

Criminal Background Checks, Barrier Crimes, and Foster Care Licensing: State Variations Complying with Federal Law & The Path Forward

The Adam Walsh Act

The federal government passed the Adam Walsh Child Protection and Safety Act of 2006 (“Adam Walsh Act”) seeking to protect “children from sexual exploitation and violent crime, to prevent child abuse and child pornography, to promote Internet safety, and to honor the memory of Adam Walsh and other child crime victims.”¹ Among its many provisions, this federal law obligates states, territories, and tribes (jurisdictions) to keep a sexual offender registry and crime database.

Within the context of the child welfare system, the Adam Walsh Act requires title IV-E agencies to conduct a variety of background checks on foster parent and adoptive parent applicants including a check of national crime information databases and state child abuse and neglect registries. Under this federal law, the state plan for foster care and adoption assistance requires procedures for criminal records checks, including fingerprint-based checks of national crime information databases for applicants before the foster or adoptive parent may be finally approved for placement of a child.²

Additionally, jurisdictions are required to check any child abuse and neglect registry maintained by the jurisdiction on any prospective foster or adoptive parent and on any other adult living in the home of such a prospective parent, and request such information from any other jurisdiction in which the prospective parent or other adult has resided in the preceding five years. If an applicant has a specified Adam Walsh felony conviction in their criminal history, they are not eligible to become a licensed foster or adoptive parent. Crimes that prevent licensure are called barrier crimes.

The Adam Walsh Act splits barrier crimes into two categories: permanent barrier crimes and five-year barrier crimes. If an applicant’s criminal history check reveals a felony conviction for a permanent barrier crime, the approval for placement of a child must not be granted regardless of when the conviction occurred.³ Permanent barrier crimes are a felony conviction for child abuse or neglect; for spousal abuse; for a crime against children (including child pornography); or for a crime involving violence, including rape, sexual assault, or homicide, but not including physical assault or battery.⁴ A five-year barrier crime prevents an applicant from being approved for placement if the felony was

¹ Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109–248, 120 Stat. 587 (2006).

² 42 U.S. Code § 671(a)(20).

³ *Id.* § 671(a)(20)(A)(i).

⁴ *Id.*

committed within the last five years.⁵ These five-year barrier crimes include a felony conviction for physical assault, battery, or a drug related offense.⁶

This issue brief lays out the landscape of states that adhere to Adam Walsh and those that go well beyond its requirements. For most states that include non-violent crimes as barrier or potential barrier crimes, the brief discusses how states assess or waive these crimes for relatives. This landscape of misalignment with federal law is set out so that states can reassess their barrier crime lists and complicated processes in light of a new federal rule allowing for Kin-Specific Foster Home Approval Standards.

The Adam Walsh Act in Practice

To effectively implement Adam Walsh requirements, states, territories, and tribes need to align their own criminal code with federal law and create specific lists of barrier crimes. However, this can be difficult. Adam Walsh's broad categories of felony convictions must be aligned with a state's detailed criminal code that does not simply list "murder," for example, but an array of degrees of murder and manslaughter. This difficulty likely contributes to the misalignment of state barrier crimes with Adam Walsh crimes, but it does not explain why over 30 states go well beyond the clear language of Adam Walsh and include misdemeanors and non-violent felonies. Shedding light on the array of barrier crime lists found in law, regulation, and policy highlights opportunities for reform.

As of January 2024, only 16 states and the District of Columbia exclusively follow the Adam Walsh Act and do not add additional barrier crimes.⁷ For example, Nebraska's regulations have an absolute bar to foster care licensure if the prospective foster parent has been convicted of a felony involving abuse or neglect of a child, spousal abuse, a crime against a child or children, including child pornography, or a crime of violence, including rape, sexual assault, or homicide, but not including other physical assault or battery.⁸ There are also two states that follow the Adam Walsh Act barrier crime list but add the crime of human trafficking to the list of barrier crimes – Maryland and Ohio.

⁵ *Id.* § 671(a)(20)(A)(ii).

⁶ *Id.*

⁷ These states include California, Delaware, District of Columbia, Florida, Georgia, Hawaii, Maine, Mississippi, Missouri, Nebraska, New Hampshire, New Mexico, New York, North Carolina, Oregon, Vermont, and Wyoming.

⁸ Neb. Admin. R. & Regs. Tit. 395, Ch. 3, §§ 003.08(A)(v)(1) and 003.08(A)(v)(2)

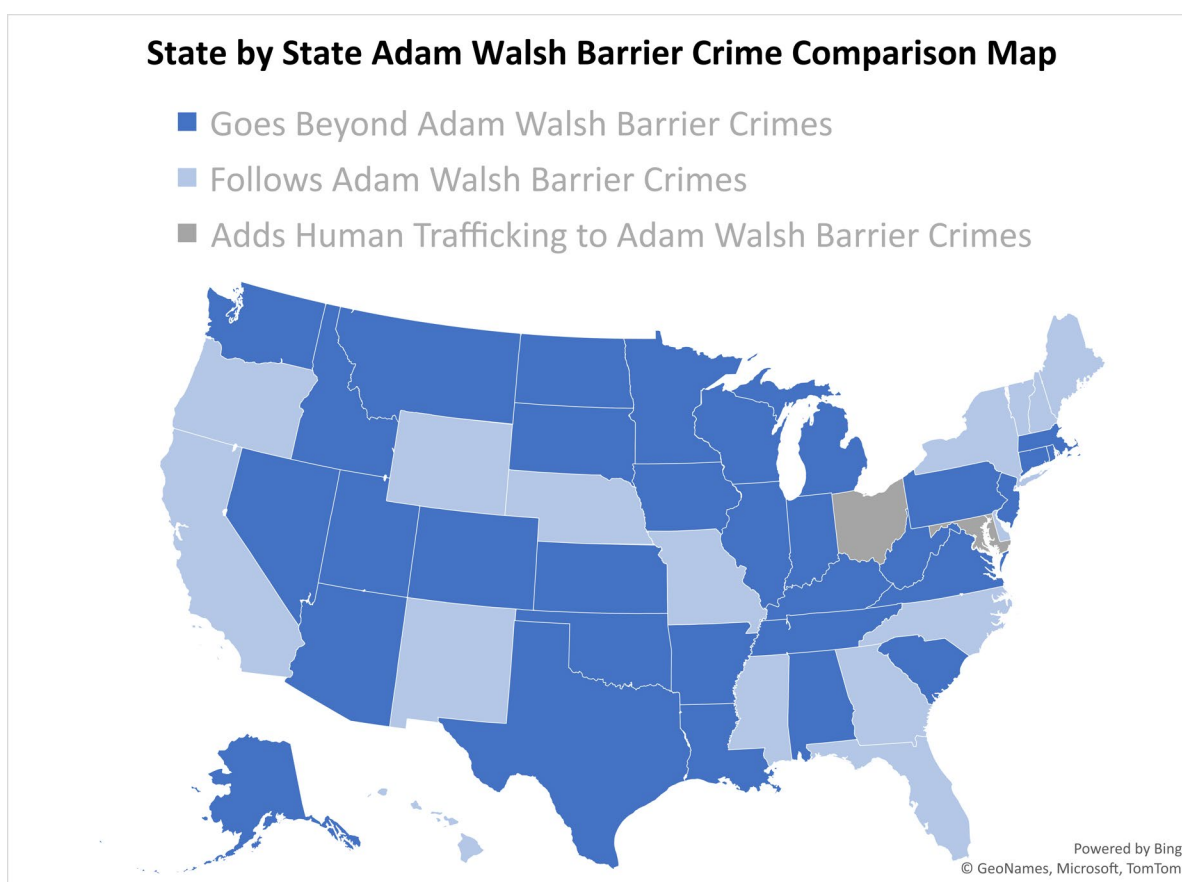


Figure 1: Adam Walsh Barrier Crimes by State (and Washington, D.C)

The remaining 33 states do not exclusively follow the Adam Walsh Act, but instead go beyond by including more crimes than prohibited by this law or creating additional barrier crime time limits before applicants are eligible for licensure.⁹

For example, Arizona significantly extended the list of permanent barrier crimes to include 48 other permanent barrier crimes such as pandering, and felony indecent exposure.¹⁰ Arizona also has a list of 68 potential barrier crimes, including misconduct involving weapons, shoplifting, and fraudulent use of a credit card.¹¹ Virginia has a long list of over 160 barrier crimes that are not waivable, including reckless handling while hunting, carelessly damaging property by fire, and reckless endangerment of others by throwing objects from places higher than one story.¹²

Some states have added additional crimes with various time limits including Texas, which has a list of 20-year barrier crimes for non-kin foster parent applicants only. Four states have ten-year barrier crimes,¹³ including Colorado which recently added a new category of a 10-year bar to licensure. If an applicant in Colorado has a pattern of

⁹ These states include Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Jersey, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin.

¹⁰ Ariz. Rev. Stat. Ann. § 41-1758.07(B).

¹¹ Ariz. Rev. Stat. Ann. § 41-1758.07 (C).

¹² Va. Code Ann. § 19.2-392.02.

¹³ This includes Alaska, Colorado, Illinois, and Michigan.

misdemeanors including “three or more convictions of third-degree assault; five misdemeanor convictions of any type with two convictions of third-degree assault; or seven misdemeanor convictions” they are barred from licensure for 10 years.¹⁴ Two states have seven-year barrier crimes,¹⁵ and three states have three-year barrier crimes.¹⁶

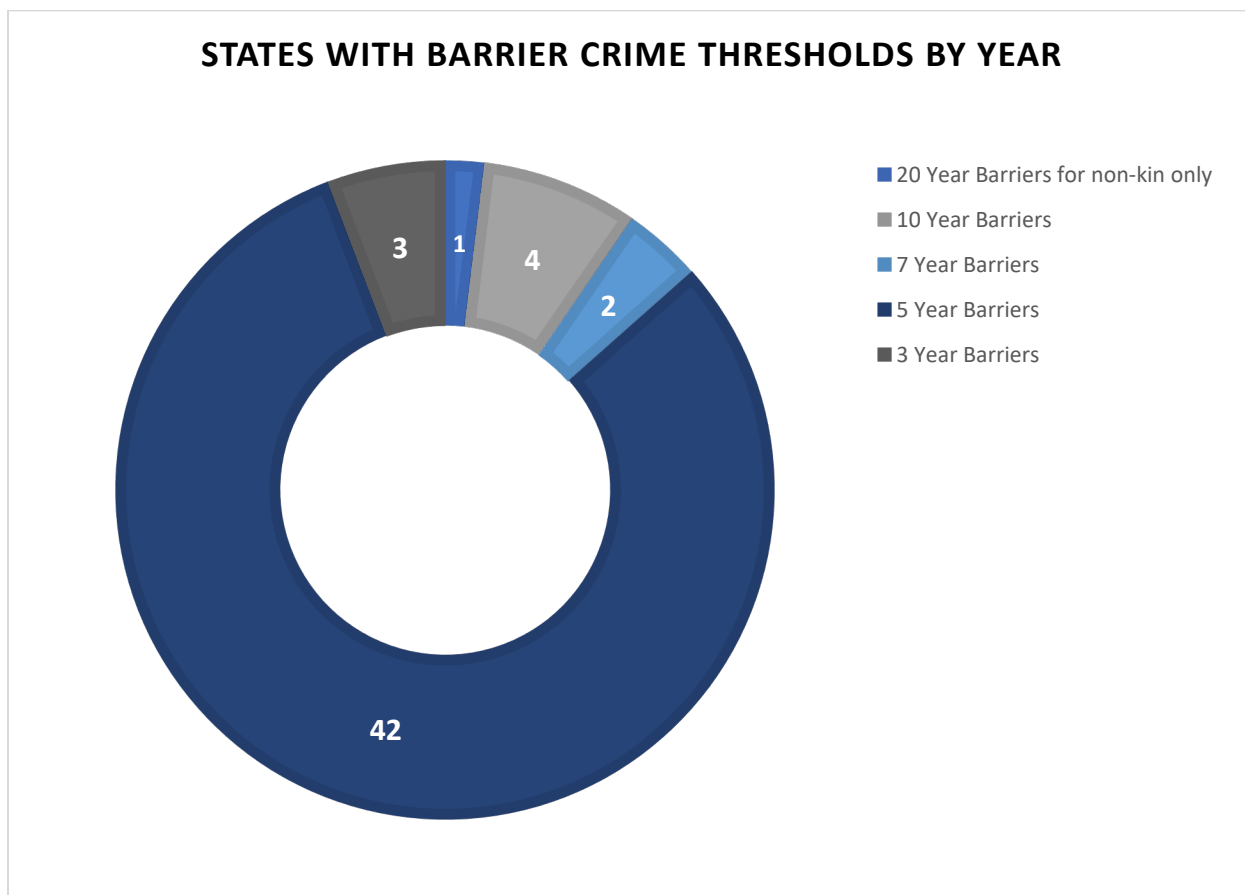


Figure 2: The Number of States (and Washington, D.C.) with Barrier Crime Thresholds by Year

Exceptions for Crimes that Go Beyond Adam Walsh

Under the Fostering Connections to Success and Increasing Adoptions Act of 2008, title IV-E agencies can waive non-safety licensing requirements for relatives. This waiver authority does not extend to the requirement to conduct criminal background, child abuse, and neglect registry checks, and to bar individuals convicted of certain felonies from becoming foster parents, as mandated by the Adam Walsh Act.¹⁷ However, under this law jurisdictions that bar individuals from becoming foster parents due to any type of

¹⁴ 12 Colo. Code Regs. § 2509-6-7.500.312(D)(3)

¹⁵ This includes Michigan and Nevada.

¹⁶ This includes Alaska, Idaho, and Utah.

¹⁷ Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 42 U.S.C. §671(a)(10).

criminal history, beyond Adam Walsh barrier crimes, may waive that history for relatives (provided the agency considers it non-safety related) and allow them to be licensed.

Most states have developed a process to review and assess non-Adam Walsh crimes to allow the relative to be licensed. States use a variety of different terms for this process, including waivers, variances, and exceptions.¹⁸

The federal government has encouraged the use of non-safety waivers for relatives based on research that shows better outcomes for children placed with relatives. Children in relative foster care are just as safe, if not safer, than children placed with non-related foster families.¹⁹ Moreover, these relative foster placements tend to be more stable and children are more likely to maintain connections to their biological siblings and their community.²⁰ Additionally, when reunification with parents is not possible, relatives are more likely to adopt or become permanent guardians to related children.²¹ Because relatives are critical for safe and timely reunification and result in overall improved outcomes for children, waivers of non-safety licensing standards for relative caregivers are essential to ensuring placement with family and ultimately permanency for children.

The NARA Model Family Foster Home Licensing Standards (NARA Standards), developed by the American Bar Association Center on Children and the Law, the Annie E. Casey Foundation, Generations United, and the National Association for Regulatory Administration, were developed to “help ensure children in foster care are safe while also establishing a reasonable, common-sense pathway to enable more relatives and non-related caregivers to become licensed foster parents.”²² The NARA Standards are a flexible response to individual circumstances and help children find safe and appropriate homes.

While the NARA Standards encourage jurisdictions to limit their barrier crimes to Adam Walsh, NARA provides criminal assessment criteria for jurisdictions that have extended their list of crimes beyond Adam Walsh. When an applicant has a criminal conviction that falls outside the Adam Walsh barrier crime list, it is recommended that the applicant not be automatically rejected as an option for placement. Instead the NARA standards suggest that the child-placing agency consider the following factors when assessing licensing applicants with a criminal history: “the type of crime, the number of crimes, the nature of the offenses, the age of the individual at the time of conviction, the length of time that has elapsed since the last conviction, the relationship of the crime and the capacity to care for children, evidence of rehabilitation, and opinions of community members concerning the individual in question.”²³ This analysis allows for a practical

¹⁸ For more information on the distinction between waivers and variances see CLASP, & American Bar Association Center on Children & the Law, [Relative Foster Care Licensing Waivers in the States: Policies and Possibilities](#) 6 (2010) (Prepared in collaboration with ChildFocus, the Children’s Defense Fund, Generations United, and the Grandfamilies State Law and Policy Resource Center).

¹⁹ American Bar Association Litigation Section, [Benefits of Kinship Placement](#) 1 (2022); Generations United, [Children Thrive in Grandfamilies](#) (May 2023).

²⁰ *Id.*

²¹ *Id.*

²² American Bar Association Center on Children & the Law, Generations United, & National Association for Regulatory Administration, [NARA Model Family Foster Home Licensing Standards](#) 9 (originally published in 2014, updated in 2018).

²³ *Id.*

evaluation of the applicant, including an assessment of the impact of the relative's history on their ability to safely and appropriately care for the child.

Exceptions for Crimes that Go Beyond Adam Walsh in Practice

Because there is no federally mandated waiver process, many states use a variety of practices to waive criminal background history for crimes beyond those enumerated in the Adam Walsh Act. Five states apply all the NARA Standards criminal history criteria when assessing convictions.²⁴ Twenty-five states apply some, but not all, of the NARA Standards criteria with some states adding additional criteria for consideration.²⁵ For example, in West Virginia, the secretary may grant a variance if mitigating circumstances are provided, and the secretary finds that the individual will not pose a danger or threat. Mitigating circumstances may include: "the passage of time, the length of time an applicant is barred starts from the date of conviction or the date of release from the penalty imposed, whichever is later, extenuating circumstances such as the applicant's age at the time of conviction, substance abuse, or mental health issues, and a demonstration of rehabilitation such as character references, employment history, education, and training."²⁶

Seventeen states and the District of Columbia do not use the NARA Standards criteria and instead use an independently developed general waiver system, which is not based on a specific list of factors.²⁷ For example, In Maryland, the director reviews the criminal findings to determine if the previous convictions will have an effect on the applicant's ability to execute the responsibilities of a resource parent; the ability of the local department to achieve its goals; and the possible effect on or the safety of children in out-of-home care.²⁸ In Louisiana, felony convictions beyond Adam Walsh are permanent barriers unless "an assessment of the circumstances of the crime and of the current situation of the prospective foster or adoptive parent, or relative guardian and any other adult living in the home of the relative guardian, has been conducted by the department and it has been determined that the child would not be at risk if placed in the home."²⁹

Some states' waiver process for crimes includes an extensive assessment applying several factors beyond those recommended in the NARA Model. For example, Ohio uses the following "rehabilitative criteria" for applicants and all other adult household members when assessing non barrier crimes: the victim of the offense was not a person under the age of 18, and certification will not jeopardize in any way the health, safety, or welfare of the children the agency serves. The factors used to determine this include

²⁴ These states follow all the NARA Standards Recommendations: Florida, Illinois, New Mexico, Oklahoma, and South Carolina.

²⁵ These states follow some of the Model Licensing Standards: Alabama, Alaska, Arizona, Arkansas, California, Delaware, Georgia, Hawaii, Indiana, Iowa, Kentucky, Maine, Massachusetts, Minnesota, Mississippi, New Jersey, New York, North Carolina, Ohio, Rhode Island, Texas, Utah, Vermont, Washington, and West Virginia.

²⁶ W. Va. Code §16-49-5, et seq., and W. Va. Code R. §69-10-7.

²⁷ These states do not follow the NARA Standards factors: Connecticut, District of Columbia, Idaho, Kansas, Louisiana, Maryland, Michigan, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Dakota, Oregon, Pennsylvania, Virginia, Wisconsin, and Wyoming.

²⁸ MD Code Regs. 07.02.25.04.

²⁹ LA Rev. Stat. §46:51.2(C)(1)(c).

age at the time of the offense, nature and seriousness of the offense, circumstances under which the offense was committed, degree of participation of the person involved in the offense, time elapsed, likelihood of reoccurrence, whether the person is a repeat offender, the person's employment record, the person's efforts at rehabilitation and the results of those efforts, any pending criminal proceedings against the person, whether the person has been convicted of or pleaded guilty to a any other non-barrier felony, if the felony bears a direct and substantial relationship to being a foster caregiver or adult member of the caregiver's household, whether the victim of the offense was: a functionally impaired person, a developmentally disabled person, a person with a mental illness, a person sixty years of age or older, and any other factors the agency considers relevant.³⁰

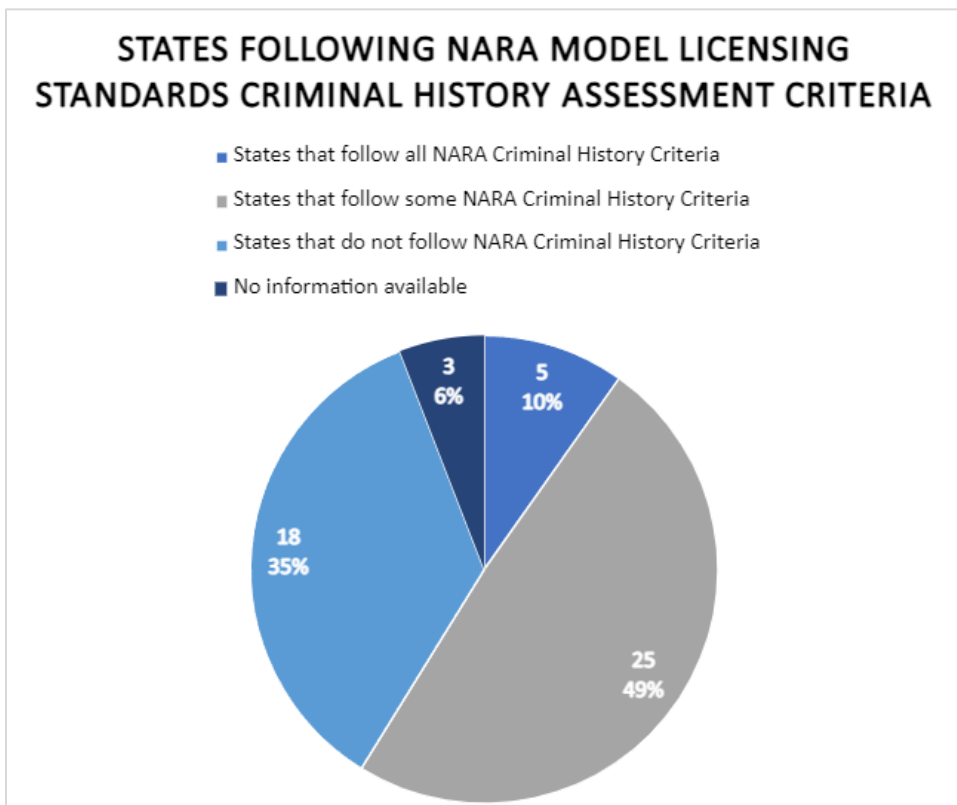


Figure 3: Number and Percentage of States (and Washington D.C.) that Follow the NARA Model Licensing Standard Criminal History Standards

Jurisdictions that License or Approve Foster Homes Despite Adam Walsh Barrier Crime Restrictions

At this time, only California and the District of Columbia allow for the licensing of foster homes with a history of crimes listed in the Adam Walsh Act. Since this is in contradiction to federal requirements, states may not provide federally funded foster care maintenance payments to these relative foster parents.

³⁰ OH Admin. Code 5101:2-7-02(K).

California recently passed new legislation allowing a county child welfare agency to grant a criminal record exemption for barrier crimes, including those listed in the Adam Walsh Act, to a relative or any other adult living in the home if seeking placement of a specific related child, if the person in question has good character necessary to justify granting the exemption and does not have a felony conviction within the last five years for an Adam Walsh barrier crime.³¹ This child-specific resource family approval will only be granted if applicant is a relative or nonrelative extended family member who has an established and significant relationship with a child, or a child is already placed in the home of the relative or nonrelative extended family member.³² The child's placement is funded with state funds and the relative is not eligible for federal financial participation while the child is placed with them.³³

The District of Columbia also offers exceptions to their enumerated barrier crime history list, which is based solely on the Adam Walsh crimes.³⁴ The District of Columbia allows the DC Child and Family Services Agency (CFSA) to approve or license as an adoptive or foster parent, a legal guardian, or a kinship caregiver if it determines that, after a discretionary agency review of the conviction and current circumstances, approval, licensure, or permission would be consistent with the health, safety, and welfare of children.³⁵ The law also states that any adoption assistance payments or foster care maintenance payments made on behalf of a child to such individual cannot be made with federal funds provided through Title IV-E.³⁶

Moving Forward

In September 2023, the U.S. Administration for Children and Families (ACF) issued a [final rule](#) that explicitly gives all title IV-E child welfare agencies the option to use kin-specific foster care licensing or approval standards. ACF further guides these agencies to “strongly consider” limiting their standards to federal requirements.³⁷ The new rule is being embraced by agencies around the country, and as of January 2024, six are piloting new national [Kin-Specific Foster Home Approval Standards](#), developed by several national organizations, and informed by state and tribal title IV-E agencies and over 100 relative caregivers. These Kin-Specific standards follow Adam Walsh, and do not add other misdemeanors or non-violent felonies that are beyond the scope of federal law.

If implemented, the new federal rule and Kin-Specific Standards will promote equity, increase the number of children placed with relatives, streamline the licensing process for kin, and save unnecessary administrative costs that can be redirected. Staff spend time and energy trying to fit relatives into standards not designed for them, including attempting to use federal authority to grant relatives case-by-case waivers or variances

³¹ CA Health and Safety Code § 1522(g)(2)(a)(iv).

³² CA Welf. & Inst. Code §16519.5(c)(4)(B).

³³ *Id.*

³⁴ D.C. Mun. Regs. tit. 29, § 6008.4 (2004); DC Code § 4-1305.06(d).

³⁵ *Id.*

³⁶ *Id.*

³⁷ ACYF-CB-IM-23-07.

for “non-safety” criminal history. Staff time can be better spent supporting children in existing placements and helping them achieve permanent homes.³⁸

Before the final rule was issued, jurisdictions had been struggling with how to license and support relatives through a licensing scheme not designed for them. After assessing data and recognizing the importance of licensing kin caregivers, some states began looking at their list of barrier crimes and processes for assessing other crimes. California and the District of Columbia are just a couple of the jurisdictions that struggled to find solutions. Arizona and Virginia are also among the states that pursued solutions.³⁹ Adhering to Adam Walsh through guidance provided by the Kin-Specific Standards and the NARA Standards provides title IV-E agencies with a clear path forward. The American Bar Association Center on Children and the Law, Generations United and its Grandfamilies & Kinship Support Network: A National Technical Assistance Center, along with an array of other national partners, stand by to help support title IV-E agencies implement the Kin-Specific Standards, thereby addressing what are often non-sensible and non-safety related background check processes.

We would like to thank the American Bar Association’s summer intern, Emily Collins Propersi, J.D., Candidate at Washington University School of Law 2024, for her assistance with this publication.

³⁸ While new Kin-Specific Standards that adhere to Adam Walsh will address barriers for relatives, it is important to elevate that title IV-E agencies should also reexamine their criminal barrier lists for non-relatives and consider adopting the NARA Standards.

³⁹ H.B. 2084, 55th Leg., 2d Sess. (Ariz. 2022); Va. S.B. 689, 2022 Leg., Reg. Sess. (Va. 2022).