estimated and easily quantifiable financial benefits for this rule, ACF should also consider how to collect and retroactively analyze data to determine the effects that separate licensing standards would have on foster children and the foster care system. While it would be ideal to assume that any changes to the foster care system would improve the welfare of foster children, it is not realistic to do so, considering the current state of the system. Data collection and retrospective review are essential so that ACF can determine whether its rule is improving the foster care system, not harming it. This will also assist ACF in its ongoing efforts to improve the foster care system in the future.

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