A USER'S GUIDE TO FEDERAL ADOPTION ASSISTANCE IN OHIO

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The National Center for Adoption Law & Policy

With

Tim O'Hanlon, PhD

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AUTHOR'S INTRODUCTION

The Guide to Federal Adoption Assistance in Ohio is intended to provide a practical map to this vital program for special needs children to adoptive parents, attorneys and child advocates. Although Title IV-E adoption assistance is a federal program, the portions of the law provide states with some latitude in how the program is administered. The first section of the guide discusses various features of adoption assistance as practiced in Ohio.

Under federal and state law, adoptive parents have the right to appeal negative agency decisions pertaining to adoption assistance. Part 2 walks the reader through the appeals process.

Readers may access federal policies, Ohio regulations, court cases and other relevant documents by clicking on the live links throughout the guide. One point to bear in mind is that clicking on an Ohio Regulation does not take you directly to the specific rule. In order to access Ohio Administrative Regulations:

- Click on the link to the rule, for example OAC 5101:2-47-29.
- Click on Management and Administration
- Click on Fiscal Management and Administration
- Click on IV-E and scroll down to the rule

This path will take you to the Ohio Department of Job and Family Services' *Family, Children and Adult Services Manual*, which is the most up to date source of state regulations pertaining to adoption assistance.

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PART 1: THE FEDERAL ADOPTION ASSISTANCE PROGRAM

Purposes and Procedures

What is the federal Title IV-E adoption assistance program?

The Title IV-E adoption assistance program was created in 1980 with the passage of the landmark Public Law 96-272, entitled "The Adoption Assistance and Child Welfare Act." The program provides monthly financial assistance, Medicaid coverage and eligibility for Title XX social services to special needs children.

The federal adoption assistance law at 42 U.S.C. 673 has changed little since 1980. The small body of federal regulations pertaining to the program may be found at 45 CFR 1356.40. No new regulations have been promulgated since 1983.

More than other entitlement programs, the federal government (Children's Bureau) has managed the program by issuing various types of policy interpretations, most notably PIQs or Policy Information Questions. These policy issuances have been consolidated into the online *Child Welfare Policy Manual*. The federal Children's Bureau is a subdivision of the Administrative for Children and Families in the U.S. the Department of Health and Human Services. Courts have regarded these policy issuances as authoritative statements of federal law.

What are the basic goals of the federal adoption assistance program?

The essential purposes of the federal adoption assistance programs are to promote and sustain permanent families for special needs children by:

- Removing financial barriers to the incorporation of children into the homes of otherwise suitable parents.

- Helping sustain the family's ability to provide emotional and material care for the child until adulthood.

The financial and medical assistance provided by the program enables single parents and couples of modest means to make the sacrifices required to provide stable homes for children who have known little else but chaos and uncertainty in their young lives. A 2004 study by the Evan B. Donaldson Adoption Institute found that providing post adoption assistance is "vitally important in helping in helping to minimize disruptions and promote adoption stability" (*What's Working for Children: A Policy Study of Adoption Stability and Termination*, Executive Summary, Nov, 2004, p.2 at: http://www.adoptioninstitute.org/). For parents, special needs adoption is both a transforming and challenging calling. The extensive care needs of disabled and emotionally damaged children demand an enormous commitment by adoptive parents, often at the expense of their careers and the income they generate. Adoption assistance is intended to make such dedication possible for average families and single parents by providing a crucial supplement to existing family resources.

In what ways is adoption assistance similar to other federal benefit programs?

Adoption assistance, like Title IV-E foster care maintenance, Temporary Assistance for Needy Families (TANF), Medicaid food stamps and Supplemental Security Income (SSI) is an open ended entitlement program, that means if a child is eligible, he or she is entitled to federal benefits. In addition:

- Applicants and recipients have federally recognized due process rights through the right to appeal adverse decisions by agencies. The provisions of Title 45 of the Code of Federal Regulations at 45 CFR 205.10 set forth these hearing rights. In Ohio, the corresponding hearing provisions pertaining to Title IV-E adoption assistance may be found in the Ohio Administrative Code (OAC) regulations at: 5101:6.

- In exchange for federal financial participation, states must file plans with the U.S. Department of Health and Human Services in which they pledge to comply with federal policies. The introductory section of IV-E State Plans reads as follows:

> As a condition of the receipt of Federal funds under title IV-E of the Social Security Act (hereinafter, the Act), the Agency (Name of State Agency) (hereinafter "the State Agency") submits herewith a State plan for the program to provide, in appropriate cases, foster care, independent living (at State option) and adoption assistance under title IV-E of the Act and hereby agrees to administer the program in accordance with the provisions of this State plan, title IV-E of the Act, and all applicable Federal regulations and other official issuances of the Department.

"Official issuances" include the various policy statements published by the federal Children's Bureau, which are increasingly being incorporated into the online *Child Welfare Policy Manual.* Federal requirements for Title IV-E state plans may be found at: 42 U.S.C. 671

The IV-E State Plan includes sections on the federal foster maintenance and Independent Living programs as well as adoption assistance. The Section entitled "Adoption Assistance Payments" is devoted to the adoption assistance program.

A copy of Ohio's IV-E State Plan may be found by going to the ODJFS web site at: http://jfs.ohio.gov/ocf/publications.stm and scrolling down to State Plans. A template of IV-E state plans may be found on the federal Children's Bureau Web Site: at http://www.acf.hhs.gov/programs/cb/laws/pi/pi0106.htm.

What is the significance of the IV-E State Plan with respect to adoption assistance?

By submitting a IV-E state plan, the designated state agency agrees that the state's policies and implementation of the adoption assistance program will be in compliance with federal laws, regulations and policies and in exchange for this compliance the state will receive the benefits of federal financial participation. The state plan ties state regulations to federal law. As a general rule, state policies regulations and practices may not be more restrictive than those provided under federal law.

In what significant ways does the adoption assistance program differ from other federal entitlement programs?

Adoption assistance differs from other federal entitlement programs in several important respects.

1. Eligibility for adoption assistance and determination of the amount of assistance are two related but distinct steps.

2. Once a child is determined eligible for the program; federal law provides that the amount of adoption assistance must be determined through negotiation, based upon a broad consideration of the child's needs and circumstances of the adopting family. Federal financial participation (FFP) in adoption assistance is available up to the level a child would receive in a foster home suitable to their level of care. Negotiation of adoption assistance payments may involve disagreements between parents and agency representatives involving several hundreds of dollars per month.

In most federal assistance programs, benefits are determined at eligibility by applying an income means test based on family size and income. Negotiating with families, accordingly, is beyond the experience of most agency officials and prospective adoptive parents often do not know what to expect. The results of the negotiations must be set forth in a written adoption assistance agreement before the final decree of adoption. This requirement adds additional pressure to the negotiation process which has few models to provide guidance for the participants. Budget constraints make negotiations for adoption assistance even more uncertain.

The unique two step process of eligibility followed by negotiation makes adoption assistance more challenging to operate than other federal programs and more difficult for applicants to grasp. Sections of federal adoption assistance law, such as the special needs definition and negotiation of the amount of assistance, are written as broad guidelines rather than specific criteria. This is a sensible approach, but lends itself to differing interpretations and

disagreements between adoptive families and public agencies administering the program. States have more latitude to act in support of, or to resist benefits to adoptive families than they have in other federal programs. The difficulties families face in securing adoption assistance for their special needs children depend in large part on whether a state concentrates its energies on looking for reasons to say "yes" or to say "no." The regulations and policies pertaining to negotiating adoption assistance will be addressed below.

Is it important for adoptive parents to familiarize themselves with state policies and regulations in addition to federal laws?

Sections of federal adoption assistance law such as special needs and negotiation of the amount of assistance are written as broad guidelines rather than specific criteria. Although state policies may not be more restrictive than federal policy, federal law allows some latitude for states to amplify eligibility requirements and negotiation procedures, which in turn lends itself to some program differences among states.

State officials are trained to deal exclusively with state laws and policies. Parents need to know state adoption assistance regulations so they understand what state officials are telling them. Initial administrative hearings will also emphasize state policies and regulations.

As noted above, sections of federal law such as special needs and negotiation of the amount of assistance are written as broad guidelines rather than specific criteria. This leaves some margin for interpretation, giving rise to disputes over whether a particular state policy is consistent with federal law. By familiarizing themselves with state adoption assistance policies, parents can also better discern if there may be a conflict between state and federal law. The pre-eminence of federal law becomes more important as parents proceed up the appeals ladder.

Eligibility Requirements

What are the basic eligibility requirements for adoption assistance and where may they be found?

Unlike other federal assistance programs, the adoptive parent's income has no bearing on the child's eligibility for adoption assistance. Eligibility for the program depends entirely on the circumstances of the child. Eligibility requirements for the Title IV-E adoption assistance program can be broken down into three parts: special needs, SSI/AFDC-relatedness and the judicial determination of best interest.

Federal law and the federal *Child Welfare Policy Manual* identify four basic eligibility scenarios for federal adoption assistance:

1. A child meets the definition of a special needs child and the AFDC-relatedness standard. In such cases, there must also be a judicial determination.

2. A child who is eligible for Supplemental Security Income (SSI) benefits and meets the definition of a child with special needs.

3. A special needs child who has a minor parent who is receiving federal Title IV-E foster care payments.

4. A child who was formerly eligible for IV-E adoption assistance remains eligible following the death of the adoptive parents or dissolution of the adoption. This provision went into effect with the passage of the "Adoption and Safe Families Act" in 1997.

See Section 8.2B of the federal *Child Welfare Policy Manual* entitled "TITLE IV-E, Adoption Assistance Program Eligibility."

The basic eligibility requirements for Title IV-E adoption assistance in Ohio may be found at OAC 5101:2-47-29.

Special Needs

What are the requirements for special needs as set forth in federal law and Ohio regulations?

Federal definitions of special needs are set forth in 42 USC 673 (c) and has three parts

I. "The state has determined that the child cannot or should not be returned to the home of the parents." Essentially this requirement asks if the birth parents' rights have been terminated and if the child is legally free for adoption.

II. The state has determined that "there exists with respect to the child a specific factor or condition (such as his ethnic background, age, or membership in a sibling group, or the presence of factors such as medical conditions or physical, mental, or emotional handicaps) because of which makes it reasonable to conclude that such child cannot be placed without adoption assistance under this section or medical assistance …"

This section is the most important part of the special needs definition from the standpoint of determining the child's eligibility for adoption assistance. Federal law, as the passage above demonstrates, does not present an exhaustive list of special needs conditions, but rather points to general factors that may result in a child's need for adoption assistance. These general special needs factors fall into two broad categories: (1) medical conditions and other disabilities and (2) special circumstances such as age, race and sibling membership.

The nature of federal law gives states some latitude to elaborate or amplify special needs factors because:

a. The use of qualifying language ("such as") in the federal law indicates that the list of special needs are not intended to be exhaustive.
b. The special needs factors are set forth as broad categories rather than special disabilities.
c. There are no federal guidelines specifying how severe an emotional disorder, physical disability, medical problem or mental disability must be in order to qualify. For

eligibility purposes, the general practice has been to accept conditions that require a level of care beyond the ordinary. The severity of the special needs condition and the corresponding amount of care that is required are more properly delegated to the negotiation stage in which the amount of assistance is considered rather than in determining the child's program eligibility.

The comparable section of the Ohio Administrative Code that sets forth special needs factors may be found at OAC 5101:2-47-30 (B) and reads as follows:

(B) The PCSA OR PCPA determines the child has a specific factor or condition(s) which indicates that in order to complete or sustain the adoption or ensure that the child's special needs are met, it is not in the child's best interest to be placed with an adoptive parent(s) without the provision of AA and/or medical assistance. A specific factor or condition shall include at least one of the following:

(1) Is in a sibling group who should be placed together.
(2) Is a member of a minority or ethnic group.
(3) Age .
(4) Has remained in the permanent custody of a PCSA or PCPA for more than one year.
(5) Has a medical condition, physical impairment, mental retardation or developmental disability.
(6) Has an emotional disturbance or behavioral problem.
(7) Has a social or medical history or the background or the child's biological family has a social or medical history which may place the child at risk of acquiring a medical condition, a physical, mental or developmental disability or an emotional disorder.
(8) Has been in the home of his/her prospective adoptive parent(s) as a foster child for at least one year and would experience sever separation and loss if placed in another setting due to his/her significant emotional ties with the foster parent(s) as determined and documented by a qualified mental health professional.
(9) Has experienced previous adoption disruption or multiple placements.

The special needs definitions of individual states may be found in the Adoption Subsidy Profiles section at: http://www.nacac.org

What does the third section of the special needs definition mean? How are its requirements met?

The third part of the federal special needs definition has been the most problematic:

> Except where it would be against the best interest of the child to place the child because of such factors as the existence of significant emotional ties with prospective adoptive parents while in the care of such parents as a foster child, a reasonable but unsuccessful, effort has been made to place the child with appropriate adoptive parents without providing adoption assistance under this section or medical assistance under subchapter XIX of this chapter.

How does the federal Child Welfare Policy Manual interpret Part 3 of the federal special needs definition?

For a number of years, adoption professionals were frustrated by this section of federal law that appeared to require agencies to make a "reasonable" effort to place a child without adoption assistance. When interpreted literally, the effort to place children without subsidy seemed to undermine the very purposes of the federal adoption assistance program, namely to expedite and to sustain adoptions. To make matters worse, the "reasonable efforts" to place without subsidy portion of the law was often cited without reference to the words that immediately preceded it," . . . except that where it would be against the best interests of the child . . . " To take the phrase literally would force agencies to delay placements until they could find someone who would be willing to forego adoption assistance whether they needed it or not. This practice would appear to conflict with federal adoption assistance regulations at 45 CFR 1356.40 (f) that require states to "actively seek ways promote the adoption assistance program."

Listing the child with the state's adoption resource or photolisting service, establishing her as a waiting child has been the traditional means of meeting the "reasonable efforts to place" requirement. In 1992, the federal children clarified the requirement to make it compatible with the purposes of adoption and the adoption assistance program.

Is the reference to significant emotional ties with foster parents intended to serve as an example?

Yes. Section 8.2B.11 of The *Child Welfare Policy Manual* notes that the existence of significant emotional ties between foster parents and children is an example of a situation where it would be contrary to the child's needs to place the child without assistance. Exceptions, it states, also extend "to other circumstances that are not in child's best interest, as well as adoption by a relative, in keeping with the statutory emphasis on the placement of children with relatives."

In *Adoption ARC, Inc. v. Department of Public Welfare*, a 1999 decision, the Commonwealth Court of Pennsylvania also reached the conclusion that there might be a number of reasons why it would be contrary to a child's best interest to be placed without adoption assistance. [See *Adoption ARC, Inc. v. Department of Public Welfare*, 727 A.2d 1209, 1214 (PA 1999) at www.fpsol.com/adoption/advocates.html] The court's interpretation of the entire sentence in the special needs section of the federal law, instead of a portion of it, played a significant role in its final determination.

Writing for the majority, Judge Joseph T. Doyle pointed out that the phrase "a reasonable, but unsuccessful, attempt has been made to place the child with appropriate adoptive parents without providing adoption assistance" is preceded by the qualification, "except where it would be against the best interests of the child because of factors such as the existence of significant emotional ties with prospective adoptive parents while in the care of the parents as a foster child." The use of "such as," he concluded, indicated that the reference to emotional ties with foster parents was intended to serve as an example, not the only situation where making a reasonable, but unsuccessful effort to place without assistance might be contrary to the child's

best interest. In short, there might be a number of situations where making an effort to place the child without assistance would not be in his or her best interest.

"In this case," noted Doyle, "each child was placed in the custody of the adoptive parents at a very tender age and formed familial bonds with their adoptive parents. It would not have been in the best interest of either child to have the child removed and placed with a different family solely because that family did not require a subsidy." The decision goes on to cite the section of a previous federal policy issuance [PIQ 92-02] stating that agencies should first locate a suitable family, make full disclosure of the child's background and then ask the parents if they need adoption assistance. This interpretation was incorporated into the *Child Welfare Policy Manual* in section 8.2B.11 which states:

> Once the agency has determined that placement with a certain family is in the child's best interest, the agency should make full disclosure about the child's background, as well as known or potential problems. If the agency has determined that the child cannot or should not return home and the child meets the statutory definition of special needs with regard to specific factors or conditions, then the agency can pose the question of whether the prospective adoptive parents are willing to adopt without assistance. If they say they cannot adopt the child without adoption assistance, the requirement in section 473(c)(2)(B) for a reasonable, but unsuccessful, effort to place the child without providing adoption assistance will be met.

Federal policy and the *Adoption Arc* case essentially leave the decision the adopting parents as to whether there is a need for adoption assistance and a willingness to proceed without it.

What Ohio regulations address the issue of a "reasonable but unsuccessful attempt" to place the child without provision for assistance?

The “reasonable but unsuccessful attempt to place without assistance” portion of the special needs definition is addressed in Paragraphs (C) and (D) of the OAC rule 5101:2-47-30. If one reads the two paragraphs together, it is clear that registering the child with the Ohio Adoption Photolisting Service (OAPL) is one alternative way of satisfying the requirement, but not the only one.

Let’s look at paragraph (C) which reads as follows:

> The PCSA or PCPA must document that a reasonable but unsuccessful effort was made to place the child with an appropriate adoptive parent(s) without providing AA or medical assistance. In making the determination that it is against the best interest of the child to be placed with an adoptive family without provision for AA or medical assistance, the PCSA or PCPA may cite factors such as the existence of significant emotional ties to the prospective adoptive parent(s) which developed while in their care as a foster child or other factors pertaining to the child's current or anticipated special need for care or services.

What does this say in plain English? First of all the paragraph refers to “reasonable efforts.” When are efforts to place the child without assistance, unreasonable or unnecessary? When such efforts are contrary to the child’s best interest, of course. That is why the paragraph refers to the agency’s documentation of instances in which it would be contrary to the child’s best interests to place him or her without provision for assistance. The existence of special needs that require treatment or an emotional attachment with the child are two examples of instances in which efforts to place the child without assistance are not required. Since the overriding concern is the child’s best interest, acting contrary to the child’s best interest is by definition unreasonable.

OAC 5101:2-48-05 (A)(15) requires agencies to provide a description of all state and federal adoption assistance, including eligibility, and the application requirements.

How can one inform adoptive families about adoption assistance and help them apply for assistance while making an effort to place a child without assistance? Documentation that a child has existing or anticipated special needs may make it contrary to his or her interest to be placed without provision for assistance. Documentation may include medical records, family histories and letters from doctors or mental health providers that address the child's condition and likely care needs.

Do federal and Ohio regulations force the family into a situation where they must choose between declining adoption assistance as condition for proceeding with the adoption?

Because foster parents and other prospective adoptive parents become emotionally attached to the children they care for, most would be willing to proceed with the adoption under almost any conditions. As noted above, the "reasonable attempt to place without assistance" provision is not intended to deprive adoptive children of support if they need it. To do so would undermine the overriding purpose of the adoption assistance program, which is to help support and sustain permanent families.

The question of whether a parent is willing to go forward with the adoption without assistance must be addressed in the larger context of the child's best interest. The parents are not being asked, if forced to choose, would they be willing to go forward without assistance as the price of being able to adopt the child? Rather, the question is: considering what is known about the child's background and current situation do they agree to decline adoption assistance? If they parents say "no," this decision does not disqualify them from being able to adopt the child.

Prospective adoptive parents might present might attempt to satisfy the requirement by presenting the agency with a written and signed statement such as the following:

> As the prospective adoptive parents we have been informed of their child's background and aware of the child's current and anticipated special need for care and services and have determined that application for adoption assistance is in the child's best

> interest. We also recognize that the purpose of adoption assistance is to help parents incorporate special needs children into permanent stable families. Accordingly, we have determined that if our child meets the eligibility requirements, we should not and cannot in good conscience finalize the adoption without provision of adoption and medical assistance.

OAC 5101:2-47-30 (C) also permits private agencies to document that reasonable efforts to place the child without provision for adoption assistance were contrary to the child's best interest. The private agency might submit a statement such as the following to the PCSA, along with the documentation the child's special needs.

> In accordance with the provisions of rule 5101:2-47-30(C) of the Ohio Administrative Code (OAC), 42 673 (c) of the United States Code and Section 8.2B.11 of the federal *Child Welfare Policy Manual*, **[Name of Agency}** has determined that the child's family and medical history contains significant risk factors that are strongly correlated with the development of special needs. Because of the child's current and anticipated special need for care and services, [_____] has further determined that it is against the best interest of the child to be placed with the adoptive parents without provision for adoption assistance and medical assistance. [ ] further affirms that, in light of the above determinations, a reasonable but unsuccessful effort has been made to place the child without provision for adoption or medical assistance in compliance with the applicable provisions of state and federal law referenced above.

Guidance: What are some steps that adoptive parents may take to document the child's special needs?

In the first place, parents should remember that OAC rule 5101:2-47-28 requires PCSAs and PCPAs to assist them in applying for adoption assistance. At minimum, parents should expect the agency to tell them clearly what kind of documentation is needed and help them to submit an application. Agencies are also required to provide information that addresses the child's existing problems or risk for future problems.

Exploring adoption assistance, however, is too important to leave in the hands of others. Ideally, parents should acquire and submit written statements from therapists, doctors or other providers that not only identify the child's condition, but address:

- How the condition plays out in daily family life or in school to give the agency or a hearing officer a picture of what caring for the child is really like.

- The effect of the child on the life of individual family members and the family as a whole.

- The prognosis for child.

- The risks involved in not addressing the special needs.

- Treatment needs of the child; needs of the parents to retain their sanity.

If you do not have this information, you can ask for a letter from therapists, doctors, teachers and other service providers. Tell them what the letter is for and what specific issues need to be addressed. Most service providers are happy to comply. Formal assessments may contain some of the same information. Include both letters and assessments as documentation.

Parents adopting children through private agencies should take particular care to document the child's special needs condition. The traumas and problems of children placed through public agencies are generally well known. The case plan for most of these children is to reunite them

with their birth families. By the time that goal is abandoned, the child's special needs are usually quite well established.

Birth parents voluntarily relinquish (surrender) infants to private agencies for the sole purpose of adoption. Because these children are so young, future conditions including serious maladies such as reactive attachment disorder or fetal alcohol syndrome are often difficult, if not impossible to diagnose. Parents adopting through private agencies must pay close attention to risk factors in the child's family history if the child's does not have an obvious condition such as prematurity or Downs Syndrome.

Parents adopting children through private agencies may also face a greater challenge in meeting the "reasonable, but unsuccessful attempt to place the child without assistance," portion of the special needs definition. The most practical approach to documenting this provision is to document that the child's existing or anticipated special needs indicated by risk factors in his or her background make it contrary to the child's interest to be placed without provision for adoption assistance. OAC 5101:2-47-30(C)

Remember, being placed with provision for assistance does not entail any particular amount of assistance. It merely ensures eligibility for assistance whatever the need might turn out to be.

Parents may also argue that emotional ties developed with the child make it contrary to the child's interest to be placed without provision for assistance. Children placed by private agencies may only have been in the adoptive parent's home for a period of a months before an application for adoption assistance is submitted. At present, there is no particular length of time associated with the establishment of an emotional attachment, so the parent's claim could be subject to dispute by the agency if the relationship is less than a year old. The parents could attempt to secure a statement from a qualified mental health provider that a bond has formed. In the absence of a clear standard, the agency may still deny the claim, but such documentation may help the family if it is forced to appeal.

In the case of private agency adoptions, may agencies require registration with the Ohio Adoption Photolisting (OAPL) service as the sole means of satisfying the "reasonable efforts to place without provision for adoption assistance" portion of the special needs definition? May agencies use the failure to register a private agency child with OAPL as a basis for denying eligibility for adoption assistance?

No. Private agencies typically have approved families identified for adoptive placement when a child is born and are not required to register a child with OAPL. Current rule 5101:2-48-07 (C) requires registration with OAPL within 90 days unless "a placement date within one month has been identified." The rule also calls for withdrawal of the child's name from OAPL if the child is placed in an approved adoptive home. In most cases, children in the care and custody of private agencies are placed with three months after the birth parents' rights are surrendered.

In most cases, requiring registration with OAPL as documentation of the child's special needs would conflict with OAC 5101:2-48-07 and would force private agencies to register a child with OAPL, creating the false impression that a child was available for adoption when a home had already been found.

AFDC-Relatedness

What are the AFDC Relatedness requirements?

The P.A. 01-01 provides more detail on the AFDC relatedness requirement than The *Child Welfare Policy Manual*, in Section 8.2B discusses the AFDC-relatedness requirement. The Source of the answer given in Question 1 is federal Policy Announcement ACYF-CB-PA-01-01 (1/23/01). P.A. 01-01 provides a bit more detail, but the two document are compatible. The corresponding Ohio rule addressing AFDC relatedness is OAC 5101:2-47-29. State and federal policy specifies that a child must meet the AFDC relatedness standard at two points in the case. NOTE: In Ohio, AFDC relatedness is known as ADC relatedness.

Removal

The child must meet the ADC Relatedness requirement:

a. During the month in which the child enters care via a JFS 01666 Permanent Surrender (voluntary relinquishment) or during the month a child enters care via a JFS 01645 Agreement for Temporary Custody (voluntary placement agreement) and subsequently is eligible for Title IV-E Foster Care Maintenance Payments.
b. During the month in which proceedings are initiated that lead to a court commitment to place the child in out of home care; or
c. In any of the six months preceding a or b.

Petition the Court for Adoption

The Child must also meet the ADC relatedness requirement in the month the petition for adoption is filed with the court. If ADC relatedness is met during the removal period, it is almost always met at the time of the adoption petition.

Must the child be removed from the home of a "specified relative" to meet the ADC-relatedness requirement?

Yes. OAC rule 5101:1-1-01 (T) defines "Specified relative" as: "the following individuals who are age eighteen and older:

(1) The following individuals related by blood or adoption;

(a) Grandparents, including grandparents with the prefix "great", "great-great", or "great-great-great";

(b) Siblings;

(c) Aunts, uncles, nephews, and nieces, including such relatives with the prefix "great", "great-great", "grand", or "great-grand";

(d) First cousins and first cousins once removed.

(2) Stepparents and stepsiblings;

(3) Spouses and former spouses of individuals named in paragraphs (T)(1) and (T)(2) of this rule.

NOTE: Rule 5101:1-1-01 may be fond in the electronic Cash Assistance Manual on the ODJFS website under Chapter 2000.

If a child is removed from the home via a voluntary agreement for Temporary Custody must the child receive federal foster care payments in order to be eligible for adoption assistance?

Yes, unless the child is removed from the home as the result of a Permanent Surrender (JFS 01666)

Children in the care of private agencies are not eligible to receive federal Title IV-E foster care maintenance funds? Are such children ineligible for adoption assistance?

Not necessarily. If a permanent surrender (JFS 01666) is the event that leads to the removal of the child from the home, then the child must meet the ADC relatedness provision during the month of the permanent surrender, or in any of the proceeding six months and at the time the adoption petition is filed with the court. Private agencies must take steps to ensure that a permanent surrender is the event that leads to the removal of the child from the home.

OAC rule 5101:2-42-09 requires that:

- A permanent surrender may not be executed until seventy two hours after the birth of a child; and
- an adoption assessor must meet with the birth parent or custodian within seventy-two hours of a permanent surrender to ensure informed consent.

In cases where a private agency places a child as a result of a permanent surrender executed in accordance with the above requirements, the permanent surrender would appear to be the event that leads to the removal of the child from the home, thereby satisfying the AFDC relatedness requirement.

How does one satisfy the AFDC (ADC) Relatedness standard when the program is no longer in existence?

When the 1996, federal welfare reform law (Public Law 104-193) went into effect, it abolished the AFDC program. AFDC relatedness, on the other hand remains an eligibility requirement for Title IV-E adoption assistance.. According to Section 8.2B, Question 1 of the Child Welfare Policy Manual. "adoption assistance eligibility that is based on a child's AFDC eligibility (in accordance with the program rules in effect on July 16, 1996) is predicated on a child meeting the criteria for such both at the time of removal and in the month the adoption petition is initiated."

This policy is reflected in OAC 5101:2-47-29. Even before the abolition of the AFDC program, the standard never required that birth parent or specified relative had to have been receiving AFDC benefits. Federal law at 42 U.S.C 673 (a)(2)(b) states that eligibility is satisfied if the child would "would have received such aid" had an application been made. The agency making an eligibility determination is therefore obliged to reconstruct the case in order to determine if the birthparent or specified relative would have qualified for ADC benefits as of July 16, 1996.

Paragraph (C) of OAC rule 5101:2-47-29 also reminds agencies and hearing officers that "in situations where absolute proof of the ADC deprivation and need standards is not available because of missing or conflicting information, determination of whether the deprivation and need standards are met shall be based upon the best evidence available."

Adoptive parents often have some knowledge of the birthparents situation. Questions such as whether the birthmother lived apart from the birthfather and held a regular job or whether the birth father contributed to the child's support can be decisive. Note: A little more detail.

If a child is receiving Title IV-E foster care maintenance payments, he or she meets both the AFDC-relatedness standard and the judicial determination requirement discussed below. These requirements are eligibility standards for both adoption assistance and federal foster care maintenance.

Guidance: Using SSI eligibility as means of obtaining adoption assistance.

Two situations encourage prospective adoptive parents to explore SSI as an avenue for adoption assistance:

1. For some reason, perhaps the birth parents' employment status, the child is not likely to meet the ADC relatedness standard; and/or
2. The child has a disability which may qualify him or her for SSI. The Social Security Administration Web Site at provides useful information on disabilities.

As noted previously, SSI can serve as an avenue to Title IV-E adoption assistance in cases where the parent's income is likely to exceed the income limits for SSI after finalization. The longstanding policy on receipt of SSI and IV-E adoption assistance is set forth in Section 8.2B.12 of the federal Child Welfare Policy Manual. A child may be concurrently eligible for adoption assistance and SSI, although he or she may not collect the full amount of benefits from both programs. The manual states: :

> The adoptive parents of a child eligible for title IV-E adoption assistance and SSI benefits may make application for both programs and the child, if eligible, may benefit from both programs simultaneously.
>
> In cases where the child is eligible for both SSI and title IV-E and there is concurrent receipt of payments from both programs, "the child's SSI payment will be reduced dollar for dollar without application of any exclusion", thus decreasing the SSI benefit by

the amount of the title IV-E payment (SSI Program Operations Manual). To reiterate, concurrent receipt is subject to the SSI rule that the SSI payment will be reduced by the amount of the foster care payment.

Source/Date: ACYF-CB-PA-94-02 (2/4/94)
Legal and Related References: Social Security Act - section 473; 20 CFR 416.1100ff; Program Operations Manual System, Part 5, Supplemental Security Income Chapter 008 - Income, Subchapter 30 - Unearned Income

The Social Security Administration regards children with certain conditions as "presumptively" eligible for SSI. In such cases, the child is declared eligible pending a complete review. Premature birth and childhood weight to age standards may be regarded as a presumptive condition. See Social Security Online, "Are children born prematurely eligible for SSI benefits?" Some other points to bear in mind are:

- Explore SSI eligibility in cases where the child has a significant problem that keeps the child from functioning at an age appropriate level. Enlist the support of the agency that holds custody of the child to file an application.

- Explore SSI eligibility in cases where there is serious doubt that the child will meet the AFDC standard or some other eligibility standard for IV-E adoption assistance other than special needs.

- Explore SSI eligibility through the local Office of the Social Security Administration

- The income of the adopting parents should not be considered as income to the child until after finalization. Most adoptive families will lose eligibility for SSI after finalization because their incomes are too high. In such cases, SSI eligibility can serve as an avenue to IV-E adoption assistance.

In some cases, the official at the Social Security Administration may not be aware that the income of prospective adoptive parents is not deemed as income to the child. The parents may direct the official to the section on "Deeming" in Social Security online at: http://www.ssa.gov/notices/supplemental-security-income/spotlights/spot-deeming.htm. and Section 2169 of the Social Security Handbook at: http://www.ssa.gov/OP_Home/handbook/handbook.21/handbook-2169.html

- Try as hard as possible to get the eligibility determination for SSI completed before the petition for adoption is filed.

- If you did not complete the eligibility determination for SSI before the petition for adoption is filed and your child appears to meet the disability criteria for SSI, consider appealing a denial of your application for Title IV-E particularly if your child is clearly eligible for SSI. Federal law itself makes no mention that the petition month is a deadline, but the Child Welfare Policy Manual and OAC 5101:2-47-29 do.

Judicial Determination

Is there a requirement for some form of judicial determination in order to qualify for Title IV-E adoption assistance?

In most cases, eligibility requirements for the Title IV-E adoption assistance program include the need for a judicial determination stating, "to the effect" that continuation in the home would be contrary to the welfare of the child. The one notable exception occurs in the case of children who become eligible for adoption assistance by qualifying for SSI. This type of judicial determination is routinely made at the time a child is placed in foster care as the result of a court proceeding. The *Child Welfare Policy Manual* in Section 8.2B.13 specifies that in cases where the child is "voluntarily relinquished either to the State agency (or another public agency (including Tribes) with whom the State has a title IV-E agreement), or to a private, nonprofit agency, there must be:

> a petition to the court to remove the child from home within six months of the time the child lived with a specified relative; and a subsequent judicial determination to the effect that remaining in the home would be contrary to the child's welfare.

Federal adoption assistance law at 42 U.S.C. 673 refers to the requirement for a judicial determination "to the effect" that continuation in the home was contrary to the child's welfare." The use of this phrase suggests a federal concern that all placements must be reviewed by a court to assure that they are in the child's best interest. In the past, a judicial determination that a **placement was in the child's best interest** has been viewed as the equivalent of a determination that "continuation in the home was contrary to the child's welfare."

In Ohio, OAC rule 5101:2-47-29 accepts both determinations as valid. Paragraph 4(a) notes that in cases where a "JFS "Permanent Surrender" (relinquishment) is executed with a public or private agency:

> Within one hundred eighty days from the date the child was removed from the home of a specified relative and prior to the final decree of adoption, the PCSA or PCPA shall obtain from the court of competent jurisdiction a judicial determination to the effect that continuation in the home would be contrary to the welfare of the child or that the placement is in the best interest of the child.

Are there any differences between the federal and state requirements?

Yes, the *Child Welfare Policy Manual* in Section 8.2B.13 specifies that a petition for a judicial determination must be filed within six months of the placement cases and a subsequent determination made. OAC 5101:2-47-29 requires that the determination be made within 180 days of the permanent surrender.

Presumably, the *Child Welfare Policy Manual* focused on deadlines for filing the petition, knowing that the crowded court dockets, custody battles and a number of other factors could delay the actual determination. The Ohio regulation is clearly more restrictive.

Guidance: Judicial Determinations

Obtaining a judicial determination is much more of a challenge in private agency adoption.than in public agency placements, when the judicial determination is made when the child enters foster care. In the past, some private agencies have not been well informed about the judicial determination requirement and have for one reason or another neglected to make a timely filing, costing the child his or her eligibility for Title IV-E adoption assistance. Parents adopting through private agencies should therefore be aware that:

- The PCPA has primary responsibility for filing a petition for a judicial determination in the case of children in their care. Make certain that the PCPA petitions the court for a judicial determination that placement is in the child's best interest as soon as possible after the permanent surrender.

- Even though federal policy requires that a petition for a judicial determination be filed within six months after the placement, parents adopting children in Ohio should attempt to meet the more restrictive deadlines in OAC 5101:2-47-29(4)(b) to avoid a possible appeal.

- If the petition is filed in a timely manner, but the actual court determination is delayed by factors beyond the parent's control, they should inform the agency and be prepared to provide the proper documentation. If the agency denies the child's eligibility based upon the fact that the court was petitioned, but did not make a judicial determination within 6 months (180 days), the parents should appeal.

Application for Adoption Assistance

How does one apply for Title IV-E adoption assistance in Ohio?

Although the Ohio Department of Job and Family Services is responsible for administering the federal Title IV-E program, for purposes of determining eligibility, the public county children services agency or PCSA functions as an agent of the state. Denials of assistance are issued by the PCSA.

Adoptive parents must complete and submit an ODJFS 1453 form to the PSCA which holds custody of the child. In Ohio, applications and requests for adoption assistance are submitted to the public children services agency (PCSA) that placed the child for adoption. In cases where placement is made by a private agency or PCPA, application is made to the public agency in the county where the private agency is located. When a child is placed with an Ohio family by a private agency in another state or where no agency is involved, applications are made to the public agency in the parent's county of residence.

Must a separate application be completed for each child?

Yes, a separate application must be completed for each child.

Are Ohio agencies required to provide information about the child background, special needs and adoption assistance programs?

Yes, OAC 5101:2-48-15 (A) requires that prior to placement, the public or private agency must "provide the prospective adoptive parent with information about the child and any special needs of the child, identified or anticipated, and available resources to assist the prospective adoptive parent in making an informed decision about the placement." Paragraph (B) reinforces this point by specifying that prior to placement the agency must provide the adoptive parents with:

- A child study inventory which includes "all background information available on the child in accordance with rule 5101:2-48-21 of the Administrative Code";

- "Information regarding any child-specific financial and medical resources, known or anticipated, including subsidy information;" and

- "Information describing types of behavior that the prospective adoptive parent may anticipate from children who have experienced abuse and neglect, suggested interventions, and the post adoption services available if the child exhibits those types of behavior after adoption."

Are Ohio agencies required to assist adoptive parents in completing applications for adoption assistance?

Yes, OAC 5101:2-47-28 requires both public and private agencies to assist parents with the application process. Often overlooked is Paragraph (J) of the rule 5101:2-47-28, which requires:

> A face-to-face interview with the adoptive parent(s) is required at application. If the adoptive parent(s) live out-of-state or in another county which is a considerable distance from the agency, a face-to-face interview is not required. The PCSA may ask the children services agency in the other county or state to assist with the determination of eligibility or continuing eligibility an interview between the applicants and the PCSA.

Applicant parents have a reasonable expectation that the public agency will inform them of any documentation they need to provide. Those adopting through private agencies should be able to count on agency to provide supporting documentation and to petition the court the a judicial determination that placement is in the child's best interest.

Must the PCSA respond to an application for adoption assistance? What are the time limits for acting on applications? What is the criteria for "reasonable promptness" in adoption assistance applications?

Federal hearing regulations at 45 CFR 205.10 (5) specify that an application must be acted upon with "reasonable promptness." Ohio hearing regulations at OAC 5101:6 also refers to the failure of an agency to act with reasonable promptness as grounds for an appeal hearing.

OAC 5101:2-47-28 (F) provides: "The PCSA shall complete an eligibility determination for each child in permanent custody who is placed for adoption. The PCSA must determine a child's eligibility for AA within thirty days after the completed application and all required documentation is provided to the PCSA."

Negotiation of Adoption Assistance

How is adoption assistance put into effect?

Adoption assistance is put into effect by written agreement between the adopting parents and the county agency. Ohio Administrative Code (OAC) rule 5101:2-47-36 (A) specifies that:

> The ODHS 1453 "Adoption Assistance Agreement" must be signed by both the adoptive parent(s) and the public children services agency (PCSA) for each child receiving adoption assistance (AA) payments. The agreement must specify the specific payments, medical and social services to be provided and the terms under which such benefits will continue to be available. The AA agreement is binding on both parties, but the specific payments and services may be modified at any time in response to a proposal by either the adoptive parent(s) or the PCSA if both parties agree to the change.

Ohio rules are based on federal law at 42 U.S.C. 673 (a) (3), which states:

The amount of the payments to be made in any case under clauses (i) and (ii) of paragraph (1)(B) shall be determined through agreement between the adoptive parents and the State or local agency administering the program under this section, which shall take into consideration the circumstances of the adopting parents and the needs of the child being adopted, and may be readjusted periodically, with the concurrence of the adopting parents (which may be specified in the adoption assistance agreement), depending upon changes in such circumstances.

Do federal and state laws require that adoption assistance agreements be negotiated between the parents and the state or public agency representing the state?

Yes, Question 1 of Section 8.2D.4 of the *Child Welfare Policy Manual* states:

> the amount of the adoption assistance payment is determined through the discussion and negotiation process between the adoptive parents and a representative of the State agency based upon the needs of the child and the circumstances of the family. The payment that is agreed upon should combine with the parents' resources to cover the ordinary and special needs of the child projected over an extended period of time and should cover anticipated needs, e.g., child care. Anticipation and discussion of these needs are part of the negotiation of the amount of the adoption assistance payment.

In question 3 of Section 8.2D.4, the Manual addresses the nature of the negotiation that is to take place. It explains:

> During the negotiation of an adoption assistance agreement, it is important to keep in mind that the circumstances of the adopting parents and the needs of the child must be considered together. The overall ability of a singular family to incorporate an individual

> child into the household is the objective. Families with the same incomes or in similar circumstances will not necessarily agree on identical types or amounts of assistance.

Recognizing the distinctive purpose of the Title IV-E adoption assistance program, the Manual notes that unlike other public assistance programs in the Social Security Act," "the title IV-E adoption assistance program is intended to encourage an action that will be a lifelong social benefit to certain children and not to meet short-term monetary needs during a crisis."

Adoption assistance is a form of insurance policy to help promote permanency. It is designed to supplement the extraordinary resources that adoptive families commit to their special needs children. As the Child *Welfare Policy Manual* puts it in Section 8.2D.4:

> The payment that is agreed upon should combine with the parents' resources to cover the ordinary and special needs of the child projected over an extended period of time and should cover anticipated needs, e.g., child care. Anticipation and discussion of these needs are part of the negotiation of the amount of the adoption assistance payment.

Finally, in Question 2 of Section 8.2D.4, the *Manual* adds, "agreements that are not negotiated to the specific needs of the adoptive child and the circumstances of the family, however, are not permissible."

In what ways do current Ohio regulations reflect current federal policy?

Ohio Administrative Code (OAC) rule 5101:2-47-42 reflects current federal policy. Paragraph (A) states:

> The amount of the adoption assistance (AA) payment is determined by negotiation and mutual agreement between the

> adoptive parent(s) and the public children services agency (PCSA) in accordance with rules 5101:2-47-36 and 5101:2-47-43 of the Administrative Code and must be based on the needs of the child, the circumstances of the adoptive family and the PCSA's adoption policy. A consideration of the child's needs and adoptive family's circumstances refers not only to such factors as the overall capacity of the adoptive parent(s) to meet the child's immediate and future needs (including educational needs), but to the ability to incorporate the child into the household in relation to the lifestyle, standard of living and future plans of the adoptive parent(s).

OAC rule 5101:2-47-43 echoes the previous rule. According to Paragraph (A), "the amount of the AA payment is determined through the discussion and negotiation process between the adoptive parent(s) and the PCSA based upon the circumstances of the adoptive parent(s) together with the needs of the child. (Emphasis added).

In a number of administrative state hearings, the case has been remanded back for negotiation when the county agency refused to comply with the negotiation requirements in federal law and OAC 5101:2-47-42 and 5101:2-47-43. For, sample copies of hearing and court decisions on this issue, contact Tim O'Hanlon at tohanlon@columbus.rr.com.

Is the concept of family circumstances the same as the family's income?

No, family circumstances is a much broader concept than family income. In fact, unlike other federal benefits, agencies may not employ an income means test based on family size and income to determine the amount of adoption assistance.

In Question 3 of Section 8.2D.4 of the Child Welfare Policy Manual specifically forbids the use of "median income adjusted to family size be used as a guide to establish consistency in determining amounts of payment." OAC rule 5101:2-47-42 (B) and OAC 5101:2-47-38 also forbid the use of a means test to determine the amount of assistance. 5101:2-47-42(B) specifies

that “no income eligibility test shall be used to determine eligibility for AA or the amount of an AA payment.”

How do you begin negotiations of adoption assistance?

As we noted previously, Ohio regulations require a face to face meeting between the parents and the public agency. The requirement for negotiation in federal law also anticipates a discussion, not merely an exchange of documents.

It has been a common practice for the agencies to inform the prospective adoptive parents their child or children are eligible for adoption assistance and ask them to sign an agreement for a certain amount of assistance. The figure cited by the agency is often hundreds of dollars below the level of support the child was receiving in foster care or would receive in foster care if he or she were placed in a foster home suitable to their level of care.

Should prospective adoptive parents sign an agreement with an amount on it that does not appear to be adequate to support the child’s needs in light of the family’s circumstances?

No, families should request that the agency discuss and negotiate an amount that adequately reflects the child’s needs and their family circumstances.

How does one attempt to negotiate?

Parents might contact the agency and request a face to face meeting to negotiate. If distance is a problem, county agencies often have access to video conference and teleconference equipment. When requesting opportunity to negotiate a higher level of assistance, it is a good idea to follow up phone contact with a written request such as the following:

Sample Request Letter

Dear_____,

I am writing to request a meeting to discuss and negotiate a Title IV-E adoption assistance agreement for (child's/children's name(s)) As responsible parents, our objective is to arrive at a level of adoption assistance that is consistent with:

a. the challenge of meeting (child's name) current and anticipated daily care and special needs; and

b. the impact that providing for those needs will have on the circumstances of our family.

We recognize that adoption assistance is designed to serve as a supplement, not as a substitute for our family resources. Knowing that the agency shares our goal of providing a permanent, nurturing family, we are confident that we can reach an agreement on an amount of assistance that will reflect the best interests of ( ). Considering the challenges that lay ahead, our request for support is a modest one. For the children's sake, however, we must not settle for an inadequate plan of support that will place their care needs at risk.

Such a letter put the parents on record as attempting to negotiate a reasonable amount of assistance in accordance with applicable law for the benefit of the child. The letter can include a brief description or examples of care needs and/or changes in family circumstances, but it is not necessary to go into great detail. Be sure and include specific reference to the **needs of the child and circumstances of the family** because those phrases are contained in the federal and state regulations. Also ask for the opportunity to discuss and negotiate the assistance agreement.

Parents who wish to apply for an increase in adoption assistance may use the same approach. Requests for amendments to existing adoption agreements should refer to changes in the child's needs or family circumstances that justify an increase. An example or two may be offered, but, once again, it is not necessary to go into great detail in the initial letter.

Should parents comply with the agency's requests for information?

Yes, it saves time to comply with the agency's requests for written documentation, but make sure you make it clear that you also want to use the information as the basis for a discussion and negotiation of an adoption assistance agreement. Parents must decide the point at which requests for additional information become counterproductive and function as barrier to negotiation. Once again, failure on the part of the agency to act on request with reasonable promptness, once sufficient information has been provided, is grounds for an appeal hearing.

Should prospective adoptive parents educate themselves on the various subsidy policies in Ohio Counties before deciding on adopting a child?

Prospective adoptive parents typically fall in love with a child before the question of adoption assistance arises. It is important to be aware that there are large variations in the amount of adoption assistance to which various Ohio Counties are willing to commit. Parents do not adopt children for the adoption subsidy, but it is nonetheless a good idea to learn about differences in attitudes and policies toward adoption assistance held by different Ohio counties in case one becomes committed to a child with extensive and expensive special needs. Such information should be available from the Children and Family Services section of the Ohio Department of Job and Family Services, adoption support groups and the county child welfare agencies themselves. OAC rule 5101:2-48-05 (A)(15) requires agencies to include "a description of all state and federal adoption assistance, including eligibility and the application requirements" as part of their adoption policies.

The Funding of Adoption Assistance

As noted above, adoption assistance is an open ended entitlement and like other entitlement programs is funded with federal dollars which must be supplemented with non-federal matching funds. The ratio of federal to non federal funding in adoption assistance is the same as that in the individual state's Medicaid plan. The portion of federal funding varies from state to state from a low of 50% to a high of around 80%. In Ohio, the federal financial participation or FFP consistently hovers around 60% of the cost.

What are the minimum and maximum amounts of adoption assistance?

There are no is legal minimums or maximums per se. The practical maximum is set by the rate of federal funding. Federal law at 42 U.S.C. 673 states that "the amount of the adoption assistance payment cannot exceed the amount the child would have received if s/he had been in a foster family home, but otherwise must be determined through agreement between the adoptive parents and the State or local title IV-E agency." The "amount of adoption assistance payments" referred to in this section of the federal statute refers to federal financial participation.

OAC rule 5101:2-47-43 (B) echoes federal law by specifying:

> The maximum amount of AA payment which is eligible for FFP shall not exceed the cost of the foster care maintenance (FCM) payment which would have been paid if the child for whom the AA payment is made had been in a foster home, including a foster home receiving difficulty of care payments for a child with special, exceptional or intensive needs as described in rule 5101:2-47-18 of the Administrative Code

What this statement actually means is that federal financial participation (FFP) is available for adoption assistance payments up to the rate a child would receive were he or she in a family foster home suitable to his/her level of care.

States can conceivably pay any amount of adoption assistance they so choose, but they will only be eligible to receive the federal share of adoption assistance up the appropriate foster home payment rate. States are rarely willing to make adoption assistance payments beyond the level of federal financial participation, so the child's individual family foster care rate usually functions as a de facto ceiling on adoption assistance payments.

Title IV-E adoption assistance requires non-federal matching funds for the remainder of the cost. Suppose, for example, a child with severe emotional problems were placed in a specialized foster

home where the caregivers were paid $1,500 per month for his care. If the child is placed in an adoptive home and qualifies for Title IV-E adoption assistance, FFP would be available for a monthly adoption assistance payment of up to $1,500. In Ohio the FFP for a $1,500 adoption assistance payment would be approximately $900 or about 60%.

It is also possible to negotiate an adoption assistance payment for zero dollars per month with the understanding that the agreement may be modified and a payment negotiated if there is a change in the needs of the family and circumstances of the child. The child would retain his or her eligibility for Medicaid in a no payment adoption assistance agreement.

Is the foster care rate today's rate or the rate the child initially received?

It is the current rate the child would receive were he or she in a foster home rather than an adoptive home. In an August 2002 policy memorandum, entitled *TITLE IV-E ADOPTION ASSISTANCE AGREEMENT NEGOTIATION CLARIFICATION***,** the Ohio Department of Job and Family Services (ODJFS) stated, "the foster care payment is the amount being paid or the amount that would have been paid if the child is or would have been in foster care at the time of the negotiation or amendment/modification of the AA payment." OAC rule 5101:2-47-43 (C) reiterates that the foster home rate is the level of support the child would receive today.

What about Ohio's adoption assistance rates?

Unlike other states, Ohio has no adoption assistance rate schedules based on age ranges or special needs. Several years ago, Ohio split the responsibilities for the non-federal (40%) portion of the Title IV-E payments between the state and counties. The state assumed the non-federal portion of adoption assistance and the counties became responsible for providing the non federal portion of foster care payments. The state also placed additional restrictions on the amount of adoption assistance payments. In 1986, the state placed a ceiling of $250 per month on Title IV-E adoption assistance payments. Six years later in 1992, the regulations were modified to allow

adoption assistance payments to reflect a child's foster care payments if the county was willing to pick up the non federal portion of each dollar over $250.

The state's share of adoption assistance payments has remained the same, approximately 40% of the first $250 of each adoption assistance payment, or about $100. Counties were not specifically required to match foster care rates or to contribute any additional funds, but were authorized to do so as means of drawing down additional federal dollars.
Some counties raised their adoption assistance payment rates to coincide with their regular foster care rates. Others negotiated rates above $250 with adoptive parents on a case by case basis. Many agencies resisted assuming any portion of adoption assistance, and in doing so increased the variation in adoption assistance payments among Ohio counties. In the ten years since 1992, persistent and informed adoptive parents have often successfully managed to negotiate adoption assistance rates above the level initially offered by the county success.

Suppose a child were placed for adoption directly from a specialized foster home where the care givers were receiving $1,000 per month. If the county agreed to an adoption assistance payment of $1,000 per month, the fiscal responsibility would break down as follows:

Total Monthly Adoption Assistance Payment:$1,000

First $250	Federal Share: $150 (60%)	State Share:$100 (40%)	County Share: 0
Remaining $750	Federal Share: $450 (60%)	County Share:$300 (40%)	State Share: 0
Totals: $1,000	Federal Share: $600 (60%)	State Share:$100 (10%)	County Share: $300 30%)

OAC rule 5101:2-47-43 (B) states adoption assistance payments eligible for federal funding include foster homes “receiving difficulty of care payments for a child with special, intensive or exceptional needs as described in rule 5101:2-47-18.”

Paragraph C of 5101:2-47-43 says to determine the amount of assistance that will be eligible for federal reimbursement:

Determine the foster care rate that the child would receive in that county where she or he in a foster care placement "at the time the most current agreement or modification/amendment to an existing agreement is signed." This means right now, today.

"Determine the amounts of any special, exceptional or intensive needs difficulty of care payments as described in rule 5101:2-47-18 of the Administrative Code. . . ."

What issues must be addressed in negotiating adoption assistance in Ohio?

Parents face the problem that there is no law that requires agencies to pay a certain amount of adoption assistance. County agencies are not required to match foster care rates or to agree to a particular amount of adoption assistance. On the other hand, both federal and state law require agencies to consider and discuss the needs of the child and circumstances of the family in negotiating adoption assistance.

What does consideration of the needs of child and circumstances of the entail?

In addition to documenting the child's special needs, parents should show how addressing those needs impacts their family situation and visa versa. OAC 5101:2-47-43 and 5101:2-47-42 both state that:

> Consideration of the circumstances of the adoptive parent(s) pertains to the adoptive family's capacity to incorporate the child into their household in relation to their lifestyle, standard of living and future plans, as well as the overall capacity to meet the immediate and future needs (including educational) of the child.

Single adults or couples often adopt children with serious emotional and behavioral problems that escalate as the child grows older. Because there are not enough families to go around, many adopt three four or more special needs children.

Adoption in such instances radically changes family circumstances. It is quite common for adoptive parents to give up careers in order become full-time caregivers with a corresponding loss of income, health insurance and a reduced ability to meet every day material needs. The gains made by serving as a full time parent are threatened by a decreased ability to pay for programs and services needed by the child as well as ordinary family needs.

Examples: Linking special Needs to Family Circumstances

Example 1

An adoptive parent quits a job to become full time caregiver because her child's need to strengthen attachment. As a result, the family needs more support because of the parent's reduced income, loss of health care coverage and other benefits. The children may be thriving under increased parental care, but the loss of financial support places the family's well-being and child's progress at risk and may limit the parent's ability to continue adequate care or meet ordinary expenses.

Types of Supporting Documentation:

A letter from a doctor or mental health provider indicating the need for more extensive parental care.

An income statement showing a loss in financial resources.

Examples of the difficulty in meeting the child's ordinary and special needs without additional support.

Example 2

The parent(s) have other special needs adopted children and are adopting a new child or a sibling group. Incorporating new children may necessitate a range of adjustments such as purchasing a

larger vehicle, remodeling a home; more frequent trips to doctors, therapists, schools, recreation programs, increased costs for food, clothing and other necessities, increased need for parental supervision and for respite. Incorporating new children also may affect the behavior of the other adopted children.

Types of Supporting Documentation

- Documentation about how the care needs of impact the family in terms of increased responsibilities or expenses.

- A letter from a doctor or mental health provider indicating the need for extensive parental care for the new children and any possible effects on the existing adoptive children.

Examples of ordinary and special needs new children that meet without additional support.

Example 3

The parent(s) have adopted a sibling group. Each child has severe emotional/behavioral problems which demand extensive supervision and demands on the family listed in Examples 1 and 2. The children are destructive, don't sleep, harm family pets or other children. The parents are wearing out the parents. The parents need respite, support for more structured activities that will benefit the children and travel expenses.

Types of Supporting Documentation

Combination of documentation discussed in examples 1 and 2.

Example 4

The adopted children are growing older. Basic necessities cost more and family income is reduced by the necessity of having to stay home and care for children. One parent may become ill or disabled. Children need various activities to develop socially. Activities and transportation cost money and children become more expensive to care for as they grow older.

Types of Supporting Documentation

- Income information, including information on the career that has been put on hold or abandoned altogether.
- Cost estimates of activities needed by the children both ordinary and special.
- Recommendations by teachers, coaches, therapists that the activities would be beneficial.

Circumstances of the family is a very broad term encompassing adjustments and changes that occur in the course of meeting the current and anticipated needs of adopted children. Remember, the object of discussing and documenting family circumstances is to show the adjustments that your family must make in order to provide a stable, healthy home for a traumatized child or children, and how the accommodations have in turn limited the resources you have to carry on this crucial task.

Does the term family circumstances include ordinary as well as extraordinary expenses?

Yes, consistent with Ohio regulations the federal *Child Welfare Policy Manual*, in Section 8.2D.4., question 1 notes:

> The payment that is agreed upon should combine with the parents' resources to cover the ordinary and special needs of the child projected over an extended period of time and should cover anticipated needs, e.g., child care. Anticipation and discussion of these needs are part of the negotiation of the amount of the adoption assistance payment.

The broad purpose of adoption assistance, as provided in state and federal law, is to help the adoptive parents sustain a permanent family for a special needs child who has no family. Special needs children are obviously more than the sum of their disabilities, so state and federal law wisely recognize that adoption assistance is also available to help children meet food clothing recreational, educational and other needs.

The notion that adoption assistance is intended to help cover ordinary as well as extraordinary services is given further credence by the fact that under the law adoptive parents have complete discretion over the use of payments on behalf of the child. It is not set aside only for certain purposes such as therapy. Section 8.2D.1 of the federal *Child Welfare Policy Manual* address this point as follows:

> **1. Question:** Are there restrictions for how title IV-E adoption assistance funds may be spent?
> **Answer:** Once the adoption assistance agreement is signed and the child is adopted, the adoptive parents are free to make decisions about expenditures on behalf of the child without further agency approval or oversight. Hence, once an adoption assistance agreement is in effect, the parents can spend the subsidy in any way they see fit to incorporate the child into their lives. Since there is no itemized list of approved expenditures for adoption assistance, the State cannot require an accounting for the expenditures. The amount of the assistance may be adjusted

periodically if the family's or child's circumstances change, but only with the concurrence of the adoptive family.

Source/Date: ACYF-CB-PA-01-01 (1/23/01)

Legal and Related References: Social Security Act - sections 473. Please note, this policy issuance is based on federal law.

How may income be used to demonstrate family circumstances?

OAC 5101:2-47-38 forbids the use of a means test to determine the amount of assistance. What does this mean? Unlike most federal assistance program, state may not employ a formula for the amount of assistance based on income and family size.

Parents, however, may cite a loss of income to indicate a change in family circumstances and a corresponding inability to meet children's needs. The loss of a job caused by increased parental responsibilities, retirement or the death of a spouse signal obvious and potentially devastating changes in family circumstances. If the agency asks for an income statement, go ahead and comply, particularly if the statement supports your argument that your family circumstances have changed such that it has become harder to keep up with your child's care needs.

Remember, income may be used to illustrate family circumstances, but the agency cannot simply use an income chart to make a decision. So if the agency asks for information be sure and include information that supports your position. Some adoptive families may have reasonably high incomes, but find themselves in financial distress trying to meet the care needs of one or more children with very serious mental health problems. If that is the case, include information that paints an accurate picture of your situation.

Are there any other documents that an adoptive family might utilize to demonstrate that providing a permanent child involves ordinary expenses as well as those more directly involved in addressing the child's special needs? Are there reports that can help parents put the amount of adoption assistance they are requesting into some reasonable perspective?

Since 1960, the U.S. Department of Agriculture (USDA) has provided estimates of annual expenditures on children from birth through age 17. The report estimates the expenditures associated with raising children by families in three economic classes based upon annual income before taxes. Expenses include: housing, food, transportation, health care, child care and miscellaneous (personal care items, entertainment, and reading materials). All of the expenses, are embraced by the concept of family circumstances.

The most recent report is *Expenditures on Children by Families, 2004*. It can be found by entering the internet search terms USDA Expenditures on Children by Families 2004. The estimates do not focus on raising special needs children. Costs incurred by adoptive parents providing families for special needs children would presumably be higher, in many cases, significantly higher. The following are overall summaries of expenses for two of the three income categories in the 2004 USDA report.

Before-tax income: $41,700 to $70,200 (Average = $55,500)

Age of Child	Total		Housing	Food	Trans.	Clothing	Health	Child Care	MIsc. Care/ Educ.
	Per Yr.	Per Mo.							
0 – 2	$9,840	$820	$3,630	$1,170	$1,230	$410	$690	$1,680	$1,030
3 - 5	10,120	$843	3,600	1,350	$1,200	400	660	1,860	1,050
6 - 8	10,030	$836	3,510	1,720	1,330	440	750	1,190	1,090
9 - 11	9,910	$825	3,260	2,030	1,410	490	820	780	1,120
12 – 14	10,640	$886	3,520	2,050	1,540	830	820	570	1,310
15 - 17	10,900	$908	3,030	2,270	1,950	740	870	980	1,060

Before-tax income: More than $70,200 (Average= $105,100)

Age of Child	Total Per Yr.	Total Per Mo.	Housing	Food	Trans.	Clothing	Health Care	Child Care/ Educ.	MIsc.
0 - 2	$14,620	$1,218	$5,770	$1,550	$1,720	$540	$790	$2,530	$1,720
3 - 5	14,960	$1,247	5,730	1,760	1,690	530	760	2,750	1,740
6 - 8	14,710	$1,226	5,640	2,120	1,820	580	870	1,900	1,780
9 - 11	14,470	$1,205	5,400	2,460	1,900	630	940	1,320	1,820
12 - 14	15,270	$1,273	5,660	2,580	2,030	1,040	940	1,010	2,010
15 - 17	15,810	$1,318	5,160	2,720	2,460	950	990	1,780	1,750

The inclusion of the USDA estimates may not influence a hearing officer that is trained to concentrate on existing Ohio regulations. Inclusion in the hearing record, however, sheds light reasonableness of the adoptive family's request for adoption assistance by providing some basis of comparison with costs associated with raising non-special needs children. Judges might be inclined to pay attention to the USDA estimates if the appeal reaches the judicial review stage.

Is it likely that the county agency will agree to an adoption assistance payment that matches the maximum foster home rate?

It is not impossible to obtain the maximum specialized level of care rate, but parents should expect agencies to resist a request for an adoption assistance payment of that amount. The maximum foster rates provide a guide, a ceiling, a context, a framework for negotiation. The real question for families is what amount adoption assistance do you need to provide an adequate level of support to meet your child's current and anticipated needs, both the specialized ones and the more ordinary, day to day needs?

If you decide that the maximum rate is necessary than by all means pursue it. On the other hand, you might cite the maximum rate as starting point in negotiation and have a lower but still adequate amount in mind. Calculating the amount of adoption assistance needed to provide an adequate level of care and a stable, healthy family life is hardly an exact science, given the uncertainties of creating a permanent home for special needs children. Nevertheless, parents

should try to use their knowledge of the children to come up with a best guess of what a sufficient amount of assistance would be, given the current situation and expenses that are likely to surface in the future.

The negotiation strategy depends upon the parents' knowledge of the agency. In some cases, the parents may object to the agency's initial offer as too low, particularly if it represents a sizable drop from the child's level of support in foster care. The parents may express a willingness to negotiate an adequate payment based upon the needs of the child and circumstances of the family, but wait for the agency to make a counter offer.

To repeat, it is always a good idea for the parents to have some idea of the amount of adoption assistance they need to provide adequate care and avoid placing the family and children at an unacceptable level of financial risk. The decision of whether to request the maximum rate and maintain a compromise fall back position or to refrain from citing a figure in the early stages of the negotiation depends on the parents' personalities and their reading of the agency.

In any case, the parents should keep returning to certain themes throughout the negotiation process such as:

- Reiterating how their concerns are consistent with existing state and federal policy. Special needs children are more than the sum of their disabilities. The object is to normalize the children's lives as much as possible. Social and recreational activities designed to boost confidence, make friends or discover talents may be more important to adopted children than children who have always lived in stable homes. There are no restrictions regarding the parent's use of adoption assistance on behalf of their children. Discretion lies with the adoptive mother and father.

- Reminding the agency that their overriding responsibility is to provide a permanent family for children who have been traumatically separated from their birth parents. The parents may politely add that permanency is the agency's goal as well as their own

- Quietly, but confidently taking the position that, as prospective parents, they have an obligation to advocate for an adequate support plan for their children. Settling for an adoption assistance agreement that would hinder their ability to meet the challenge of the children's care needs would be irresponsible and place the very goals of the adoption at risk.

- Remembering that although parents may request an amendment to the adoption assistance agreement at any time, it is perfectly legitimate to consider anticipated needs in the initial negotiation. Parents have somewhat less negotiating power after the adoption has been finalized.

PART 2. APPEALING AGENCY DECISIONS

Appeal Procedures: Steps in Obtaining an Administrative ("State") Hearing

As noted in Part 1, Title IV-E adoption assistance is a federal entitlement program and as such applicants and recipients have the right to appeal adverse decisions by agencies. The provisions of Title 45 of the Code of Federal Regulations at CFR 205.10 apply to adopting and adoptive families as well as to other participants in federal programs.

45 CFR 205.10 (5) states that

> An opportunity for a hearing shall be granted to any applicant who requests a hearing because his or her claim for financial assistance (including a request for supplemental payments under Secs. 233.23 and 233.27) is denied, or is not acted upon with reasonable promptness, and to any recipient who is aggrieved by any agency action resulting in suspension, reduction, discontinuance, or termination of assistance, or determination that a protective, vendor, or two-party payment should be made or continued.

Ohio hearing regulations at OAC 5101:6 have similar provisions, implementing the federal due process guidelines. Note: For access to Ohio hearing regulations

- Click on links containing OAC 5101:6.;
- Click on State Hearings annual on the right side of the screen.
- Click on appropriate rule from the left side of the screen

What is the legal foundation for hearing rights?

Hearing rights for applicants and participants in federal entitlement programs, including Title IV-E adoption assistance, were established 1970 by the United States Supreme Court in the case of ***Goldberg v. Kelly***, 397 U.S. 254 (1970).

What kinds of decisions pertaining to Title IV-E adoption assistance may be appealed?

All of the following may be appealed when the application or request is denied by the PCSA:

- A denial of a child's eligibility of adoption assistance.
- A request for an increase in adoption assistance before finalization.
- A request for a modification to an existing adoption assistance agreement after finalization to increase existing levels of support.
- A denial of an application for adoption assistance submitted after a final decree of adoption.
- The denial of a request for nonrecurring adoption expenses associated with the adoption of a special needs child.
- When an application for assistance has not been acted upon with reasonable promptness

See OAC 5101:6-3-01

What is the criteria for "reasonable promptness" in adoption assistance applications?

OAC 5101:2-47-28 (F) provides: "The PCSA shall complete an eligibility determination for each child in permanent custody who is placed for adoption. The PCSA must determine a child's eligibility for AA within thirty days after the completed application and all required documentation is provided to the PCSA."

How must denials of assistance be communicated to the adoptive parents?

Ohio regulations on the denial of assistance reflect the provisions for adequate notice in Title 45 of the Code of Federal Regulations at CFR 205.10 (a)(4). The Ohio Administrative Code (OAC) at 5101:6-2-03 specifies that notice of a denial of benefits must be communicated in writing and

- shall contain a clear and understandable statement of the action the agency has taken and the reasons for it, cite the applicable regulations, explain the individual's right to and the method of obtaining a county conference and a state hearing, contain the name and telephone number of the person to contact for more information and contain a telephone number to call about free legal services.

- be issued on a "Notice of Denial of Your Application for Assistance," (JFS 07334 form), or its computer-generated equivalent, shall be used.

Adoptive parents rely on adequate notice to know what issues they must address in the hearing.

In Ohio, is there any difference between a "state hearing" and administrative hearing?

No, in Ohio the term "state hearing" is used. In other states, the term administrative or "fair" hearing is employed. The terms are synonymous.

How does an adoptive parent request an administrative or "state" hearing in Ohio?

OAC 5101:6-3-02 defines a request as a clear oral or written expression by the applicant or an authorized representative, "to the effect that he or she wishes to appeal a decision or wants the opportunity to present his or her case to a higher authority." Contact information is provided to the applicant as part of the written denial. The request may be made to the Ohio Department of Job and Family Services' Bureau of State Hearings in Columbus either in writing or by fax to the number provided on the form.

What is the time limit for requesting a hearing?

The adoptive parent has ninety days from the day after the date on which the notice of denial is mailed to request a hearing. For example, if the notice of denial was mailed in April 20, the adoptive parent would have ninety days from April 21 to request a hearing. OAC 5101:6-3-02(B)

What are the time limits for issuing a hearing decision?

According to OAC 5101:6-7-01(B)(1) hearing decisions must be issued within seventy days from the date of the hearing request.

Are hearings conducted in person or via telephone?

The final decision rests with the adoptive parents (appellants). Federal hearing regulations at 45 CFR 205.10(a)(2) specify that states must provide the opportunity for face to face hearings. The option of hearings by phone may be exercised if the parent agrees. In Ohio, a telephone hearing will be scheduled unless the appellant specifically requests an in person hearing.

Is there any advantage in attending the hearing in person?

Issues such as the level of care necessitated by a child's special needs and the broad guidelines for determining the amount of adoption assistance, make hearings on adoption assistance more complicated than appeals involving other federal benefit programs. Even though, hearings are ultimately decided by application of the rules, appearing in person may be of some advantage in reminding the parties what is at stake in the life of a child with serious emotional of behavioral problems. In short, face to face hearings may be of some advantage to the parents. If one cannot appear in person, it is still possible to present a strong case over the phone.

What are hearings like?

Hearings are usually informal in nature. Normally, the agency representative states her argument for denying the parent's request for adoption assistance. The adoptive parent then presents his or

her argument. Parents and the hearing officer may ask the agency representative questions after the agency presentation and the agency and hearing officer may question the parents at the end of their presentation.

Adoptive parents often choose to read a prepared statement and then submit that statement as part of the hearing record. In presenting their cases, adoptive parents should try to integrate two basic components: 1. The particular facts of their case with 2. Existing state regulations and federal policy. In short, the parents' objective is to show how the agency is in error, by discussing the relevant facts and citing existing state regulations and federal policy that support their claims.

1. The particulars of the adoptive family's situation might include such facts and documents as:
    - In cases involving the amount of assistance, a presentation that emphasizes the challenge of meeting the ordinary and special needs of the child and the overall impact on family life. Suggestion: Walk the hearing officer through a day or week in the life of your family.

    - Statements by psychologists, physicians, school authorities that document the child's problems, needs, prognosis, along with the consequences of failing to address the child's needs.

    - Errors made by the agency such as the failure to provide important information about the child, the child's background, adoption assistance programs; or cases in which the agency provided incorrect information that the parents acted upon in good faith. These factors would support appeals for adoption assistance after finalization or hearings involving the amount of assistance.

2. Parents should seek to show how the facts of their case are supported by existing law and policy. Parents can do this by including references to relevant portions of:

- State regulations, supported further by:

- Federal laws and policy issuances such as those in the *Child Welfare Policy Manual*

- Citations to federal law, policy or Ohio's IV-E State Plan if the existing state regulation or policy is not in compliance with federal law or policy.

- Citations to state appeals court decisions, judicial review decisions and hearing decisions that contradict the agency's position.

Once again, the family's situation (the facts) must be supported by state regulations whenever possible, strengthened by federal law or policy, whenever relevant sections can be located. Parents should attempt to cite the specific state rule number, law, policy statement, court case or hearing decision that supports their argument. Generally speaking, the more specific the citation, the better.

The agency's basic strategy will consist of citing regulations and offering an interpretation that attempts to show that the parents' request for adoption assistance does not meet the rule requirements. The specific rules invoked by the agency as grounds for denying the adoptive family's request must be communicated in writing. The parents, then have the opportunity to show that:

- The agency is misinterpreting the rule in a way that is contrary to state and federal policy.
- The rule does not apply to the facts of the case.
- The agency is basing its decision on the wrong rule.

How should the parent's presentation be organized?

Parents often compile a written statement. The may read it or paraphrase it. During the presentation, depending on the issues involved, they may refer to or quote from such items as:

- Letters and reports from psychologists, physicians, therapists and other relevant service providers that document special needs and risk factors.
- Other documents that address a point of disagreement with the agency, such as an eligibility issue other than special needs.
- Statements detailing the impact on the family's circumstances resulting from the child's care needs. (This is an issue in hearings involving the amount of assistance)
- State regulations and federal laws and policy statements.
- Appeals court decisions, judicial reviews and hearing decisions.

The parent's statement becomes part of the record. The parent may then submit the individual documents, letters, reports, laws, cases, etc. as individual exhibits for the record. It is common to identify the documents as Exhibit A, Exhibit B and so on and ask that they be admitted into the record. Additional steps in the appeal process will rely on the initial hearing record, so it is important that all pertinent information and documentation be included.

There are no limitations on the number of documents, witnesses or advocates to speak on your behalf or the time you take to present your case. Parents can take as much time as they need. If certain key documents are not available at the time of the hearing, the parents may request that the record be kept open for a certain period of time to allow the documents to be included.

Federal hearing regulations at: 45 CFR 205.10 (a) (13) specify

The claimant, or his representative, shall have adequate opportunity:

- To examine the contents of his case file and all documents and records to be used by the agency at the hearing at a reasonable time before the date of the hearing as well as during the hearing.
- At his option, to present his case himself or with the aid of an authorized representative.
- To bring witnesses.
- To establish all pertinent facts and circumstances.
- To advance any arguments without undue interference.
- To question or refute any testimony or evidence, including opportunity to confront and cross-examine adverse witnesses.

These provisions are also contained in OAC 5101:6-6-02 which adds: "The individual and representative shall have the opportunity to present their case in their own way. The hearing shall be conducted informally, and formal rules of evidence shall not apply."

Are hearings tape recorded?

Hearings are taped, so both verbal testimony and written materials are included as part of the hearing record. You may request a copy of the tape after the hearing. The tape recording or transcript of the hearing is not part of the official hearing record. On the other hand, OAC 5101:6-6-03 (F) provides:

> If, during the administrative appeal process, it is found that the hearing officer's tape recording is lost or unusable (for example, because it has been damaged or because material portions of the tape are inaudible), the administrative appeal hearing examiner shall remand the case to the state hearing officer for a new hearing if the following conditions are met:
> The individual takes material issue with the recitation of the testimony set forth in the hearing decision; and
> The individual and either the state hearing officer or the agency are not able to stipulate to the testimony given.

This provision suggests that even if the hearing and hearing transcript are not part of the official record, they are still used to verify the facts and arguments set forth at the proceeding, particularly when a hearing decision is appealed.

May adoptive parents be assisted by non-attorneys?

Both federal and Ohio hearing regulations specify that adoptive parents may select "an authorized representative" who is not an attorney to assist them at the hearing. 45 CFR 205.10 (a)(3)(iii) states that every applicant must be informed in writing that they may "be represented by an authorized representative, such as legal counsel, relative, friend, or other spokesman," or "they may represent themselves."

ODJFS form 4059 entitled "Explanation of Hearing Procedures" informs the appellant"

> You may have someone (lawyer, welfare rights worker, friend or relative) go to the hearing to present your case for you. If you are not going to be at the hearing, the person attending for you must bring a written statement from you saying he or she is your representative. If you want legal help at the hearing, you must

> make arrangements before the hearing. Contact your local legal aid program to see if you qualify for free legal help.

A non-attorney friend or advocate that participates in a hearing on behalf of an adoptive family is generally referred to as a representative.

Are there provisions about the responsibilities of hearing offers that adoptive parents should understand?.

Yes, OAC 5101:6-7-01 (c) states "It shall be the responsibility of the agency to show, by a preponderance of the evidence, that its action or inaction was in accordance with ODJFS rules." In short, the county agency must establish that its decision to deny adoption assistance benefits was correct.

In addition, OAC 5101:6-1-01 (B) states:

> All rules contained in Chapters 5101:6-1 to 5101:6-9 of the Administrative Code shall be interpreted in a manner consistent with section 1.11 of the Revised Code, which requires that they be liberally construed in order to promote their objective and assist the individual in obtaining justice. All rules relating to the right to a hearing and limitations on that right shall be interpreted in favor of the right to a hearing.
>
> Section 1.11 of the Ohio Revised Code, entitled "Liberal Construction of Remedial Laws." Provides:
> Remedial laws and all proceedings under them shall be liberally construed in order to promote their object and assist the parties in obtaining justice. The rule of the common law that statutes in derogation of the common law must be strictly construed has no application to remedial laws.

Taken together, these two provision suggest that the burden of proof rests somewhat more heavily on the county agencies than the adoptive parents and that hearing officers should interpret the rules liberally in order to fulfill the goals of the adoption assistance program and to try and ensure that a special needs receive the benefits for which they are eligible.

OAC 5101:6:6-02(10) discusses the responsibility of the hearing officer to ensure that all relevant issues are addressed and that a complete record is developed.

> In regulating the conduct of the hearing, the hearing officer is responsible for developing the fullest possible record upon which to base all necessary findings of fact. Each party shall be treated fairly and impartially and given adequate opportunity to address the issues. The hearing officer has an affirmative obligation to assist unrepresented individuals in understanding the nature of the issue and the regulations that relate to it, and in presenting testimony and evidence necessary to address all relevant factual questions. The hearing officer shall take an active part in questioning the parties and the evidence presented, insofar as that is necessary to develop the fullest possible record.

What is meant be preponderance of evidence?

Preponderance of evidence means the greater weight of the evidence. The evidence may not free an impartial observer from all reasonable doubt, but it is sufficient to incline one to one side of the issue rather than the other. According to OAC 5101:6-7-01 (c), the agency must establish by a preponderance of evidence that the denial of assistance was in accordance with state regulations.

Is it advisable to hire an attorney the initial hearing?

The hearing system is supposed to function as an evidentiary forum in which all of the parties have a common commitment to ensuring that eligible children receive the benefits to which they are entitled. Appellants in such an informal process do not need to possess any specialized knowledge e about legal procedures and presumably can represent themselves.

Because adoption assistance lends involves general categories such as special needs and requires negotiation, it is more subject to differences in interpretation than other federal programs. As a consequence, hearings involving adoption assistance often become quite adversarial in nature.

If parents become reasonably well-informed, they can effectively represent themselves at the initial hearing, particularly with help from a knowledgeable advocate. No one knows more about their children and family situation than the adoptive parents. Adoptive families, however, need to inform themselves about applicable state and federal regulations and to get an idea how hearings will be conducted. It is a good idea to consult with experienced adoptive parents or a knowledgeable advocate.

Relatively few attorneys are familiar with adoption assistance issues. If one can be found and is affordable, they can be quite helpful, but are not essential at the initial hearing level of the appeals process. Parents will need legal assistance if the appeal goes to the judicial review before the county court of common pleas. In the final analysis, the decision to enlist the services of an attorney for the initial hearing depends on a number of considerations:

- How difficult or unusual is the case?
- Are there knowledgeable advocates or support groups that can help me to prepare?
- Can I afford an attorney?
- Are there any attorneys around that are familiar with adoption assistance appeals in general and my problem in particular?

Review: What are some basic things to consider when pursuing an administrative hearing?

When faced with an adverse agency decision pertaining to adoption assistance, you should seriously consider an appeal. The following are some practical steps to take when faced with the prospect of pursuing an administrative hearing:

- **Follow the time frames for requesting an administrative hearing.** That information should be contained in the agency's written denial of your request for adoption assistance. If it is not, contact the state office of administrative hearings in the state agency that administers the adoption assistance program and ask them about the deadlines for appeal.

- **Make sure you know that federal and state hearing regulations require that families be given "adequate notice"** which, among other things, includes the specific reason for the proposed action by the agency and the relevant laws or regulations on which it is based.

- **Obtain the state adoption assistance regulations from the internet or contact the state agency with responsibility for adoption and request a copy of the state adoption subsidy regulations.** If detailed information about adoption assistance is not contained in state regulations, the agency usually has some form of policy manual. The portions of that document pertaining to adoption subsidy should be available on request from the county agency.

- **Contact the legal section of ODJFS if the agency refuses to send you a copy of the subsidy regulations and you cannot obtain then online.** The documents should be considered public information. Remind them that federal regulations entitle you to adequate notice and that you cannot present adequate testimony on behalf of your child without access to the regulations cited by the agency to deny adoption assistance benefits.

- **Contact the agency to make arrangements to see and acquire relevant documents and to determine the basis for the agency's proposed denial of benefits.** Federal and state hearing regulations stipulate that the family or its representative shall have

"adequate opportunity" to "examine the contents of his case file and all documents and records to be used by the agency at the hearing at a reasonable time before the date of the hearing as well as during the hearing; . . ." If the agency will not comply, contact the hearing and legal sections of the state child welfare. The state office of administrative hearings usually has some subpoena authority, but is often reluctant to use it. You can request the office of hearings to issue subpoenas if crucial records are being withheld. Even a refusal on the record may help you at a later stage of appeal.

- **Insist on sufficient time to present your case and to refute testimony presented by the agency.** Federal and state hearing regulations afford you the right to " (v) advance any arguments without undue interference; and (vi) to question or refute any testimony or evidence, including opportunity to confront and cross-examine adverse witnesses."

- **If the agency is making confusing claims about groups that are excluded from its IV-E adoption assistance program, or you seems to be citing policies that are in conflict with state or federal law, you can obtain a copy of the state's IV-E plan.** The IV-E State Plan includes sections on the federal foster maintenance and Independent Living programs as well as adoption assistance. The Section entitled "Adoption Assistance Payments" is devoted to the adoption assistance program.

  A copy of Ohio's IV-E State Plan may be found by going to the ODJFS web site at: http://jfs.ohio.gov/ocf/publications.stm and scrolling down to State Plans. A template of IV-E state plans may be found on the federal Children's Bureau Web Site: at http://www.acf.hhs.gov/programs/cb/laws/pi/pi0106.htm. You can also contact the state's agency's legal section or the regional office of the U.S. Department of Health and Human Services', Administration for Children and Families. The regional offices are listed on the U.S. Department of Health and Human Services web site at: http://www.hhs.gov/.

Once the basis of the agency's objection is identified, you can begin to prepare an argument against the agency's position. At that point, it is a good idea to contact an advocacy group to

consult with your case. A person or group with experience in administrative appeals can help you to determine what kind of evidence you need to gather.

Taking steps to contest an agency decision often invests families with a sense of empowerment whether they ultimately win or lose. Launching an appeal is not confusing if you take it a step at a time, particularly if you walk through the process with a more experienced family or advocate.

What is the next step in the appeal process if the hearing decision "overrules" the adoptive parent's argument and denies the request for adoption assistance?

If an adoptive parent disagrees with the hearing decision, he or she may request an administrative appeal. Administrative appeals are not additional hearings, but reviews of the initial hearing decision. In Ohio, the review is conducted by an attorney in the Office of Legal Services at ODJFS. OAC 5101:6-8-01. Notice of the right to and the method of obtaining an administrative appeal is included on the state hearing "state hearing decision," JFS 04005.

What is the procedure for requesting an administrative appeal?

The hearing decision (JFS 04005) includes a section that entitled "Notice to Appellant" that instructs the adoptive parent on how to request an administrative appeal. It reads as follows:

> This is the official report of your hearing and is to inform you of the decision and order in your case. All papers and materials introduced at the hearing or otherwise filed in the proceeding make up the hearing record. The hearing record will be available for examination at the local agency during normal office hours.
>
> If you believe that the state hearing decision is wrong, you may request an administrative appeal by writing to: Ohio Department of Job and Family Services, Office of Legal Services, 30 East Broad

Street, 31st Floor Columbus, Ohio 43266-0423. Your request should include a copy of this hearing decision and an explanation of why you think it is wrong. The department will respond to your request quickly so any information, arguments, or documents you want considered must be sent with your request. Your written request must be received by the Office of Legal Services with 15 calendar days from the date this decision is issued. (If the 15th day falls on a weekend or holiday, this deadline is extended to the next work day.

During the 15 day administrative appeal period, you may request a free copy of the tape recording of the hearing by contacting the district hearings section. If you want information on free legal services but don't know the number of your local legal aid office, you can call the Ohio State Legal Services Association, toll free, at 1-800-589-5888, for the local number.

Should the adoptive parent submit an argument along with their request for an administrative appeal?

Yes, to support their appeal, it is advisable for adoptive parents to include information, documentation and arguments such as:

- A written statement pointing out errors of fact, law/regulations or policy in the hearing decision;
- Key points that were overlooked;
- Procedural problems such as not being allowed sufficient time to present the case or call witnesses?
- Exhibits such as letters from providers, federal policy statements, previous hearing decisions, court cases to accompany the written statement

Generally speaking, including a detailed rebuttal of the hearing decision is a good idea because it becomes part of the hearing record and therefore part of any further appeals. The argument against the hearing decision is not intended to introduce new evidence, but to point out mistakes. The adoptive parent may include key documents or point to sections of the taped hearing record to support his or her case.

What records must be kept by ODJFS' Office of Legal services and the Bureau of State Hearings?

The administrative appeal decision, together with all requests, documents, and correspondence filed in the proceeding, make up the exclusive administrative appeal hearing record. The record must be compiled and certified by the ODJFS' Office of Legal Services and maintained by the ODJFS Bureau of State Hearings in accordance with applicable record retention requirements and made available for review by the individual and authorized representative.

ODJFS' Office of Legal Services must maintain a library of all administrative appeal decisions. The decisions shall be available for public inspection and copying, subject to applicable disclosure safeguards.

What is the next step in the appeals process if the administrative review "sustains" the hearing decision and decides against the appellant?

The next step in the appeals process in Ohio is to file for a **judicial review** in the county court of common pleas. The court review involves a judge's consideration of the issues and arguments that arose from the hearing. Sometimes courts will accept oral arguments as part of a judicial. Judicial reviews, however, primarily function as courts of appeals that review the initial hearing and administrative appeal decisions. For this reason, it is important to present all the essential arguments and documentation at the original hearing so that they will become part of the record that is reviewed. Parents are usually permitted to file depositions with the court outlining the errors of fact and law and the arguments for adoption assistance on behalf of their request for

judicial review. The Clerk of Court or Magistrate can help explain the procedures for judicial review.

The hearing itself and the administrative review are available to the appellants at no cost. Judicial reviews generally require modest filing fees. Adoptive families usually secure legal counsel to file for the judicial review and to represent them before the court if they decide to carry their appeal to this step in the administrative hearing process or take further legal action. Attorneys file the necessary motions with the court and submit briefs on behalf of the parents. If a settlement is possible, the attorney negotiates on behalf of the adoptive family.

In what county do adoptive parents file for judicial review?

Adoptive parents file for judicial review in their county of residence. OAC 5101:6-9-01(A)(2). Parents who live outside Ohio must file with the court of common pleas in Franklin County.

What is the time limit for requesting a judicial review?

The time limit for filing for judicial review is no later than 30 days after the ODJFS, Office of Legal Services mails the administrative appeals decision. The court may extend the deadline when good cause is shown. OAC 5101:6-9-01(A)(4)(b). The adoptive parent, or usually the adoptive parent's attorney must also mail a notice of appeal to the ODJFS, Office of Legal Services.

Written arguments or briefs by the opposing parties are not do within the 30 day filing period. Through the court, a schedule for submitting briefs is established.

What are the responsibilities of the Office of Legal Services at ODJFS when it receives a notice of appeal for judicial review?

When the ODJFS Office of Legal Services receives a notice of appeal for judicial review, it must:

- Request the original of the complete state hearing record, as defined in rule 5101:6-7-01 of the Administrative Code, and the original of the complete administrative appeal hearing record, as defined in rule 5101:6-8-01 of the Administrative Code, from the local agency. The local agency shall respond to such requests within two workdays, making a copy of each record for retention in the case file before forwarding the original to the office of legal services.

- Upon receipt of the state hearing record and the administrative appeal hearing record from the local agency, the office of legal services shall certify the records to the court.

- Upon receipt of the notice of appeal, the office of legal services shall request the original of the tape recording of the hearing from the district hearings section. The district hearings section shall respond to such requests within two workdays.

- Unless one was already provided under the provisions of rule 5101:6-6-03 of the Administrative Code, the adoptive parent or authorized representative may request a copy of the tape recording of the hearing from the office of legal services. Such requests must be in writing and received by the office of legal services within thirty calendar days following the filing of the notice of appeal. One copy of the tape shall be provided, within two workdays whenever possible, free of any charge.

Preparing for Hearings

Do ODJFS hearing officers rely on federal law, regulations or policies or upon court cases in rendering hearing decisions?

Hearing officers in Ohio rely almost exclusively on Ohio administrative rules. OAC rule 5101:6-7-01(C) (2) provides:

> The hearing officer's conclusions of policy and recommendations shall be based solely on published ODJFS regulations, or local agency policy adopted pursuant to options authorized in state law, except when these regulations and policies are silent and reference to the Revised Code or other statutory source is necessary to resolve the issue.

In most other federal entitlement programs, OAC rules mirror federal regulations quite closely. As we have seen, however, Title IV-E adoption assistance differs from other federal benefit programs in that:

1. Key portions of adoption assistance law dealing with special needs and negotiation of adoption assistance agreements are written as broad guidelines with illustrative examples. This approach lends, while encouraging flexibility, also lends itself to differences in interpretation.

2. The program has been administered and interpreted through federal policy issuances rather than by amendments to federal laws or regulations.

As a consequence, Ohio regulations do not speak specifically to questions such as:

- How much assistance accurately reflects the needs of the child and circumstances of the individual family?

- When is a child clearly not a special needs child?

Questions such as these require discernment and turning to federal policy statements and court decisions seem to represent logical sources of guidance. Appellants should be aware, however, that ODJFS hearing officers are trained to rely solely on Ohio regulations. Adoptive parents should utilize Ohio regulations as much as possible in arguing their cases.

Besides state regulations, should appellants include federal laws, regulations, policy statements and court cases in their hearing presentations?

Yes. Citing relevant federal laws, regulations, policy issuances and pertinent court decisions makes them part of the record for any future appeals. If the appeal reaches the judicial review level, courts are much more likely to take federal and court decisions into consideration. In citing federal laws and policies, appellants can point out.

1. Ohio has pledged to comply with federal policies in the IV-E State Plan as a condition for federal financial participation. The introductory section of the IV-E state plan says the state agency "agrees to administer the program in accordance with the provisions of this State plan, title IV-E of the Act, and all applicable Federal regulations and other official issuances of the Department." The Department is the U.S. Department of Health and Human Services and the *Child Welfare Policy Manual* is an official issuance of that agency.

2. Title IV-E adoption assistance is a federal program. Federal policies and court cases, even those from other states, clarify existing Ohio rules. In exchange for federal financial participation, states must file plans with the U.S. Department of Health and Human Services in which they pledge to comply with federal policies. The introductory section of IV-E State Plans reads as follows:

> As a condition of the receipt of Federal funds under title IV-E of the Social Security Act (hereinafter, the Act), the Agency (Name of State Agency) (hereinafter "the State Agency") submits herewith a State plan for the program to provide, in appropriate cases, foster care, independent living (at State option) and adoption assistance under title IV-E of the Act and hereby agrees to administer the program in accordance with the provisions of this

State plan, title IV-E of the Act, and all applicable Federal regulations and other official issuances of the Department.

Federal requirements for Title IV-E state plans may be found at: 42 U.S.C. 671

The IV-E State Plan includes sections on the federal foster maintenance and Independent Living programs as well as adoption assistance. The Section entitled "Adoption Assistance Payments" is devoted to the adoption assistance program.
A copy of Ohio's IV-E State Plan may be found by going to the ODJFS web site at: http://jfs.ohio.gov/ocf/publications.stm and scrolling down to State Plans. A template of IV-E state plans may be found on the federal Children's Bureau Web Site: at http://www.acf.hhs.gov/programs/cb/laws/pi/pi0106.htm.

3. Court cases from other states, are not formally precedent setting, but may be persuasive insofar as Title IV-E adoption is a federal entitlement program and individual state regulations cannot be more restrictive than federal policy. Court decisions in adoption assistance often cite cases in other state jurisdictions.

Hearings Involving Eligibility for Adoption Assistance

What eligibility issues are most likely to be the subject of appeals in public agency adoptions?

The eligibility of children placed by private agencies is more likely to be a contested issue. Private agencies place infants who may not be developmentally mature enough to manifest special needs conditions, particularly ones in the emotional/behavioral realm. Reactive attachment disorder, fetal alcohol syndrome and serious mental illnesses are not subject to a firm diagnosis until a child advances beyond the infant and toddler stage. For this reason, the focus with respect to special needs will turn to risk factors or to issues such as race or ethnicity.

In cases where the special needs factors are either mild or more in a question of risk, parents and agency representatives are well advised to remember the distinction between eligibility and the amount of adoption assistance. Determining that a child is eligible for adoption assistance does not entail any particular amount of support. If the parties concur that no immediate support is needed, an adoption assistance agreement may provide no payment, with the understanding that payments will be negotiated if special needs conditions arise or family circumstances change. The child retains eligibility for Medicaid in the case of zero payment adoption assistance agreements.

The issue of a "reasonable attempt to place the child without provision for adoption assistance" is more likely to become an issue in private agency placements than in public agency adoptions. Unlike children in the public foster care system, the plan for the child is not reunification with the birth parents. Children in the custody of private agencies are voluntarily relinquished (surrendered) for the sole purpose of adoption. When reunification attempts are abandoned and parental rights are terminated, it is common to register the child on the Ohio Adoption Photo Listing service (OAPL). Children in the permanent custody of private agencies do not spend years in foster care and are not customarily registered on OAPL. The private agency attempts to find a suitable match with adoptive parents as soon as possible.

Adoptive parents, with the help of the private agency must stress federal and state language that qualifies the requirement to make reasonable efforts to place without assistance with the caveat "Except where it would be against the best interest of the child." The child's "current or anticipated special need for care or services" is the most obvious reason why making an effort to place without provision for assistance would be contrary to the child's interest. After documenting the child's existing care needs and or risk factors, the parents and PCPA might cite OAC 5101:2-47-30 (C) in support of the argument that "reasonable efforts are not required. Paragraph (C) provides:

> In making the determination that it is against the best interest of the child to be placed with an adoptive family without provision for AA or medical assistance, the PCSA or PCPA may cite factors

> such as the existence of significant emotional ties to the prospective adoptive parent(s) which developed while in their care as a foster child or other factors pertaining to the child's current or anticipated special need for care or services.

An argument for emotional attachment may be more difficult to make if the child has been in the preadoptive home for a few months. If the agency or parents feel that a bond has been formed, they might seek an opinion from a qualified psychologist or pediatrician as to the significance of the growing attachment between child and parents and the consequences of sundering that bond. The "reasonable efforts to place without assistance" provision may arise in determining eligibility for reimbursement of non-recurring adoption expenses since that program's only qualifying standard is special needs. Documentation that a child's anticipated or existing special needs make it contrary to his or her interest to be placed without provision for assistance. Documentation may include medical records, family histories and letters from doctors or mental health providers that address the child's condition and likely care needs.

The appellants might also cite federal law at 42 U.S.C 673 (c)(2)(B) which states that reasonable efforts must be made to place without provision for assistance, "Except where it would be against the best interest of the child . . . ." Section 8.2B.11 of The *Child Welfare Policy Manual* notes that the existence of significant emotional ties between foster parents and children is an example of a situation where it would be contrary to the child's needs to place the child without assistance. Exceptions, it states, also extend "to other circumstances that are not in child's best interest, as well as adoption by a relative, in keeping with the statutory emphasis on the placement of children with relatives."

The most logical reason that it would be contrary to the child's welfare to attempt to place him or her without assistance would be concern about existing or potential care needs. This concern is cited in OAC 5101:2-47-30 (C) as a valid reason why efforts to place the child without assistance are not required.

Child Welfare Policy Manual in section 8.2B.11 provides guidance on how to deal with the reasonable efforts to place with out assistance issue. It states:

> Once the agency has determined that placement with a certain family is in the child's best interest, the agency should make full disclosure about the child's background, as well as known or potential problems. If the agency has determined that the child cannot or should not return home and the child meets the statutory definition of special needs with regard to specific factors or conditions, then the agency can pose the question of whether the prospective adoptive parents are willing to adopt without assistance. If they say they cannot adopt the child without adoption assistance, the requirement in section 473(c)(2)(B) for a reasonable, but unsuccessful, effort to place the child without providing adoption assistance will be met.

In a literal sense adoptive parents can always adopt without assistance. In this case, "cannot" adopt without assistance refers to the parent's conclusion that, given the child's background and care an existing or potential care needs, receiving adoption assistance is consistent with the child's well being and the permanency goal of the adoption. is reasonably

Finally, the Commonwealth Court of Pennsylvania's decision in ***Adoption ARC, Inc. v. Department of Public Welfare*** may be cited as relevant. The Commonwealth Court is a state appellate court and therefore shapes Pennsylvania state case law. As noted previously, the court pointed out that the phrase "a reasonable, but unsuccessful, attempt has been made to place the child with appropriate adoptive parents without providing adoption assistance" is preceded by the qualification, "except where it would be against the best interests of the child because of factors such as the existence of significant emotional ties with prospective adoptive parents while in the care of the parents as a foster child." The court cited federal policy issuances in rendering its decision.

Hearings on the Amount of Adoption Assistance

Hearings on the amount of adoption assistance have become more common as the portion of special needs children adopted by their foster parents have increased. It is common for an agency to offer a rate of adoption assistance that is substantially below the foster care payment rate.

What are the fundamental issues in such hearings involving the amount of assistance?

Unlike other federal benefits that are determined by a means test based on family income and size, adoption assistance must be determined through negotiation. On one hand, there is no law that requires agencies to pay a certain amount of adoption assistance. Federal law merely states that federal financial participation is available up to the foster home rate suitable to the child's level of care.

On the other hand, state and federal law clearly direct that that negotiations must consider the needs of the child and circumstances of the family and how they impact one another in arriving at an adoption assistance agreement.

It is obviously difficult to quantify the care needs of the child and the circumstances of the family into a specific figure. How much assistance is needed to help sustain the adoptive family given its overall situation and resources? This is not an easy question to answer.
County agencies are not required to match foster care rates or to agree to a particular amount of adoption assistance. Hearing officers are accustomed to conducting hearings on TANF (welfare) benefits, food stamps, Medicaid and other programs where there are very specific eligibility provisions and benefits are based on income and family size. Adoption assistance is more flexible program, but hearing officers, trained to look at the literal text of rules, will not find any specific provision requiring that counties must pay a certain amount of adoption assistance. They may be reluctant to interpret the rules even when faced with a situation in which an adoptive child would receive $1,500 per month as a foster child and the agency only wants to pay $250 in adoption assistance.

What must adoptive parents do to strengthen their appeal?

Occasionally, a hearing officer will determine that the amount of assistance offered by the public agency is inadequate. In most cases however, hearings on the amount of assistance turn on procedural issues.

- Did the agency engage the adoptive parents in a valid negotiation?
- Did the negotiation take the child's needs and family circumstances into account in a manner that is consistent with Ohio rules?

If the appellant parent parents succeed in establishing that the agency did not comply with either or both of the above requirements, the hearing decision will probably sustain the appeal and remand the case back with orders for the agency to engage in proper negotiation. Although such an order does not guarantee that adoptive parents will receive the level of assistance they seek, resuming negotiations often results in agreements for higher levels of support than those originally proffered.

How do adoptive parents prepare for a hearing involving a dispute of amounts of assistance?

Adoptive parents have 2 basic tasks.

1. To become familiar with applicable Ohio administrative code rules.

2. To show how those rules apply to their current family situation, which includes efforts to meet the children's needs and the ways in which family circumstances have been affected by attempts to meet those needs.

What are the applicable rules that apply to requests for modification of adoption assistance agreements?

The most important rules for amendment of adoption assistance agreements and negotiation of amounts of adoption assistance are: 5101:2-47-43 and 5101:2-47-42. OAC 5101:2-47-43 (A)

states "the amount of the AA payment is determined through the discussion and negotiation process between the adoptive parent(s) and the PCSA based upon the circumstances of the adoptive parent(s), together with the needs of the child." (emphasis added).

OAC 5101:2-47-43 and 5101:2-47-42 both state:

Consideration of the circumstances of the adoptive parent(s) pertains to the adoptive family's capacity to incorporate the child into their household in relation to their lifestyle, standard of living and future plans, as well as the overall capacity to meet the immediate and future needs (including educational) of the child."

Circumstances of the family is a very broad term encompassing adjustments and changes that occur in the course of meeting the current and anticipated needs of adopted children.

Parents should also obtain a copy of OAC 5101:2-47-18 and see if your child fits one of the special levels of foster care. If he does you can argue that he or she would be receiving a high rate of support if he were in a foster home placement. OAC 5101:2-47-43 (C) advises: "To determine the amount the FCM payment would have been if the child had been in a foster home, the PCSA shall:

(1) Determine the appropriate FCM rate in effect for the PCSA completing the JFS 01453 at the time the most current agreement or modification/amendment to an existing agreement is signed.

(2)

(2) Determine the amounts of any special, exceptional or intensive needs difficulty of care payments as described in rule 5101:2-47-18 of the Administrative Code, clothing payments as described in rule 5101:2-47-19 of the Administrative Code and school supplies and other

> allowable FCM payments as described in rule 5101:2-47-02 of the Administrative Code which are not part of the daily or monthly foster care board rate, if the same payments are equally available to a Title IV-E and non-Title IV-E child; and
>
> (3) Divide the annual total of payments described in paragraph (C)(2) of this rule by twelve and add the quotient to the monthly foster care board rate determined in paragraph (C)(1) of this rule.

This shows that the foster home rate is the current level of support the child would receive, but also refers the reader to a rule that defines specialized levels of foster care. The appellant can present documentation that their child fits one of the three specialized levels of care described in OAC 5101:2-47-18. While this information does not require the agency to agree to an adoption assistance payment equal to a specialized foster care rate, it does address the question of the child's special needs and corresponding level of care.

Applying the rules, did the agency refuse to discuss or negotiate with you?

If you asked to discuss and negotiate an amount of assistance that reflected your actual situation and the agency did not comply, appellants may cite the lack of responsiveness as a refusal to negotiate in violation of applicable rules. The appellate may argue that 5101:2-47-42 and 5101:2-47-43 anticipate discussion and negotiation. The parents might also argue that you requested an opportunity to negotiate in hopes of arriving at a mutual agreement as provided in OAC 5101:2-47-38.

A somewhat more difficult situation presents itself when the there is some interaction between the agency and the parents, but little in the way of a real dialogue. In such cases, the appellants may try to point out the meaning of negotiation and its purpose in reaching a mutually acceptable outcome. They may try and contrast genuine negotiation, which involves a good faith effort to

reach a compromise through considering the other party's point of view, with cases in which there is little effort to reach a compromise and the parents are faced with a take or leave it proposition allowing for little or no dialogue.

Sometimes agencies respond to parents' request for more adoption assistance, by threatening to place the child with another family. Parents would be well advised to consult the child's Guardian Ad Litem or another attorney if they believe the threat is credible. From the standpoint of determining the amount of assistance, such threats are clearly contrary to state and federal laws requiring negotiation and should be entered into the record in any hearing involving amounts of adoption assistance.

Beyond the question of whether negotiation actually took place, what other steps must appellants take to prepare for a hearing on the amount of assistance?

In addition to the question of whether negotiation took place, the adoptive parents must also be prepared to:

Describe and document the child's special and ordinary needs.

Document and describe describing how the challenge of meeting the child's care needs affects family circumstances and how your family circumstances in turn affects the parents' ability to meet the child's special and ordinary needs.

Show how the agency has failed to engage you in a discussion and negotiation of children's needs and family circumstances <u>considered together</u>. Show how the agencies response to your request violates the requirements set forth in OAC 5101:2-47-43 and 5101:2-47-42.

For practical guidance on documenting and describing special needs and family circumstances, review in Part 1.

How do you describe and document special needs?

In preparing for a hearing, it is a good idea to secure assessments and written statements from therapists, doctors or other providers that not only identify the child's condition, but

- Discuss how the condition plays out in daily family life or in school to give the hearing officer a picture of what caring for the child is really like.

- The effect of the child on the life of individual family members and the family as a whole.

- The prognosis for child.

- The risks involved in not addressing the special needs.

- Treatment needs of the child; needs of the parents to retain their sanity.

If you do not have this information, you can ask for a letter from therapists, doctors, teachers and other service providers. Tell them what the letter is for and what specific issues need to be addressed. Most service providers are willing to comply if you explain what is at stake. Formal assessments may contain some of the same information. Include both letters and assessments as documentation a hearing exhibits. They will become part of the hearing record.

Parents are more familiar with their children's special needs than anyone. In the hearing statement, give the hearing officer a clear picture of the how those problems affect your child's behavior and the daily challenges involved in healing the trauma he or she has suffered. Support your story with documentation from professionals. Make the hearing officer spend some time in your shoes as you describe your efforts to heal and care for a child with special needs.

If parents can get a key therapist or doctor to testify directly, by all means do so. As in obtaining written letters, you will have to tell them what questions they will need to cover. If oral

testimony is not feasible, written testimony and documentation is fine. You may choose to read excerpts from that testimony or incorporate parts into your hearing statement.

Does the concept of children's needs include ordinary items such as food, clothing, shelter, recreation?

Yes, OAC 5101:2-47-42 and 43, as we have noted stipulate that the term "family circumstances" takes into consideration the family's capacity to incorporate the child into their household in relation to their lifestyle, standard of living and future plans; and. the overall capacity to meet the immediate and future needs (including educational) of the child." The federal *Child Welfare Policy Manual*, in Section 8.2D.4, question 1 notes:

> The payment that is agreed upon should combine with the parents' resources to cover the ordinary and special needs of the child projected over an extended period of time and should cover anticipated needs, e.g., child care. Anticipation and discussion of these needs are part of the negotiation of the amount of the adoption assistance payment.

"Unlike other public assistance programs in the Social Security Act," explains the *Child Welfare Policy* Manual, in Question 1, "the title IV-E adoption assistance program is intended to encourage an action that will be a lifelong social benefit to certain children and not to meet short-term monetary needs during a crisis."

Special needs children eat, wear clothes, engage in recreational activities and have transportation needs like all other children. Parents should include ordinary needs in their hearing statements that may be difficult to provide for. Many of the "ordinary needs" have the therapeutic purpose of helping the child make important social and emotional adjustments.

Example

Suppose for you are a single parent who has adopted a sibling group of three. You have a modest income from your job. The children do not have severe special needs, but are growing older and cost more to raise. They want to participate in normal activities such as sports and summer camp. Your child care expenses are increasing and you need a larger place to live. Adoption assistance is intended to help you sustain a permanent family and that includes support for everyday expenses.

How do you link family circumstances with the children's special and ordinary needs?

Agencies may be prone to concentrate on the child's service needs in arguing that the adoptive family does not need additional support. Two common arguments against increasing adoption assistance are:

- The services are covered by Medicaid.

- The Post Adoption Special Services Subsidy (PASSS), the regular service subsidy or some other program will meet your child's needs, so an increase is not necessary.

The adoptive family faces the challenge of showing show that adoption assistance is intended to support permanent families. In addition to documenting the child's special needs, the parents need to show how addressing those needs impacts their family circumstances and visa versa. The time, energy and financial resources that must be marshaled to provide care for a traumatized child takes away time from other pursuits such as careers and leisure activities. Adoptive parents willingly sacrifice career ambitions and other activities, but not without emotional and financial cost.

At the hearing, the parents must show how the gains achieved by spending more time with the children are threatened by a decreased ability to pay for programs and services needed by the

child as well as ordinary family needs. Under existing state and federal law adoption assistance may legitimately to serve as a supplement to existing family resources.

How can adoptive parents link special needs and family circumstances in their hearing presentation?

Parents might develop and argument based upon one or more of the scenarios in Part 1: Examples: Linking special Needs to Family Circumstances.

Should adoptive families include federal policy arguments?

Yes, the federal policy issuances and a reference to the IV-E State plan may be integrated into the hearing presentation and presented as exhibits to show that:

- The OAC rules must reflect federal policy issuances according to the IV-E State plan.
- The OAC rules reflect the federal policy issuances.

In addition to citing the parallels between OAC rules 5101:2-47-42 and 43 and Section Section 8.2D.4. of the federal Child Welfare Policy Manual, parents may also choose to cite Section 8.2D.1 which explains that adoptive parents have discretion to decide how adoption assistance may best be spent on behalf of the child. There are no distinctions between the use of adoption assistance for ordinary as opposed to extraordinary expenses. The lack of restrictions on the use of adoption assistance supports the arguments that the assistance may be needed for more normal everyday activities that facilitate the child's adjustment to family and community life.

Should adoptive parents utilize reports such as the UDSA's Expenditures on Children by Families?

Yes, if it helps to illustrate the reasonableness of the amount of adoption assistance payment sought for the child? Remember, such information is more likely to be given serious consideration by a judge at the judicial review stage of the appeals process.

Amending Existing Agreements

Do the same procedures, requirements for negotiation and arguments apply to requests for amendments to existing adoption assistance agreements as to the initial agreement?

Yes. The adoptive parents must do their best to show that:

- Changes in the child's care needs and/or family circumstances justify the need for an increase in adoption assistance; and/or

- The adoptive parents underestimated the extent of the child's care needs and the impact on family circumstances and as a result the amount of adoption is inadequate.

How should parents initiate a request for an increase in adoption assistance?

As in the case of initial adoption assistance agreements, Ohio regulations anticipate a discussion and negotiation of the request for higher levels of assistance based on the family's changing situation. The most important rules for amendment of adoption assistance agreements and negotiation of amounts of adoption assistance are: OAC 5101:2-47-38, 5101:2-47-43 and 5101:2-47-42. Two key provisions of OAC 5101:2-47-38 appear in Paragraph (B)

- Adoptive parents may request a modification "at any time."
- Any modification must be "based on the needs of the child and the circumstances of the adoptive family."

Adoptive parents might contact the agency and request an opportunity to discuss a modification of the existing agreement or agreements. It is a good idea to put it in writing to retain a copy and to ask for a chance to discuss the situation.

Sample Request Letter

Dear_____,

I am writing to request an increase in Title IV-E adoption assistance for (child's name). I am requesting an increase in the amount of adoption assistance to a level that is consistent with the challenge of meeting (child's name) current and anticipated daily care and special needs and the corresponding impact that providing for those needs is having on the circumstances of our family. Finally, I would like to schedule an appointment to discuss and negotiate an increased level of assistance that better reflects to challenges and opportunities to provide a permanent family and normal life for our child.

Parents can include a brief description or examples of increased care needs and/or changes in family circumstances, but it is not necessary to go into great detail. It is important to include specific reference to the needs of the child and circumstances of the family because those phrases are contained in the regulations. By asking for the opportunity to discuss and negotiate the change in assistance, parents get the request on record. If the agency refuses to negotiate, the hearing officer has grounds for sustaining the parents' appeal and remanding the case back for negotiation between the parties.

Applying for Adoption Assistance After Finalization

Do federal and state laws require that an adoption assistance agreement be completed prior to the final decree of adoption?

Federal regulations at 45 CFR 1356.40 (b)(1) require that the adoption assistance agreement be signed and in effect at the time of, or prior to, the final decree of adoption. OAC 5101:2-47-36(B) reiterates this basic requirement.

Are some adoptive parents able to obtain adoption assistance after finalization?

Instead of amending 45 CFR 1356.40 (b)(1), the federal Children's Bureau began allowing cases by case appeals through the administrative hearings systems when adoptive parents failed to make timely application through no fault of their own because of extenuating circumstances. The first policy issuance addressing application for adoption assistance after finalization was ACYF-Policy Interpretation Question (PIQ 88-06); followed by PIQ 92-02. In 1991, in *Ferdinand v. Department for Children and Their Families*, the U.S. District Court in Rhode Island determined that an adopted child could be awarded federal adoption assistance after finalization in large part because the program "was not adequately explained to the Ferdinands."

Since that time, for over 10 years, numerous court decisions in a variety of jurisdictions have awarded adoption assistance and retroactive benefits after finalization in accordance with guidelines set forth in those earlier policy issuances and their successor, the *Child Welfare Policy Manual.* In each instance, adoption assistance has been awarded over the strenuous opposition of the state. Several states, cited by the appellants, including, but not limited to: Ohio Oregon, Minnesota, Maryland, Oklahoma, Massachusetts, Colorado, Arizona and New York have amended their statutes or regulations to require the awarding of adoption assistance after finalization if extenuating circumstances prevented an otherwise eligible child from receiving adoption assistance prior to finalization

The mechanism of appeal is the administrative (state) hearing system. Ohio amended its regulations setting forth procedures for obtaining eligibility in September 1992. In December 1993, the OAC was amended to award retroactive payments to most children who became eligible for adoption assistance after finalization.

What is the first step in applying for adoption assistance after finalization?

Parents first must apply for adoption assistance by completing the JFS 01453 form. The agency will deny the application on the grounds that the adoption was previously finalized. The written denial must conform to the requirement in OAC 5101:6-2-03 and triggers the right to a hearing. If the agency intends to challenge the child's eligibility on grounds other than lack of timeliness, it must communicate them so the parent can adequately prepare for the hearing.

What is the first fact that the adoptive parents must establish at the hearing?

The first burden assumed by adoptive parents applying for assistance after finalization is to establish that extenuating circumstances prevented them from completing an application or agreement prior to the final decree of adoption. The *Child Welfare Policy Manual* addresses the issue of applying for adoption assistance after finalization in question 2 of Section 8.4G. The Manual refers to "some allegations" that might comprise extenuating circumstances, including:

- Relevant facts regarding the child were known by the State agency or child-placing agency and not presented to the adoptive parents prior to the finalization of the adoption;

- Failure by the State agency to advise potential adoptive parents about the availability of adoption assistance for children in the State foster care system;

- Denial of assistance based upon a means test of the adoptive family

The use of the qualifying term "some" indicates that, like the approach to special needs, the extenuating circumstances cited in the Manual are examples, not an all inclusive list.

What Ohio regulation addresses the issues of extenuating circumstances?

OAC 5101:2-47-35 addresses application for adoption assistance after finalization. Paragraph set for the extenuating circumstances that are similar to those cited in Section 8.4G. of the *Child Welfare Policy Manual.* The paragraph states:

> A JFS 01451 was not completed or a JFS 01453 was not executed prior to the final decree of adoption due to one of the following extenuating circumstances,

(a) Relevant facts regarding the child are known by the PCSA or PCPA and not presented to the adoptive parent(s) prior to the final decree of adoption;

(b) The PCSA denied AA based upon a means test of the adoptive parent(s

(c) The PCSA erroneously determined that the child was ineligible for AA; or

(d) The PCSA or PCPA failed to advise the adoptive parent(s) of the availability of AA. Advisement of the adoptive parent(s) by the PCSA or PCPA may be met by alerting potential adoptive parents of the availability of AA during a recruitment campaign (website, newspapers, flyers, etc.). The PCSA or PCPA is not responsible to seek out and inform individuals who are unknown to the agency about the possibility of AA for special needs children who are not in the custody of the PCSA or PCPA.

Are there any significant differences between the treatment of extenuating circumstances in the Child Welfare Policy Manual and the OAC 5101:2-47-35

Federal issuances dating back to 1992 have used qualifying phrases "such as' or "includes," signaling the reader that the list of extenuating circumstances to follow contains examples, rather than an all inclusive list. OAC 5101:2-47-35 contains no such qualifying language which means that the hearing officers would not be inclined to entertain claims of other extenuating circumstances other than those on the list. "

For example, suppose an agency provides incorrect information to adopting parents. The agency tells the parents they can proceed with the adoption without provision for assistance and access the program after finalization through the hearing system. The agency fails to stress the significance of completing an adoption assistance agreement prior to the final decree of adoption. The parents act on the agency's advice and later face the burden of establishing the existence of

extenuating circumstances prevented them from completing an adoption assistance agreement prior to the final decree of adoption.

One might suppose that giving incorrect advice meets the intent of "failing to advise the adoptive parent(s) of the availability of AA." Giving incorrect advice has the same consequences as withholding "relevant facts regarding the child" that are "known by the PCSA or PCPA and not presented to the adoptive parent(s) prior to the final decree of adoption." This argument is given added weight by OAC 5101:2-48-15(A) which clearly makes both public and private agencies responsible for informing parents about adoption assistance programs and helping them to apply. Obviously, agencies cannot meet this important obligation and remain ignorant of application guidelines. Rule OAC 5101:2-48-15 states:

- prior to placement, the public or private agency must "provide the prospective adoptive parent with information about the child and any special needs of the child, identified or anticipated, and available resources to assist the prospective adoptive parent in making an informed decision about the placement." (Paragraph A).

- Paragraph (B) of the rule reinforces this point by specifying that prior to placement the agency must provide the adoptive parents with: A child study inventory which includes "all background information available on the child in accordance with rule 5101:2-48-21 of the Administrative Code";

- "Information regarding any child-specific financial and medical resources, known or anticipated, including subsidy information;" and

- "Information describing types of behavior that the prospective adoptive parent may anticipate from children who have experienced abuse and neglect, suggested interventions, and the post adoption services available

if the child exhibits those types of behavior after adoption." (**Note:** Click on "Social Services, " then "Adoption" to find rules under 5101:2-48.).

OAC 5101:2-47-28 requires both public and private agencies to assist parents with the application process. Once again, informing adoption parents about crucial deadlines must considered an essential feature of helping with the application process.

Other examples that are not explicitly cited as extenuating circumstances in OAC 5101:2-47-35, but arguably fit the standard are:

- The failure of a PCPA to provide adequate assistance to the adopting parents in completing the application process for adoption assistance.

- The failure of the PCSA to act on a completed application, for an unreasonable length of time prompting the adoptive parents to give up and finalize the adoption. The failure to act on an application not only has the same negative consequences as an erroneous determination of ineligibility, but encourages some agencies to deny assistance by simply running out the clock. Such an omission amounts to a violation of the adoptive parents due process rights without any consequences to the agency.

If adoptive parents find that they did not have a reasonable opportunity to complete an adoption assistance agreement prior to finalization for one of the reason cited above that are not explicitly mentioned in OAC 5101:2-47-35, they are advised to pursue the appeal. A reasonable strategy is to point out that:

- Extenuating circumstances refer to situations in which an adoptive parents failed to obtain adoption assistance for their child through no fault of their own.

- The failure to obtain adoption assistance before finalization was due to an agency's error or omission in violation of Ohio regulations.

- The error or omission by the agency was the equivalent of one of the extenuating circumstances listed in OAC 5101:2-47-35.

Is the failure to recognize special needs conditions until after finalization an extenuating circumstance?

This is a controversial issue. Neither Child Welfare Manual Section 8.4G. , nor OAC 5101:2-47-35 explicitly recognize the discovery of special needs after finalization as an extenuating circumstance. The situation is complicated by the fact that earlier federal policy issuances and an previous version of the OAC both recognized this situation as an extenuating circumstance. It most commonly arises in infant adoptions in the case of children placed by private agencies. Court decisions recognizing the discovery of special needs after finalization as an extenuation circumstances further complicates the issue.

Federal Policy Interpretation Question (PIQ) PIQ 88-06, the first federal policy document that recognized the opportunity to apply for adoption assistance after finalization, involved a child whose special needs condition was not diagnosed until after the final decree of adoption. Even though PIQ 88-06 has been withdrawn, it suggests the intent of the federal policy change.

Policy Interpretation Question (PIQ) PIQ 92-02, the seminal policy issuance that set out the procedures for accessing adoption assistance after finalization cites "relevant facts regarding the child, the biological family or child's background are known and not presented to the adoptive parents prior to the legalization of the adoption," as an example of an extenuating circumstances. Since the issuance of PIQ 92-02 in 1992, a body of hearing, judicial review and appellate decisions have held that:

- The changes in federal policy articulated in PIQ 92-02 were intended to provide an avenue of redress. Many of the these decisions awarded adoption assistance over the strenuous objections of the state agencies.

- The common thread in determining the existence of extenuating circumstances was whether the adoptive parents had sufficient information at their disposal to have an reasonable opportunity to apply for adoption assistance.

- The primary issue was not whether the state was somehow negligent in failing to ensure that that the adopting parents were informed. The overriding issue was whether a potentially eligible child had a fair chance to access the adoption assistance program.

See Appendix A for access to hearings, judicial reviews and appellate decisions dealing with the application for adoption assistance after finalization.

What options are open to Ohio adoptive parents, if the hearing officers fail to recognize the existence of extenuating circumstances beyond the literal language of OAC 5101:2-47-35.

If adoptive parents research some cases and believe that they did not have a reasonable opportunity to apply for adoption assistance finalization, they should consider taking the appeal as far as the judicial review level of appeal. Judges are more likely to consider court decisions and to view the child's situation in terms of the broad purposes of the adoption assistance program than ODJFS hearing officers.

Parents may, for example, be able to argue that denying a special needs child access to adoption assistance simply because her existing condition was not capable of diagnosis at the time of adoptions is both unjust and contrary to the intent of federal law. The appellants should be able to find hearing or court decisions that support such arguments. Courts may find decisions from other states as persuasive because the cases pertain to a federal program that each state through its IV-E state plan has pledged to abide by.

What successful outcomes can the adoptive parents achieve from the appeal?

If the parents succeed the hearing office may either:

- Determine that extenuating circumstances existed and the child met the requirements for Title IV-E adoption assistance. The result of these determinations would be an order to negotiate adoption assistance payments and in most cases to make retroactive payments back to the date the petition for adoption was filed with the court.

- Determine that extenuating circumstances existed and order the agency to conduct an eligibility determination for adoption assistance as if the final decree of adoption had not occurred. This decision to remand occurs when the hearing not does take up the issue of the child's eligibility?

Should the adoptive parents present evidence of the child's eligibility at the hearing even if the agency does not cite any eligibility issues except timeliness in its written denial?

If the parents have the capacity to document the child's eligibility, they can ask the hearing officer, not only to determine the existence of extenuating circumstances, but to determine that their child met the requirements for Title IV-E adoption assistance. By presenting effective evidence of eligibility, the parents can avoid the time involved in remanding the case back to the agency for an eligibility determination.

The agency also may not be in a position to contest the eligibility requirements if they were not part of the original denial. Presumably, this situation would work to the advantage of the appellants because the standard of proof is preponderance of evidence. In cases where the denial includes a claim that the child did not meet a specific eligibility requirement such as ADC-relatedness, the parents must be prepared to present a counter-argument.

Retroactive Adoption Assistance Payments

If the child is awarded adoption assistance after finalization, how are the future payments determined?

As provided in OAC 5101:2-47-35, future payments are negotiated as if the adoption had not been finalized in according with OAC rules 5101:2-47 42 and 43. The needs of the child and circumstances of the family must be taken into consideration during discussion and negotiation.

If an Ohio child is determined eligible for adoption assistance after finalization, does he or she receive retroactive payments?

Yes, OAC 5101:2-47-39(A) provides:

> A retroactive Title IV-E adoption assistance (AA) payment shall be approved by the Ohio department of human services (ODHS) when a child is determined eligible for AA after a final decree of adoption in accordance with the conditions set forth in rule 5101:2-47-35 of the Administrative Code and an ODHS 1453 "Adoption Assistance Agreement" for future AA is negotiated and completed in accordance with applicable rules of Chapter 5101:2-47 of the Administrative Code.

Retroactive benefits may nor be awarded for months a child received SSI or a state adoption maintenance subsidy payment. According to the rule:

> The total amount of retroactive AA payment to be awarded to the adoptive parent(s) and an explanation showing how the total was derived based on a month by month calculation of the amount of AA that would have been eligible for FFP had the child been eligible for AA during the appropriate time period …….

For adoptions finalized after September 1, 1988, retroactive payments extend back in time to the date the adoption petition was filed. The adoption parents and agency affirm their agreement that the amount of retroactive benefits is proper by signing the ODHS 01454 form.

Beginning with the issuance of the Federal Policy Interpretation Question ACYF-PIQ 92-02 in 1992, the Children's Bureau has permitted federal financial participation for retroactive adoption assistance payments. The most recent iteration of this policy may be found in Question 2, Section 8.4G of the *Child Welfare Policy Manual*. It affirms

> In situations where the final fair hearing decision is favorable to the adoptive parents, the State agency can reverse the earlier decision to deny benefits under title IV-E. If the child meets all the eligibility criteria, Federal Financial Participation (FFP) is available, beginning with the earliest date of the child's eligibility (e.g., the date of the child's placement in the adoptive home or finalization of the adoption) in accordance with Federal and State statutes, regulations and policies.

Ohio regulations on retroactive payments were put into effect in response to PIQ 92-02 and have continued to reflect federal policy.

PART 3: ADMINISTRATIVE HEARING CHECKLIST

Adequate Notice Provisions

[ ] Has the agency informed you in writing of its determination to deny your child eligibility or benefits?

[ ] Does the written notice contain reasons for the denial and references to relevant rules or statutes?

[ ] Does the written notice inform you of your appeals rights, how to obtain an administrative hearing and the time limits for requesting a hearing?

[ ] Have you obtained via the internet or requested a copy of the state's adoption subsidy regulations and policies from the state agency in charge of adoption assistance? If you run into difficulty, have you checked with the agency's legal action or office of administrative hearings? Have you made these officials aware that you are seeking public information and that the adequate notice provisions of federal hearing regulations entitle you to be informed about policies that pertain to appeal?

Preparation

[ ] Have you consulted experienced adoptive families or advocates about your situation?

[ ] Do you understand the basic eligibility requirements for the adoption assistance program in question?

[ ] Are you reasonably well informed about the basis for the agency's denial and specific issues that will need to addressed at the hearing?

[ ] Are you aware that you may obtain a copy of the state's IV-E plan from the state A copy of Ohio's IV-E State Plan may be found by going to the ODJFS web site at: http://jfs.ohio.gov/ocf/publications.stm and scrolling down to State Plans? A template of IV-E state plans may be found on the federal Children's Bureau Web Site: at http://www.acf.hhs.gov/programs/cb/laws/pi/pi0106.htm. You may also contact the Legal Services Section at ODJFS or the regional office of the U.S. Department of Health and Human Services' Administration for Children and Families.

[ ] Are you aware that you have right to insist on appearing in person state hearing? Are you aware that in Ohio Bureau of State Hearings will automatically schedule a hearing via telephone, unless you request a face to face hearing?

[ ] Do you have access to applicable federal laws and policy statements that support your case?

[ ] Are you aware that federal hearing regulations afford you an "adequate opportunity" to "review the contents of the case file" and "all documents and records to be used by the agency at the hearing at a reasonable time before the date of the hearing as well as during the hearing; . . . . .?"

[ ] Are you planning on asking medical providers, psychologists or others to submit written or oral testimony on your behalf?

[ ] Are you aware that if the hearing officer determines that an independent medical assessment is necessary, the cost must be absorbed by the state agency.

[ ] Are you aware that federal hearing regulations give you sufficient time to present your case, and to "refute any testimony, including opportunity to confront and cross-examine adverse witnesses."

[ ] Are you aware that the initial hearing and an administrative appeal of a hearing decision within a state agency do not cost any money, unless you decide to hire an attorney?

[ ] Are you aware that you may represent yourself or choose to be represented by a lawyer or other person of your choosing?

[ ] Are you aware that federal government will reimburse states that cover transportation and other costs that you incur in connection with the hearing?

[ ] Are you aware that an appeal for a judicial review requires a relatively modest filing fee, but that you will probably want to hire an attorney to file the necessary papers and submit a brief on your behalf?

[ ] Are you aware that you may ask the hearing officer to leave the record open for one or two weeks in order to submit important evidence or documentation that was not presented at the hearing? Such requests are routinely granted.

Remember that federal regulations give you the right to examine the case record and relevant documents and if the agency refuses, you can ask that the records be obtained through subpoena. If you are being denied access to pertinent documents, contact the hearing section at the state agency. They may agree to issue subpoenas. If not, you can document your request that state's refusal to present at a later stage of the appeals process.

You can ask for a continuance in a scheduled hearing until you have reasonable time to access records or arrange for witnesses to be present or submit written testimony. As noted earlier, you can also insist on a face-to-face hearing if you choose.

APPENDIX A: TITLE IV-E ADOPTION ASSISTANCE CASE LAW

Negotiating Adoption Assistance Payment Rates

Kessler v. ODJFS, case no. 03 CVF01-48, 10/28/2004, pgs. 9-10, footnotes omitted

The Franklin County Court of Common Pleas, in an October 2004 Judicial Review decision, sustained the adoptive parents' appeal and remanded the case for further negotiation in large part because of a "total lack of recognition of the materiality of the family circumstances."

Unfortunately, the negotiations remained deadlocked, resulting in another round of appeals. Finally in an Administrative Review decision rendered on September 5, 2005, the Legal Services section of the Ohio Department of Job and Family Services ordered:

> 1. The ODJFS Adoption Services Section shall by October 21, 2005, appoint a facilitator to work with the parties, and notify them both in writing of the appointment;
>
> 2. The parties shall meet with the facilitator at such times and places chosen by the facilitator over the following 30 days, until an amended adoption assistance agreement has been executed.

The reviewing officer justified the decision by pointing to the lack of progress in the negotiations. He explained:

> As the present case shows so clearly, if the extent of a state hearing remedy in these cases reaches only to a succession of orders to continue fruitless negotiations, without specific direction, then it is difficult to see how we can fulfill the mandate of OAC 5101:6-1-01(B) that the hearing rules as a whole "be liberally construed in order to promote their objective and assist the individual in obtaining justice." In this instance, justice

> pertains to both the Appellant and the agency who seemed trapped in a revolving door of hearings and deadlocked negotiations. In the final analysis, a state hearing decision is required to make "recommendations for resolution of the issue...(and give) Clear instructions to the parties...when additional action is necessary to resolve the matter at issue."16 Accordingly, we see our role in this case, where negotiation has obviously failed, to analyze the disparate positions of the parties in light of the foregoing payment standards and order a facilitated negotiation session designed to result in a sum certain they can incorporate into an amended adoption assistance agreement.

In affirming that existing law required adoption assistance agreements to consider both the needs of the child and circumstances of the family, the administrative appeal decision made additional points of significance to guide the facilitator in the final round of negotiations. The reviewer concluded that the record contained "substantial evidence" in support of the child's "ample 'existing and anticipated needs.' " The Administrative Reviewer also endorsed " the hearing officer's conclusion that the 'circumstances of the family' merit some increase in the adoption assistance subsidy."

The reviewer also pointed out that negotiations between the adoptive family and agency had been "hampered" by the latter's position that "the separate PASSS program, which it administers pursuant to OAC 5101:2-44-13.1, could be used to provide some of the items for the child being sought by the Appellant."

In additional to trying to arguing that access to the PASSS program rendered an increase in adoption assistance unnecessary, the agency further confused the issue by attempting to apply restrictive provisions in the state funded PASSS program to federal adoption assistance. The agency, noted the reviewer,

> even seems to be implying that the Appellant would be required to exhaust PASSS as a resource for every one of the child's needs before requesting

> an adoption assistance increase. To the contrary, it is the PASSS program that specifically requires as an eligibility prerequisite that " Other sources of assistance are inadequate or are unavailable to meet the child's immediate needs."19 This is not to suggest that accessing that program is necessarily an unwise strategy, only that we do not find support in the adoption assistance rules that it is a prerequisite to qualifying for an increase if one is otherwise warranted.

Laws v. State ex rel. Oklahoma Department of Human Services, 2003 OK CIV APP 97, P. 3d ; Case Number 96740

In August 2003, the Oklahoma State Court of Appeals rejected the state' two-tiered adoption assistance payment system that awarded higher rates of support to foster parents who adopted their foster children than to adoptive parents who were not the child's former foster parents. The appellate court's ruling in also affirmed the purpose of the adoption assistance law, which was, in the words of the Child Welfare Policy Manual (8.2D.4, Question 5), "to encourage an action that will be a lifelong social benefit to certain children" and to do so through "a discussion and negotiation process." The purpose of the negotiation, according to the appellate court, was "meet the needs of the child and consider the circumstances of the family."

The absence of a means test in the adoption assistance program, in the court's opinion, reinforced the conclusion that "persons qualified to adopt and who are willing to adopt a special needs child, shall be entitled to obtain assistance when that child's needs and their circumstances warrant." The prohibition against a means test was "further indication that the underlying legislative intent is to make the subsidy available to *all* adoptive parents and in an amount up to the maximum provided by law."

Eligibility and/or Retroactive Adoption Assistance Payments After Finalzation

Glassco v. Ohio Department of Job and Family Services **– Ohio Court of Appeals**

The Court of Appeals for Ohio's Tenth Appellate District in Columbus reversed a judicial review decision denying eligibility for adoption assistance. The appeals court found that the common pleas court erred in imposing an impossible standard of special needs; accepting Franklin County's definition of special needs, which was more restrictive and therefore out of compliance with state and federal law and policy. The common pleas court also failed to apply the standards for an application for adoption assistance submitted after finalization. Instead the court erroneously applied pre-adoption standards.

The Responsibility to Inform

Ferdinand v. Department for Children and their Families, 768 F. Supp. 401 (D.R.I U.S. Dist. 1991)

The federal District Court ruled that an adopted special needs child could be awarded federal adoption assistance after finalization in large part because the program "was not adequately explained to the Ferdinands." The state had an "affirmative duty" to ensure that adopting parents had sufficient information to make an informed choice about adoption assistance. The court's finding was based on 45 CFR 1356.40 (f), which requires that "the State agency must actively seek ways to promote the adoption assistance program." **.**

SSI and Adoption Assistance

*Hogan v. Vermont Department of Social and Rehabilitative Services***,** 168 Vt. 615; 727 A.2d 1242, (Vt. 1998).

The Hogans adopted their child through a private agency without obtaining adoption assistance. They applied for adoption assistance after finalization. The Hogans based their case on the argument that their child met the eligibility standards for SSI prior to finalization of the adoption.

However, an application for SSI had never been completed. . The court agreed that, with respect to adoption assistance, the child's eligibility under the statute must be determined on the basis of the child's circumstances prior to the final decree of adoption. The question for the court was "how to interpret the eligibility standards when, through no fault of their own, the adoptive parents were deprived of the opportunity to make an application at the proper time? Section 673(a) [federal law]

> plainly contemplates that an application for adoption assistance benefits will normally be filed prior to the finalization of adoption. We agree that the child's eligibility under the statute must be determined based on the child's circumstances at that point in time. The question here is how to interpret the eligibility standards when, through no fault of their own, the adoptive parents were deprived of the opportunity to make an application at the proper time.

In finding for the parents, the court reasoned that it was inconsistent to allow parents an avenue of appeal to apply for adoption assistance after finalization and then categorically deprive them of the means to meet the eligibility requirements. The court concluded that:

> If, as the federal Department of Health and Human Services advised SRS [Vermont Department of Social and Rehabilitation Services], the circumstances of this case justify a post adoption application for benefits, then it follows that these circumstances also permit a post adoption application for diagnosis of a condition that meets the SSI disability criteria to substitute for the normal pre adoption diagnosis of such a condition. Otherwise, the remedy for the failure to inform the parents of the program would be illusory because the parents could not show what the diagnosis would have been if the child had been examined for this purpose at the time. As a simple matter of logic, mitigating the unfair deprivation of an

opportunity to seek benefits is useless unless there is also a mitigation of the similar deprivation of an opportunity to build the requisite medical record.

Awarding Adoption Assistance and Retroactive Payments

York County Children and Youth Services v. Department of Public Welfare, NO. 660 C.D. 2003, (Pa Commw. October 1, 2003. State Appeals Court Decision .

The Commonwealth Court of Pennsylvania decision in *York County Children and Youth Services v. Department of Public Welfare* considered overlapping extenuating circumstances and awarded both eligibility and retroactive payments to the child even the adopting parents had received information about the adoption assistance program and had turned it down. The parents also received summaries of the child's medical and social history. A Diagnosis prior to the adoption concluded that the child was struggling as a result of prior abuse and neglect, but had developed a strong sense of attachment with her adopting parents and had experienced some progress toward emotional stability. However,

- The agency informed the parents about adoption assistance, but the appeals court affirmed the hearing decision that the agency did not provide a "meaningful understanding of the program." The burden to inform the parents falls squarely on the agency.

- The adopting parents did not receive full information about the child's medical and social history until years after the adoption. The child was diagnosed with Reactive Attachment Disorder and Oppositional Defiant Disorder around ten years after the adoption was finalized.

- The psychologist that diagnosed the child with Oppositional Defiant Disorder and Reactive Attachment Disorder traced the problems to the first three years of the child's

life. Apparently, the child had a serious disorder that was traceable to the early trauma of abuse and neglect, but the disorder was not known or diagnosed prior to the adoption.

- The likelihood that the child's Reactive Attachment Disorder and Oppositional Defiant Disorder originated with the early abuse and neglect visited upon the child was the basis of awarding retroactive payments back to October 7, 1991, the date of the final decree of adoption.

Even though, the discovery of Reactive Attachment Disorder and Oppositional Defiant Disorder years after the adoption was not treated explicitly as an extenuating circumstance, it appeared to effect the conclusion as the whether the parents had been adequately informed about the adoption assistance program or the child's background. Adoptive parents might consider citing this case as an example where the essential question regarding extenuating circumstances is: did the adopting parents had sufficient information at their disposal to make an informed decision about applying for adoption assistance. Whether the information could have been known or should have been known is not the relevant concern, but rather was an eligible child denied adoption assistance due to circumstances beyond the parents' awareness or control

Allegheny County Office of Children, Youth and Families v. Department of Public Welfare, 800 A.2d 367, (Pa. Commw. 2002).
http://www.courts.state.pa.us/opposting/cwealth/out/2035cd01_6-7-02.pdf

The Commonwealth Court of Pennsylvania upheld an award of retroactive adoption assistance payments back to the termination of parental rights. The child met the eligibility requirements for Title IV-E adoption assistance before the final decree of adoption in 1989, but the agency did not discuss the program with the parents. The adoptive parents applied for assistance in 1997 after their child began exhibiting behavior problems.

At subsequent administrative hearings, the county agency agreed that that the child qualified for adoption assistance, but argued that retroactive payments should extend only to the most recent

application in 1997. The Commonwealth Court affirmed the hearing officer's initial decision to award retroactive payments back to the October 5, 1989, the date of the final decree of adoption.

Gruzinski v. The Pennsylvania Department of Public Welfare, **7**31 A.2d 246, (Pa. 1999))

In *Gruzinski v. Pennsylvania Department of Public Welfare*, the Gruzinski family won its initial hearing only to see it reversed by the Pennsylvania Department of Public Welfare. The Commonwealth Court of Pennsylvania determined that the state's position had little merit and found in favor of the family. Not only did the court declare that the child was eligible for adoption assistance, but awarded retroactive payments to the Gruzinski family.

Here is the significant part of that ruling.

> This case meets the federal criteria for extenuating circumstances cited in DHHS PIQ 92-02 and this Commonwealth and the local agency should be bound by the federal guidelines and should welcome the opportunity to provide this much needed and deserved entitlement. Most importantly, however, CYS and DPW are bound by the determination of the Fair Hearing officer, who found [child's name] eligible.
>
> PIQ 92-02 further outlines the earliest date from which adoption assistance may be provided after the legalization of an adoption. In this instance, because the adoption was finalized after October 1, 1986, adoption assistance payments may be granted when the child is placed in the adoptive home, even prior to a final decree of adoption. This is true in this instance even for retroactive payments.

"Based on the court's understanding of PIQ 92-02," it concluded that the Gruzinski child "is eligible for Title IV-E adoption assistance retroactive to the first instance where [the child] was

residing with the adoptive mother and the Birth Mother's parental rights were terminated, which date is December 10, 1989." The Pennsylvania Department of Public Welfare petitioned to have the Gruzinski decision reviewed by the Pennsylvania Supreme Court, but were denied.

Ward v. Pennsylvania Department Of Public Welfare, 756 A.2d 122; (Pa. Commw. 2000) The Commonwealth Court of Pennsylvania reversed an administrative hearing decision denying the monthly adoption assistance to the adopted child in *Ward v. Pennsylvania Department Of Public Welfare*, 756 A.2d 122; (Pa. Commw. 2000). The Wards adopted their special needs child in 1994 after being told by the private agency placing the child that he was not qualified. Two year later, the Wards applied for assistance and were denied. A hearing and state agency review upheld the denial. The Commonwealth Court held that whether or not the child met the standards for federal reimbursement or not, he was eligible for an adoption subsidy under Pennsylvania law.

***Ross v. Department of Public Welfare*,** 811 A.2d 1076, (Pa. Commw. 2002). State Appeals Court Decision, **http://www.courts.state.pa.us/opposting/cwealth/out/2676cd01_11-7-02.pdf**

The Pennsylvania Commonwealth Court awarded the adoptive family both eligibility and retroactive payments for adoption assistance, but the Commonwealth Court held that the family was not entitled to interest payments. While federal law allowed families to obtain adoption assistance after finalization back to the earliest date of eligibility, there were no provisions for payment of interest.

The county agency did not inform the family about the history of abuse and mental illness in the child's family or the availability of adoption assistance prior to final decree of adoption in 1988. In 1997, petitioners learned of the availability of adoption assistance and applied. They were denied and on appeal were awarded both eligibility and retroactive payments by the administrative hearing authority. The county calculated the retroactive amount based on rates in effect at the time and issued checks totaling $120,985.74, but denied a request for interest payments.

C.B. v. Pennsylvania Department of Public Welfare**,** 786 A.2d 176, (Pa. 2001); an**d** ***Barczynski v. Pennsylvania Department of Public Welfare*** 727 A.2d 1222, (Pa. Commw. 1999) – State Supreme Court Decision and State Appeals Court Decision

The Commonwealth Court of Pennsylvania reversed an administrative review decision that the child was not eligible for adoption assistance because he was not placed by an agency. The Barczynskis had obtained custody prior to the adoption. The court concluded that the stated purpose of Congress in enacting the law "was to enable each state 'to provide adoption assistance for children with special needs. (42 U.S.C. 670). This statement of purpose does not limit adoption assistance to special needs children in the legal custody of a county agency or other state approved agency.'" Accordingly, the court found that Pennsylvania's law requiring placing by an agency was in conflict with federal law.

In refusing to accept the constitutional argument that the Pennsylvania and federal adoption assistance law were in direct conflict, the Pennsylvania Supreme Court chose to accept a "narrower, non-constitutional" claim that harmonized state and federal law while awarding adoption assistance to the Barczynskis.
In awarding adoption assistance to the child, the court stated that as a foster child with special needs, the boy met the requirements for IV-E adoption assistance.

> An award of adoption assistance to appellees here is consistent with the agency custody requirement of the Pennsylvania Act. This case does not resemble a private adoption in the least; rather R.R.M. unquestionably began in agency custody, was placed in the foster care of the appellees through the agency, was adjudicated dependent, and was a child of special needs who, it is undisputed, otherwise qualified for an adoption assistance subsidy.

Rooks v. Georgia Department of Human Resources, Superior Court for the County of Glynn, State of Georgia, Civil Action File NO. 02-01491 (June 11, 2003)

In Rooks, the Georgia Superior Court for the County of Glynn reversed the state's denial of adoption assistance to the child and awarded both retroactive eligibility and benefits. In finding on behalf of the family, the court determined:

- The Georgia Department of Human Resources had the burden of showing that the denial was proper. Accordingly, the agency representative's "feeling" that the parents were informed about the adoption assistance program was outweighed by the parents' claim that they were not informed.

- "At least one Court has found that the impairments do not have to be "evident at the time of the adoption. *Ferdinand v. Department for Children and Their Families*, 768 F.Supp. 401 (D.C.R.I. 1991)." .

The court ruled the state's contention that the child was not in the custody of the state or any agency immediately prior to the adoption was without merit. The child had been in the state foster care system. The court cited the Pennsylvania Supreme Court's decision in ***C.B. v. Pennsylvania Department of Public Welfare,*** 567 Pa. 141, 786 A.2d 176 to distinguish the Rooks situation from a private adoption. *Rooks v. Georgia Department of Human Resources*,

Sanders v. Georgia Department of Human Resources, **Superior Court of Richmond County (September, 2001).**

On September 11, 2001, the Superior Court of Richmond County Georgia (Augusta) found that the Administrative Law Judge's earlier decision in favor of state agency flew in the face of his own findings of fact. The A.L.J. conceded that important medical records from their child's early months were not disclosed to the Sanders prior to the adoption. In addition, he also found that the Georgia Department of Human Resources did not fully inform the Sanders about the possibility

of receiving adoption assistance. The assumption that their child did not qualify for adoption assistance led the Sanders to waive their application for the program.

The Court determined that these circumstances "made it impossible for the Sanders to apply for benefits at the earliest possible date of the child's eligibility." Not only did the state's policy deny the Sanders a means of regaining years adoption assistance lost through no fault of their own, noted the court, but such a policy

> . . . allows the Department to shield itself from payment of statutorily mandated benefits by simply failing to fully inform prospective adoptive parents. This is inherently wrong and clearly in contravention of the statutory scheme and intent of both the federal and state statutes set out herein. Therefore, the A.L.J.'s failure to determine and consider the child's eligibility prior to the Sanders' application was clearly erroneous.

Alsdorf v. Nevada Department Of Human Resources**,** Division of Child And Family Services, Case No. 30142, In The Fourth Judicial District Court Of The State Of Nevada, In And For The County of Elko, July 6, 2000;

In *Alsdorf,* the court ruled that the State's policy of automatically denying the adoptive parents' request for retroactive adoption assistance payments constituted an abuse of it's discretion and remanded the case back to an administrative hearing to be determined on its individual merits.

The decision by Nevada's Fourth Judicial District Court for Elko County is significant because a number of states have taken the position of blanket opposition to all requests for retroactive adoption assistance benefits. The implication of the court's ruling is that adoptive parents are entitled to a hearing on retroactive adoption assistance payments based on the specific facts of the their case. A state agency does not have the discretionary authority to automatically reject all claims for retroactive benefits.

The children in question were placed in 1987. When the family finally applied for adoption assistance in 1998, the state agreed that the children met the eligibility criteria for adoption assistance at the time of the placement. According to the court decision, it was "also obvious that the agency did not inform the Alsdorfs that benefits were available at the time of the placement or finalization of the adoption. The record further reveals that the State denied the existence of the availability of the benefits when the Alsdorfs continued to inquire throughout the term of the adoption."

The subsequent administrative hearing awarded future adoption assistance, but in the court's words, "neither the State nor the Hearing Officer reviewed or seriously considered the underlying facts and circumstances in this case when deciding not to award retroactive benefits." A policy which denies "all claims for retroactive benefits without considering the underlying facts of a case," in the Court's view is "a denial of due process and is in violation of the Constitutions of the United States and the State of Nevada."

Noting that the Alsdorfs had requested approximately $48,000 in retroactive payments, the judge expressed the opinion that "by finally granting the adoption benefits 11 years after the placement of the children with the Alsdorfs, the State acknowledged their failures in this adoption. It would therefore appear that if the agency had seriously considered the facts and equities in this case, instead of relying on the 'automatic denial policy,' and exercised its discretion in this case, the Alsdorfs would have been seriously considered for an award of retroactive benefits."

The Judge in *Alsdorf* pointed to the Court's reliance on 45 CFR 1356.40 (f) in the pivotal case of *Ferdinand v. Department for Children and Their Families*, 768 Fed.Supp. 401 (R.I. 1991). The court in *Ferdinand*, noted the judge, relied on C.F.R. Section 1356.40(f) which

> . . . held that the state has an affirmative duty to fully explain all available adoption assistance programs so that the adoptive parents can make an informed decision. In this case, the State failed to advise the Alsdorfs of the assistance programs. As in *Ferdinand*, there is no mention in the agency's file that assistance programs

> were explained or offered to the Alsdorfs at the time the children were placed in their home or when the adoption was finalized. In fact, at the time of the adoption, the Alsdorfs asked whether there was financial assistance available and were told, "no." The Alsdorfs discovered the availability of such programs through a local social worker, after having again been told by the State that financial assistance was not available.

The Reisner Case of Indiana **– Administrative Hearing Decision**
(Case Number: AAP-76-28653)

A 1999 Indiana hearing decision awarded both eligibility for adoption assistance and retroactive payments after finalization to the Reisner's adopted child who was placed by a private agency. The following is a direct quote from the decision.

> 14) Policy Interpretation Questionnaire (PIQ) dated June 25, 1992 stipulates States have the option to choose to pay adoption assistance retroactively to the earliest date of the child's eligibility.
>
> 15) Based on the above described extenuating circumstances which occurred in this case, payment of a retroactive adoption subsidy is justified in [child' name] case.
>
> In situations where the final fair hearing decision is favorable to the adoptive parents, the State agency can reverse the earlier decision to deny benefits under title IV-E. If the child meets all the eligibility criteria, Federal Financial Participation (FFP) is available, beginning with the earliest date of the child's eligibility (e.g., the date of the child's placement in the adoptive home or finalization of the adoption) in accordance with Federal and State statutes, regulations and policies.

***In Re: Bell*,** Washington State Hearing Decision, Docket No: 07-1999-A-1737, Initial Decision, Issued January 2000

In an initial administrative hearing decision rendered in January, 2000, Judge Nan Thomas wrote that, while federal law did not mandate adoption assistance back to the date of adoption or placement, "it clearly makes federal funds available to states when such support is deemed appropriate for a particular child." She ordered the state to make retroactive payments, even though PIQ 92-02 did not specifically address the issue and "no existing Washington law, statute or regulation," provided "any direct guidance on this issue."

Judge Thomas based her decision in part upon the Washington statute that required the state Department of Social and Health Services to "make maximum use of, such federal funds as are or may be made available to the department for the purpose of supporting the adoption of hard to place children . . ." To "automatically" deny retroactive benefits to an otherwise eligible child "because of late application which was not the fault of the parent," conflicted with the directive to maximize federal funding for special needs adopted children.

"The entire focus of the hearing mandated by PIQ 92-02," she observed, was "to determine if there are extenuating circumstances, which allow the inquiry into whether the child was eligible for assistance at the time of his adoption." Although PIQ 92-02 focused on eligibility for adoption assistance after finalization, the judge believed that by doing so, "the federal policy linked retroactive eligibility to potential retroactive assistance."

> Here, the Department acknowledges that [the child] was a special needs child and was eligible for assistance at the time he was adopted. Extenuating circumstances, specifically, the Department's failure to offer adoption assistance to [the child's] mother, prevented [the child] from receiving adoption assistance from the earliest date of his eligibility.

In a footnote to her decision, the judge also noted that "procedurally, there is no impediment to payments back to the date of eligibility" in federal hearing regulations. Federal regulations dealing with hearing rights in 45 C.F.R. 205.10 provide that "when the hearing decision is favorable to the claimant, or when the agency decides in favor of the claimant prior to the hearing, the agency shall promptly make corrective payments retroactively to the date the incorrect action was taken."

The hearing decision, "having determined that federal law specifically allows retroactive adoption assistance back to the date of a child's adoption when he was eligible at that time, and that nothing in Washington law prohibits such assistance," then turned to the one remaining issue, "the amount of such assistance due to this child in this case." The judge ordered the state to negotiate the amount of retroactive payments based on the child's needs and family's circumstances and then added this further guidance. "In the usual event where adoption assistance is negotiated at the time of the adoption, the discussion will revolve around anticipated future needs of the special needs child; whereas in a case where adoption assistance is granted retrospectively for a disabled child, such as this case, the department and parent have the assistance of hindsight and the more specific needs of the more mature child."

In *Re: Lynn Smith*, Washington State Administrative Hearing Decision; Docket No. 08-1999 A 2017

In *Re: Lynn Smith*, a Washington State hearing decision involving a private agency adoption, issued in March 2000, Judge Nan Thomas determined that, by setting forth procedures to determine if a child was eligible for adoption assistance prior to finalization, PIQ 92-02 linked retroactive eligibility to retroactive payments. In order to qualify for adoption assistance after finalization, it was necessary to establish that a child met the eligibility requirements "at the time of her adoption." If, according to PIQ 92-02, adoption assistance payments could be made back to the earliest date of eligibility, Judge Thomas reasoned that such payments should be made. As in the *Bell* case she held that to "deny any benefits after the date of an otherwise eligible child's adoption because of late application which was not the fault of the parent would contravene the

explicit directives set forth in state law which mandate maximum use of federal funds for the adoption of special needs children . . ."

Affirmation of Eligibility, Denial of Retroactive Payments

Greenfield v. Florida Department of Children and Family Services, 794 So. 2d 739, (Fla. App. 2001).

The Florida Court of Appeals upheld an administrative hearing decision awarding the Greenfield children eligibility for adoption assistance after finalization, but denied the petition for retroactive benefits. The court held that states had the authority to award retroactive payments back to the earliest date of eligibility prior to the final decree of adoption, but neither federal or state law required that such payments be made.

The Greenfield's adopted two children as from a private agency in Florida in the 1980's. They were not informed about the adoption assistance programs nor were they given complete background information about the children's family history. The Greenfield's applied for federal Title IV-E adoption assistance. Based upon the extenuating circumstances that prevented the Greenfields from applying prior to adoption assistance, the administrative hearing officer reconsidered the children's eligibility and awarded them IV-E adoption assistance. The hearing denied the Greenfield's request for retroactive payments and the Appellate Court upheld the denial, concluding that federal Policy Interpretation Question (PIQ) 92-02, in effect at the time, authorized, but did not require states to make retroactive payments.

Denial of Eligibility After Finalization

Becker v. Iowa Department of Human Services, 661 N.W.2d 125 (Iowa 2003).

The Iowa Supreme Court reversed the district court's decision awarding adoption assistance to the child's grandparents. The Supreme Court determined that the children were ineligible because they were not under the guardianship of the state as provided in section 600.20 of the

Iowa Statutes. The Beckers had obtained guardianship of the children after the public agency opposed their intention to adopt the children. Curiously, the Court cited *C.B. v. Pennsylvania Department of Public Welfare,* 786 A.2d 176, (Pa. 2001) as grounds for its decision, even though the Pennsylvania Supreme Court awarded adoption assistance to the child. The Pennsylvania Court found that although the parents obtained custody of the child prior to the adoption, the "case does not resemble a private adoption in the least; rather R.R.M. unquestionably began in agency custody, was placed in the foster care of the appellees through the agency, was adjudicated dependent, and was a child of special needs who, it is undisputed, otherwise qualified for an adoption assistance subsidy." The children in *Becker* had also been in the foster care system, prior to the grandparents obtaining custody.

Glanowski v. N.Y. State Dep't of Family Assistance, 225 F. Supp. 2d 292 (U.S. Dist. 2002).

The federal district court granted the state's motion for summary judgment and denied the adoptive parents' cross-motion for summary judgment in a case involving eligibility for Title IV-E adoption assistance. The adoptive parents argued that their Downs Syndrome children qualified for adoption assistance even though they had not been in the custody of a public or private agency by virtue of meeting the requirements for Supplemental Security Income (SSI). The parents pointed out that federal adoption assistance law at 42 U.S.C. 673 supported their contention that if special needs children qualified for SSI, agency custody was not required.

The court determined that the federal law "clearly" delegated to the states "he responsibility for making eligibility determinations for 'special needs' adoption assistance. New York statutes at SSL § 451(1) defined "child" as:

> *a person under the age of twenty-one years whose guardianship and custody have been* committed to a social services official or a voluntary authorized agency, or whose guardianship and custody have been committed to a certified or approved foster parent *pursuant to a court order prior to such person's eighteenth birthday*.

The court reasoned that the adoptive parents' children did not meet the definition of "child" under New York's subsidy statutes and that New York laws were not in conflict with federal adoption assistance law.

Special Needs

Reasonable Attempt to Place Without Adoption Assistance

Adoption ARC, Inc. v. Department of Public Welfare,, 727 A.2d 1209, 1214 (PA 1999)

The Commonwealth Court of Pennsylvania observed the federal special needs provision in which, "a reasonable, but unsuccessful, attempt has been made to place the child with appropriate adoptive parents without providing adoption assistance" is preceded by the qualification, "except where it would be against the best interests of the child because of factors such as the existence of significant emotional ties with prospective adoptive parents while in the care of the parents as a foster child." The use of "such as," indicated that the reference to emotional ties with foster parents was intended to serve as an example, not the only situation where making a reasonable, but unsuccessful effort to place without assistance might be contrary to the child's best interest. In short, there might be a number of situations where making an effort to place the child without assistance would not be in his or her best interest.

In the case at hand, the court concluded "each child was placed in the custody of the adoptive parents at a very tender age and formed familial bonds with their adoptive parents. It would not have been in the best interest of either child to have the child removed and placed with a different family solely because that family did not require a subsidy." The decision goes on to cite the section of federal Policy Interpretation Question ACYF-PIQ 92-02, stating that agencies should first locate a suitable family, make full disclosure of the child's background and then ask the parents if they need adoption assistance. ***Adoption ARC, Inc. v. Department of Public Welfare*, 727 A.2d 1209, (Pa. Commw. 1999). (NOTE:** After PIQ 92-02 was rescinded, the

provision was incorporated into the federal *Child Welfare Policy Manual* Section 8.2B.11 "TITLE IV-E, Adoption Assistance Program, Eligibility, Special Needs.")

Agency Custody as an Eligibility Requirement

C.B. v. Pennsylvania Department of Public Welfare*, 786** A.2d 176, (Pa. 2001); and ***Barczynski v. Pennsylvania Department of Public Welfare 727 A.2d 1222, (Pa. Commw. 1999) – State Supreme Court Decision and State Appeals Court Decision

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The court determined that the federal law "clearly" delegated to the states "he responsibility for making eligibility determinations for 'special needs' adoption assistance. New York statutes at SSL § 451(1) defined "child" as:

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The court reasoned that the adoptive parents' children did not meet the definition of "child" under New York's subsidy statutes and that New York laws were not in conflict with federal adoption assistance law.

Arkansas Department of Human Services v. Jackson, CA02-802 (Ark. App. 2003).

The Arkansas Court of Appeals affirmed the Circuit Court's award of financial support to the children, even while agreeing with the appellant agency that the children did not qualify for adoption assistance because they were not in the custody of the department of human services (DHS). The children had been placed with relatives by their birthmother. The appellate court found that Ark. Code Ann. § § 9-27-334(a)(1)(A), (2)(A) (2002) permitted the court to order the DHS to provide family services and to "transfer custody of the child to relative or other individual." The court held that financial assistance was justified to prevent removal of the children from the relatives home and to support a permanency plan. In the end the appeals court affirmed the circuit court's award of financial support, even though it determined the correct decision was reached for the wrong reasons.

Adoption Assistance Agreement as a Contract

***Babicz v. Kaplan,* 583 N.Y.S.2d 543,** (N.Y. App. Div. 1992)**.**

Based on its conclusion that the adoption subsidy agreement is a contract, a New York State Appellate Court awarded retroactive subsidy payments to an adoptive family that had been denied by a county agency. The adoptive family's adoption subsidy agreement provided for a monthly payment that was equal to his foster care rate. Further, the agreement specified that the subsidy payment would increase as the foster care rate increased. On November 1, 1986, the county replaced its single foster care rate with one that recognized different levels of care: "normal", "special" and "exceptional." The adoption family continued to receive the "normal" rate.

The family requested an increase in their son's subsidy, contending that he met the care standards for an exceptional rate. The county denied the request and the parents appealed by requesting an administrative hearing. In a 1992 decisions, the New York appellate court agreed that the child met the qualifications for exceptional needs and that there was "merit to petitioners' contention that the local DSS breached the adoption subsidy agreement, which by its express terms 'constitutes a contract between [petitioners] and [the Local DSS].' " Accordingly, the adoptive family was entitled to receive the exceptional needs rate from the date the county adopted the three categories of foster care.

***Department of Social Services v. Kevin T.* (In re Crystal T.),** 546 N.W.2d 774, ((Neb. App. 1996).

The Nebraska Court of Appeals affirmed a county court decisions denying the state's motion to require the parent's financial contribution for the care of their adopted son in a mental health facility. The adoption subsidy agreement contained provisions for mental health coverage, including out of home treatment. The adoptive parents argued successfully that the state had a contractual obligation to provide for the juvenile's care by virtue of the subsidized adoption agreement.

State in the Interest of A.R., 765 So. 2d 395, (La. App. 2000)**.**

The Louisiana Court of Appeals affirmed the trial court's decision that the appellants had no right of action to make visitation between twins a condition of an adoption subsidy agreement. The attorney for the twins brought the action when one twin was placed for adoption and the other was not. The court found that the adoption subsidy agreement constitutes a contractual obligation on the part of the state in favor of the adoptive parent to the extent that the adoptive parent remains eligible for the subsidy." Accordingly, the court determined neither the state not federal subsidy acts gave any of the parties the right to negotiate or impose conditions other than those provided for in the law.

Continuing Eligibility for Adoption Assistance

Arkansas Department of Human Services v. Welborn, 66 Ark. App. 122; 987 S.W.2d 768, (Ark. App. 1999)
http://courts.state.ar.us/opinions/1999a/19990407/ca98-890.html

An adoptive family's Title IV-E adoption assistance was reinstated, even though the children were in residential care and the parents had no intention of reunification with the children. The Welborns adopted two special needs boys in 1993 and moved to Florida the same year. The parents sent the boys to a boarding school in 1995 and thereafter the children lived in various residential care facilities.

> In March 1996, the Florida Department of Health and Rehabilitative Services (DHRS) took the boys into custody and the Welborns entered into an agreement to pay child support by assigning the monthly adoption assistance checks to the Florida agency. The Arkansas Department of Human Services then terminated the adoption assistance on the grounds that the Welborns were no longer providing emotional support to their sons.

The Arkansas Court of Appeals overruled the administrative hearing decision that adoption assistance should be terminated because the Welborns were no longer providing emotional support for their sons. The Court held that the language in 42 USC 673 stipulating that adoption assistance payments could not be made if the child is no longer receiving support from the parents did not extend to emotional support.

Due Process

Schmidt v. Department of Social Services, 255 Neb. 551, 586 N.W.2d 148, (Neb. 1998**).**

The Nebraska Supreme Court determined that the denial of the child's eligibility for IV-E adoption assistance after finalization was invalid because the Nebraska Department of Social Services (DSS) did not follow prescribed procedures for reviewing applications. No application was completed and reviewed by a state specialist as prescribed by law. Instead an administrative hearing took place without any formal denial of assistance. The Director of DSS issued the denial of adoption assistance following the hearing. The Supreme Court held that in doing so, the Director ended up making both the initial and final determination which was contrary to state law. Nebraska regulations authorized the DSS Director to review hearing decisions, but not to override the hearing process altogether. DDS' failure to follow state and federal regulations deprived district and appellate courts of jurisdiction to review the decisions. Accordingly, DSS' denial of adoption assistance was vacated and remanded for rehearing

Adoption Assistance and Child Support Obligations

Benefit for the Child

Hamblen v. Hamblen, 54 P.3d 371, (Ariz. App. 2002)**.**

The Arizona Court of Appeals affirmed the trial court's holding that the divorced husband could not claim half the children's adoption subsidies to be paid as part of his child support obligation. The couple had adopted five special needs children who each had an adoption subsidy of $671

per month. The trial court held that the adoption subsidies were intended to provide support and care of the children and as such were not the parents' property. The appeals court concurred, but held that the birthfather should receive a portion of the subsidy commensurate with supporting the children during their annual visitation with him. In this case, the proportion was 16.1%..

Lattimore v. Lattimore, Case No. 97CA2482, Court of Appeals of Ohio, Fourth Appellate District, Scioto County, (Ohio 1997)**.**

The Ohio Court of Appeals reversed the trial court's deduction of the adoption assistance payment from the ex-husband's child support obligation and remanded the case back for further consideration. The court held that no finding had been made as why a deviation in the amount child support would be in the best interest of the child.

Collado v. Vega, FA 980355397, Superior Court of Connecticut, Judicial District of Fairfield, at Bridgeport, (Conn. Super. 1999). See also, ***Szydlo v. Szydlo***, FA 93-0530294S, Superior Court of Connecticut, Judicial District of Hartford - New Britain, at Hartford, (Conn. Super. 1996)

The Connecticut Superior Court held that the subsidies for the adopted children were not to be included in calculations of income available for child support. The Court reasoned that the purpose of the adoption subsidy was to "to cover expenses beyond the ordinary costs of raising a child." .

A.E. v. J.I.E.**, 179** Misc. 2d 663, 686 N.Y.S.2d 613**.**

The Supreme Court of New York for Bronx County refused to reduce the plaintiff adoptive mother's child support obligation by the amount of the child's adoption subsidy. The court held that the subsidy was a resource for the child. The couple adopted a special needs child, but the adoptive mother moved out of the home, claiming that the child threatened her. The adoptive father as de facto custodian was awarded temporary child support and child care expenses, as well as the adoption subsidy.

Out of Home Placements

County of Ramsey v. Wilson, 526 N.W.2d 384, (Minn. App. 1995)**.**
The Minnesota Court of Appeals affirmed the trial court's order that the adoptive father use the adoption subsidy to reimburse the county for his son's voluntary out of home placement. The subsidy agreement required the father to verify annually that the child remained in his care, that the subsidy was needed and to report any circumstances that might affect the amount or duration of the subsidy, including the child's absences from the home. The Court of Appeals agreed that, although not explicitly stated in the law, the adoption subsidy was a resource to the child and the lower court was correct in requiring the father to contribute to that support while the child was in out of home care. The father could have appealed the county's initial order to contribute the subsidy to his son's out of home care by requesting an administrative hearing but did not pursue that option.