

# Clearinghouse REVIEW

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Sargent Shriver National Center on Poverty Law



# Adoption Assistance

❧ AN INTRODUCTION ❧

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**A**doption assistance programs allow children with special needs to live with adoptive families rather than in foster care. They also help adoptive families meet children's needs and ensure that adoptive placements are successful. These programs—which provide cash benefits, medical assistance, and services—are designed to remove the financial disincentives that prevent parents from adopting children who would be eligible for foster care benefits in state care but lose that eligibility once they are adopted. Although the purpose of adoption assistance programs is clear, eligibility and assistance rules can be complicated. Advocacy is often necessary to ensure that children receive program benefits and can remain with their adoptive families.

Eligibility for and benefits of adoption assistance programs vary with the funding source. Title IV-E of the Social Security Act provides federal financial participation for adoption assistance payments when the child meets federal eligibility criteria.<sup>1</sup> The federal government provides federal financial participation in cash benefits at the federal medical assistance percentage rate and contributes 75 percent of training expenses and 50 percent of administrative expenses related to the adoption assistance program.<sup>2</sup> All states must establish a Title IV-E adoption assistance program as a condition of receiving federal financial participation for foster care maintenance payments.<sup>3</sup> However, because states have flexibility in designing these programs, some program details vary from state to state.<sup>4</sup> States fund state-only adoption as-

<sup>1</sup>Social Security Act, 42 U.S.C. §§ 671(a)(1), 673(a)–(c).

<sup>2</sup>The federal medical assistance percentage is the amount that the federal government provides in federal financial participation for Medicaid expenditures. E.g., if a state's federal medical assistance percentage rate is 50 percent, the federal government reimburses the state fifty cents for every dollar that the state spends on qualified expenditures. For each state's federal medical assistance percentage rates, see [Office of the Assistant Secretary for Planning and Evaluation, U.S. Department of Health and Human Services], Federal Medical Assistance Percentages or Federal Financial Participation in State Assistance Expenditures, FMAP (updated Jan. 14, 2010), <http://1.usa.gov/mgpV4S>. For information about tribal federal financial participation rates, see 42 U.S.C. §§ 674(a)(2), 679c(d). For information on expenses, see *id.* § 674(a). For allowable costs, see ADMINISTRATION FOR CHILDREN AND FAMILIES, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CHILD WELFARE POLICY MANUAL § 8.1A (n.d.), <http://1.usa.gov/lpyfs> (under revision) [hereinafter CHILD WELFARE POLICY MANUAL].

<sup>3</sup>Native American tribes may operate Title IV-E foster care and adoption assistance programs as well (42 U.S.C. § 679(c) (2011); CHILD WELFARE POLICY MANUAL, *supra* note 2, § 9). See also Administration for Children and Families, U.S. Department of Health and Human Services, Guidance on Fostering Connections to Success and Increasing Adoptions Act of 2008 (July 9, 2010), <http://1.usa.gov/mR0f7T>. For information on states' obligation to establish Title IV-E programs, see 42 U.S.C. § 671(a)(1).

<sup>4</sup>For descriptions of state adoption assistance programs, see North American Council on Adoptable Children, State Adoption Subsidy Profiles (n.d.), <http://bit.ly/mE1Ajr>. See also Administration for Children and Families, U.S. Department of Health and Human Services, Child Welfare Information Gateway, Adoption Assistance by State (n.d.), <http://1.usa.gov/jyU1Pz>.

sistance programs that have no federal financial participation and are not required to meet federal requirements.<sup>5</sup> Here I present an overview of federal and state adoption assistance programs and highlight some of the issues that commonly arise for parents who adopt children with special needs.

## I. Federal Adoption Assistance

Federal adoption assistance is provided through an adoption assistance agreement between the state or local adoption assistance agency and the adoptive parents.<sup>6</sup> The agreement must be signed and in effect at the time of, or prior to, the final decree of adoption and must specify (1) the duration of federal assistance and (2) the nature and amount of any payment, services, and assistance to be provided. Moreover, the agreement must state that (1) the child is eligible for Medicaid services and (2) the agreement will remain in effect regardless of which state the adoptive parents live in at any given time.<sup>7</sup> A copy of the signed agreement must be given to each party.<sup>8</sup>

### A. Eligibility

Federal eligibility criteria apply to the child, not the adoptive parents, and requirements vary with the age of the child at the time the adoption assistance agreement is made, the child's duration in foster care, and whether the child is adopted with siblings.<sup>9</sup> These variations stem from changes that were made by the Fostering Connections to Success and

Increasing Adoptions Act of 2008 and that broaden eligibility for adoption assistance but phase in the new eligibility criteria from 2010 to 2018.<sup>10</sup>

## 1. Special Needs

All children must meet the federal definition of "special needs" to qualify for adoption assistance.<sup>11</sup> A special-needs designation has three components: (1) a determination by the state that the child cannot or should not be returned to the home of the child's parents; (2) a specific factor or condition, such as ethnic background, age, membership in a minority or sibling group, a medical condition, or a physical, mental, or emotional disability, making it reasonable to conclude that the child cannot be placed with adoptive parents without adoption assistance benefits or Medicaid; and (3) a reasonable but unsuccessful effort to place the child without assistance, unless such an effort would be against the best interests of the child (e.g., when the child has developed significant emotional ties to foster parents who wish to adopt).<sup>12</sup>

## 2. Linkage to Aid to Families with Dependent Children or Supplemental Security Income

For historical reasons, Title IV-E adoption assistance eligibility is linked to the Aid to Families with Dependent Children (AFDC) program (which was replaced by the Temporary Assistance for Needy Families (TANF) program in 1996) and the Supplemental Security Income (SSI) pro-

<sup>5</sup>E.g., some state-only programs impose a means test on adoptive parents. A means test is prohibited in the Title IV-E adoption assistance program (see note 9, *infra*).

<sup>6</sup>42 U.S.C. § 673(a)(1).

<sup>7</sup>Some states allow parents to enter into a deferred agreement for children who do not need additional financial support at the time of the adoption but may need more support later. See also III. Due Process and Enforcement *infra* for exceptions when the state does not provide sufficient information prior to finalization of the adoption.

<sup>8</sup>42 U.S.C. § 675(3); 45 C.F.R. § 1356.40(b) (2011).

<sup>9</sup>States may not employ a means test for adoptive parents (45 C.F.R. § 1356.40(c)).

<sup>10</sup>Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949 (2008), amending, *inter alia*, 42 U.S.C. § 673.

<sup>11</sup>42 U.S.C. §§ 673(a)(2)(A)(i)(II), 673(a)(2)(A)(ii)(II).

<sup>12</sup>*Id.* § 673(c)(1)(B). In 2009 foster parent adoptions constituted 54 percent of all adoptions of children in foster care (Administration for Children and Families, U.S. Department of Health and Human Services, The AFCARS [Adoption and Foster Care Analysis and Reporting System] Report: Preliminary FY 2009 Estimates as of July 2010 (n.d.), <http://1.usa.gov/mTgC4g>).

gram.<sup>13</sup> The eligibility criteria created by the Fostering Connections to Success and Increasing Adoptions Act de-link adoption assistance from AFDC by eliminating the requirement that children meet the AFDC income, resource, and family structure tests that were in effect in 1996. The Act also eliminates the requirement that children with disabilities meet the SSI income and resource criteria.

A child who is eligible for adoption assistance under the new criteria is called an “applicable child.” A child is an applicable child if (1) the child is at a specified age at the time the adoption assistance agreement is made (starting with age 16 in 2010 and decreasing by two years every year until 2018 when the new criteria apply to any child); (2) the child, of any age, has been in foster care for at least sixty consecutive months; or (3) the child, of any age, is to be placed in the same adoptive placement with a sibling who is an applicable child.<sup>14</sup>

### 3. Applicable Child

Children who meet the federal definition of “applicable child” do not have to meet the AFDC linkage requirement or the SSI income and resource requirements. Instead they must establish that (1) at the time of the adoption the child was in the care of a public or private licensed child placement agency or tribal organization (either as a result of a voluntary placement agreement or an involuntary removal in which the court determined that continuation in the home would be contrary to the welfare of the child); (2) the child meets the medical or disability requirements for

SSI; or (3) the child was residing with the child’s minor parent who was in a foster care placement.<sup>15</sup>

The Administration for Children and Families confirms that the state child welfare agency may determine whether an applicable child meets the medical or disability criteria for SSI.<sup>16</sup> Before the Fostering Connections to Success and Increasing Adoptions Act, the Administration for Children and Families took the position that only the Social Security Administration was allowed to determine whether the child met the SSI criteria, but at least one state supreme court disagreed.<sup>17</sup>

### 4. Not an “Applicable Child”

A child who does not meet the definition of “applicable child” must (1) meet the 1996 eligibility criteria for AFDC when the child is removed from home, (2) meet all the eligibility requirements for the SSI program, or (3) have been the child of a minor parent in foster care in a placement paid for by Title IV-E foster care maintenance.<sup>18</sup> In 2018 these eligibility criteria will be phased out because all adopted children will meet the age criteria under the Fostering Connections to Success and Increasing Adoptions Act.

### 5. Immigration Status and International Adoptions

The child’s immigration status may affect eligibility for Title IV-E adoption assistance. Title IV-E benefits are “federal public benefits” available only to “qualified aliens.”<sup>19</sup> Children who are qualified

<sup>13</sup>The Adoption Assistance and Child Welfare Act of 1980 created Title IV-E (see Pub. L. No. 96-272, 94 Stat. 500). Before 1980 children in foster care were supported by Aid to Families with Dependent Children (AFDC) under Title IV-A. The Adoption Assistance and Child Welfare Act created the Title IV-E foster care program and authorized federal financial participation for state adoption assistance programs for the first time (see S. Rep. No. 96-336 (1980) and H.R. Rep. No. 96-900 (1980), reprinted in 1980 U.S.C.C.A.N. 1561).

<sup>14</sup>42 U.S.C. § 673(e).

<sup>15</sup>An applicable child who meets the medical or disability requirements for Supplemental Security Income automatically meets the requirement that the child has a specific factor or condition that makes it reasonable to conclude that the child cannot be placed without assistance (42 U.S.C. § 673(c)(2)(B)(i), (a)(2)(A)(ii)).

<sup>16</sup>CHILD WELFARE POLICY MANUAL, *supra* note 2, § 8.2B.11 Question 3 (Feb. 15, 2011).

<sup>17</sup>Compare *id.* § 8.2B. Question 1 and 8.2B.11 with *Hogan v. Department of Social and Rehabilitation Services*, 727 A.2d 1242 (Vt. 1998).

<sup>18</sup>Social Security Act, 42 U.S.C. § 673(a)(2)(A)(i).

<sup>19</sup>Immigration and Nationality Act, 8 U.S.C. § 1611 (1998); U.S. Department of Justice, Specification of Community Programs Necessary for Protection of Life or Safety Under Welfare Reform Legislation, 61 Fed. Reg. 45985–86 (Aug. 30, 1996), <http://1.usa.gov/jOzhO>.

aliens at the time of adoption but who must establish that they meet the AFDC link when they were removed from home may have difficulty establishing eligibility for adoption assistance because the 1996 AFDC requirements included immigration and citizenship criteria.<sup>20</sup> Other children need only show that they are qualified aliens when adoption assistance eligibility is determined.

Children adopted internationally, regardless of their immigration status, may also have difficulty establishing eligibility for Title IV-E adoption assistance. Meeting the Title IV-E eligibility criteria has always been difficult for a child adopted internationally, and the Fostering Connections to Success and Increasing Adoptions Act explicitly prohibits Title IV-E adoption assistance for any applicable child who was not a citizen or resident of the United States at the time of adoption and was adopted outside the United States or brought into the United States for the purpose of adoption.<sup>21</sup> This prohibition does not apply to children placed in foster care as a result of a failed adoption and subsequently adopted.<sup>22</sup>

## 6. Subsequent Adoptions

Children who have been determined eligible for Title IV-E adoption assistance but whose adoptive parents have died or whose prior adoption dissolved retain Title IV-E eligibility and can qualify for adoption assistance. To do so, the state must determine that the child is a child with special needs with respect to the current adoption.<sup>23</sup> Children who are

adopted after a guardianship can be eligible for Title IV-E adoption assistance if they received Title IV-E guardianship assistance payments. The state or local adoption assistance agency applies the Title IV-E adoption assistance criteria as if the guardianship never occurred. This rule applies whether the child is adopted by the guardian or the guardianship is dissolved and the child is adopted by someone else.<sup>24</sup>

## B. Benefits

Adoption assistance is determined by agreement between the adoptive parents and the state or local adoption assistance agency based on the needs of the child and the circumstances of the adoptive parent(s). The monthly cash benefit can be in any amount up to the foster care maintenance payment, including any specialized care rate, that the child would have received in family foster care.<sup>25</sup> Some states provide adoption assistance for residential treatment costs to avoid the need to place the child in foster care and pay for the placement.<sup>26</sup> Once the adoptive parents enter into an adoption assistance agreement, they are free to spend the adoption assistance benefits to incorporate the child into the family in any way they see fit; the state may not require an accounting of how the benefits are spent.<sup>27</sup>

The adoption assistance agreement may not specify events such as an improvement in the child's condition, an improvement in the parent's financial circumstances, the child's eligibility for

<sup>20</sup>Children who have special immigrant juvenile status are qualified aliens at the time of adoption. For more information on special immigrant juvenile status, see Daryl L. Hamm, *Special Immigrant Juvenile Status: A Life Jacket for Immigrant Youth*, 38 CLEARINGHOUSE REVIEW 323 (Sept.–Oct. 2004). See CHILD WELFARE POLICY MANUAL, *supra* note 2, § 8.4B, for a discussion of the 1996 AFDC requirements.

<sup>21</sup>CHILD WELFARE POLICY MANUAL, *supra* note 2, § 8.2b.6.

<sup>22</sup>42 U.S.C. § 673(a)(7).

<sup>23</sup>*Id.* § 673(a)(2)(C); Administration for Children and Families, U.S. Department of Health and Human Services, Log No. ACYF-CB-PI-09-10, Adoption Assistance, Fostering Connections to Success and Increasing Adoptions Act of 2008, at 3 (Aug. 26, 2009), <http://1.usa.gov/IAKsQd>; CHILD WELFARE POLICY MANUAL, *supra* note 2, § 8.2B.4.

<sup>24</sup>42 U.S.C. § 673(a)(2)(D); Administration for Children and Families, *supra* note 23, at 5. Children who receive kinship guardianship assistance benefits under a Title IV-E waiver are also eligible for adoption assistance under this rule, but children in state-funded kinship assistance programs are not (CHILD WELFARE POLICY MANUAL, *supra* note 2, § 8.2B Question 3).

<sup>25</sup>42 U.S.C. § 673(a)(3); CHILD WELFARE POLICY MANUAL, *supra* note 2, § 8.2D.4 Question 5.

<sup>26</sup>See, e.g., CAL. WELF. & INST. CODE § 16121 (2010). See also North American Council on Adoptable Children, *supra* note 4.

<sup>27</sup>CHILD WELFARE POLICY MANUAL, *supra* note 2, § 8.2D.1.



other forms of assistance, or the child's reentry into foster care as reasons for automatic termination. But the agreement may provide for automatic increases based on the state's foster care rates and any adjustments necessary to keep the adoption assistance payment at or below the foster care maintenance payment that the child would have received in a foster family home.<sup>28</sup> Keeping pace with the amount the child would receive in foster care can be an important factor in reducing the disincentive to adopt.

A child can receive both SSI and Title IV-E adoption assistance benefits if the child is eligible for both programs, but the child's SSI payment will be reduced dollar for dollar by the amount of federal adoption assistance that the child receives. The Social Security Administration treats adoption assistance benefits funded from other sources differently depending on the source of the funds and the structure of the program that provides the benefits.<sup>29</sup>

## 1. Medicaid

The Title IV-E adoption assistance agreement provides categorical Medicaid eligibility for the child.<sup>30</sup> States may not require a child with an adoption assistance agreement to submit a separate Medicaid application.<sup>31</sup> Medicaid eligibility is available whether or not cash adoption assistance payments are made.<sup>32</sup> Therefore adoptive parents who

do not need cash assistance may want to consider entering into an adoption assistance agreement to establish Medicaid eligibility for their child. Children who are placed across state lines or who move to another state are eligible for Medicaid in the state where they reside, regardless of the state responsible for the adoption assistance payments.<sup>33</sup>

## 2. Social Services

The services that the state agrees to provide for the child must be specified in the adoption assistance agreement.<sup>34</sup> If the child moves to another state, the original state is responsible for services that are set out in the adoption assistance agreement and are not provided by the state in which the child resides.<sup>35</sup> Arranging services across state lines can be difficult as a practical matter. The Association of Administrators of the Interstate Compact on Adoption and Medical Assistance may be able to provide some assistance, but parents contemplating a move may want beforehand to make arrangements with the state responsible for their child's services.<sup>36</sup>

## C. Duration of Assistance

Adoption assistance payments may begin as soon as the child is placed for adoption and the adoption assistance agreement is finalized, regardless of whether the adoption has become final.<sup>37</sup> This allows some children to begin receiving

<sup>28</sup>42 U.S.C. § 673(a)(3); CHILD WELFARE POLICY MANUAL, *supra* note 2, § 8.2D.4 Questions 2, 4. See also *ASW v. Oregon*, 424 F.3d 970 (9th Cir. 2005), cert. denied, 549 U.S. 812 (2006); *C.H. v. Payne*, 683 F. Supp. 2d 865 (S.D. Ind. 2010).

<sup>29</sup>CHILD WELFARE POLICY MANUAL, *supra* note 2, § 8.4D; Social Security Online, POMS [Program Operations Manual System] SI 00830.415 Adoption Assistance, (effective May 28, 2010), <http://1.usa.gov/iwX2Xu>.

<sup>30</sup>42 U.S.C. §§ 673(b), 1396a(a)(10)(A)(i)(I).

<sup>31</sup>AAICAMA [Association of Administrators of the Interstate Compact on Adoption and Medical Assistance], AAICAMA FAQs Series: Medicaid and Title IV-E Adoption Assistance, Question 3 (Nov. 3, 2010), <http://bit.ly/IWXMhT> (response approved by the Centers for Medicare and Medicaid Services, April 2010).

<sup>32</sup>42 U.S.C. § 673(b)(3)(A)(ii).

<sup>33</sup>*Id.* § 673(b)(1). See further discussion in I.D. Interstate Protections *infra*.

<sup>34</sup>42 U.S.C. § 675(3); 45 C.F.R. § 1356.40(b)(3). Children who are the subject of Title IV-E adoption assistance agreements are treated as AFDC recipients for the purposes of Title XX Social Services (42 U.S.C. § 673(b)(2)). However, states generally no longer employ an eligibility criterion or preference for AFDC recipients.

<sup>35</sup>CHILD WELFARE POLICY MANUAL, *supra* note 2, § 8.2A.1 Question 2.

<sup>36</sup>See also discussion in I.D. Interstate Protections *infra*.

<sup>37</sup>42 U.S.C. § 673(a)(5). States may also pay Title IV-E foster care maintenance payments while a child is in an adoptive placement before finalization of the adoption, provided the child is eligible for Title IV-E foster care and the placement is licensed for foster care (CHILD WELFARE POLICY MANUAL, *supra* note 2, § 8.2b.2 Question 2).

adoption assistance without being placed in foster care and facilitates the placement of children with prospective adoptive parents who are not already licensed foster parents.

Federal adoption assistance is available for children up to the age of 18, or 21 if the state determines that the child has a “mental or physical handicap that warrants the continuation of assistance.”<sup>38</sup> States also have the option of extending benefits to age 19, 20, or 21 for youths who meet specified criteria.<sup>39</sup> States may limit the duration of assistance case-by-case based on the needs of the child and the circumstances of the adoptive parents, but the durational limitation must be agreed to by the adoptive parents. States may not impose blanket durational limitations and may not condition benefits on the appropriation of funds.<sup>40</sup>

The adoption assistance agreement is a contract that may not be changed unilaterally.<sup>41</sup> Once the adoption assistance agreement is signed, the state may terminate benefits only if (1) the child reaches the maximum age (18, or 21 for children with disabilities, or 19–21 at state option) or any durational limit agreed to by the adoptive parents, (2) the adoptive parents are no longer legally responsible for the support of the child, or (3) the adoptive parents are not supporting the child. States may not suspend benefits if a child is placed in out-of-home care as long as the adoptive parent is supporting the child, but the amount of adoption assistance may be renegotiated with the concurrence of the adoptive parents.<sup>42</sup> Title

IV-E does not require annual redeterminations. States that conduct redeterminations may not terminate benefits for failure to respond to a redetermination notice, and may not reduce the amount of assistance without the concurrence of the adoptive parents, but parents have an obligation to report any circumstances that would make the child ineligible for assistance.<sup>43</sup>

#### D. Interstate Protections

When a child is placed across state lines, the placing state is responsible for negotiating the adoption assistance agreement and paying adoption assistance benefits. The benefit is based on the law in the placing state, but the rate structure of the placing state can take into account the rate paid in the state where the child will be placed.<sup>44</sup>

States must specify that the adoption assistance agreement will remain in effect regardless of the state in which the adoptive parents reside and must include provisions for the protection of the interests of the child if the parents and child move to another state.<sup>45</sup> If the adoptive family and the child move to another state, the adoption assistance state retains the responsibility for all the benefits and services in the adoption assistance agreement. The adoption assistance state must help the family access Medicaid and other social services in the state where the family lives and remains responsible for any services that are identified in the adoption assistance agreement and are not available in the new state of residence.<sup>46</sup>

<sup>38</sup>42 U.S.C. § 673(a)(4)(A).

<sup>39</sup>*Id.* § 675(8). For a more thorough description of this option, see Jennifer Pokempner et al., *Fostering Connections to Success: Extending a Social Safety Net for Youths Facing Homelessness and Poverty*, 43 CLEARINGHOUSE REVIEW 139 (July–Aug. 2009); see also Jennifer Pokempner et al., *Update: “Fostering Connections to Success: Extending a Social Safety Net for Youths Facing Homelessness and Poverty,”* 44 CLEARINGHOUSE REVIEW 582 (March–April 2011).

<sup>40</sup>CHILD WELFARE POLICY MANUAL, *supra* note 2, §§ 8.2D.2, 8.2A.

<sup>41</sup>See, e.g., *E.C. v. Sherman*, No. 05-0726-CV-C-SOW, 2006 U.S. Dist. Lexis 25119 (W.D. Mo. May 1, 2006).

<sup>42</sup>CHILD WELFARE POLICY MANUAL, *supra* note 2, §§ 8.2B.2 Question 2, 8.2D.5 Question 3.

<sup>43</sup>*Id.* § 8.2B.9.

<sup>44</sup>*Id.* § 8.2A.1 Questions 1, 3.

<sup>45</sup>42 U.S.C. § 675(3).

<sup>46</sup>Children with Title IV-E adoption assistance agreements are eligible for Medicaid in the state where they reside. For information regarding states’ obligations to provide unavailable services, see CHILD WELFARE POLICY MANUAL, *supra* note 2, § 8.2A.1 Question 2.

Federal law expressly recognizes that states may enter into an interstate compact or other agreement to provide the required interstate protection. The District of Columbia and all states except Wyoming have adopted the Interstate Compact on Adoption and Medical Assistance.<sup>47</sup> The Association of Administrators of the Interstate Compact on Adoption and Medical Assistance, a voluntary organization, gives information and support to compact administrators in the states. Its website has information about the compact, the laws in each state, and contact information for state adoption assistance administrators, and the organization's staff members are often helpful in resolving interstate problems.<sup>48</sup>

### E. Nonrecurring Adoption Expenses

States must pay for nonrecurring adoption expenses incurred by or on behalf of parents who adopt an eligible child who meets the definition of "special needs."<sup>49</sup> The child does not need to meet the categorical linkage requirements, and states may not impose an income eligibility (means) test on adoptive parents.<sup>50</sup>

Examples of nonrecurring adoption expenses are reasonable and necessary adoption fees, court costs, attorney fees, and other expenses directly related to the adoption.<sup>51</sup> Other nonrecurring expenses may be the adoption study, including health and psychological examinations; supervision of the placement prior to adoption; transportation; and, when

necessary to complete the placement or adoption, the reasonable costs of lodging and food for the child or the adoptive parents or both.<sup>52</sup>

As with incoming adoption assistance benefits, the amount of reimbursement is determined by agreement between the adoptive parents and the state or local adoption assistance agency.<sup>53</sup> Federal financial participation is available at a 50 percent matching rate for expenses up to \$2,000 that are not reimbursed from other sources. States may set a lower maximum consistent with reasonable charges for the adoption of children with special needs in the state, but the basis for the lower maximum must be documented and available for public inspection.<sup>54</sup>

### II. State-Only Programs

All states provide adoption assistance for children who meet the states' definition of special needs but do not meet Title IV-E eligibility criteria. Many states require the child to be in state care at the time of the adoption to qualify, but some provide benefits if the child is at risk of foster care placement without adoption or medical assistance.<sup>55</sup> Benefits provided by states vary.<sup>56</sup>

Title IV-E requires states to provide health care coverage for children who are subjects of a non-Title IV-E adoption assistance agreement if the children meet the definition of special needs and the state has determined that the children

<sup>47</sup>The Interstate Compact on Adoption and Medical Assistance is adopted in state law. For the language of the compact, see Interstate Compact on Adoption and Medical Assistance (n.d.), <http://bit.ly/lasBHB>. Although Wyoming has not adopted the compact, it is still required to protect the interests of the child in interstate situations.

<sup>48</sup>Association of Administrators of the Interstate Compact on Adoption and Medical Assistance, [www.aaicama.org](http://www.aaicama.org).

<sup>49</sup>42 U.S.C. § 673(a)(1)(B)(i).

<sup>50</sup>45 C.F.R. § 1356.41(c)-(d).

<sup>51</sup>42 U.S.C. § 673(a)(6).

<sup>52</sup>45 C.F.R. § 1356.41(i).

<sup>53</sup>42 U.S.C. §§ 673(a)(1)(B)(i), (a)(3).

<sup>54</sup>45 C.F.R. § 1356.41(f)(2).

<sup>55</sup>Administration for Children and Families, *supra* note 4, Question 2, <http://1.usa.gov/jtxgSH>. California is one state that provides benefits in this situation (see CAL. WELF. & INST. CODE § 16120(i)(2) (Deering 2011)).

<sup>56</sup>See references in *supra* note 4.



cannot be placed for adoption without medical assistance. States may provide coverage through Medicaid or an equivalent program.<sup>57</sup> Federal law permits states to offer categorical Medicaid eligibility to children with agreements for non–Title IV–E adoption assistance.<sup>58</sup> All states except New Mexico have opted to provide Medicaid coverage for these children.<sup>59</sup> In order to obtain federal adoption incentive funds, states must provide health care coverage to children who have adoption assistance agreements from other states as well.<sup>60</sup> Most states provide Medicaid to eligible children with state–only adoption assistance agreements from other states through reciprocity agreements.<sup>61</sup>

### III. Due Process and Enforcement

Title IV–E gives children and parents the right to a fair hearing if they disagree with an adoption assistance determination or if a claim is not acted on with reasonable promptness.<sup>62</sup> The fair hearing requirement applies to services as well as cash benefits.<sup>63</sup> Due process also requires notice and an opportunity to contest a denial, reduction, or termination of benefits, and most states apply the fair hearing process developed for Title IV–E benefits to state–only adoption assistance programs.<sup>64</sup> Even though federal law

requires an adoption assistance agreement to be signed before an adoption is finalized, a fair hearing is available to establish eligibility if the adoption agency fails to explain adequately the child’s eligibility for adoption assistance before an adoption.<sup>65</sup>

Adoption assistance agreements are contracts that are fully enforceable in law.<sup>66</sup> Children and families have the right to challenge a reduction in benefits and the denial of the right to a fair hearing in federal court.<sup>67</sup>

### IV. Looking Ahead

Adoption assistance enables permanency for children who would otherwise live in foster care.<sup>68</sup> Growth in adoption assistance is a positive sign that child welfare agencies are moving children out of foster care, but some states are scrutinizing adoption assistance costs in this budget climate. Litigation in Indiana, Missouri, and Oregon, has been successful in stopping some of the proposed cuts.<sup>69</sup> Families and their advocates should not assume that information that agencies give them is correct. Adoption assistance rules are complicated, and social workers handling adoptions may not be familiar with all the rules and regulations that apply. In some cases, families

<sup>57</sup>42 U.S.C. § 671(a)(21) (2011).

<sup>58</sup>*Id.* § 1396a(a)(10)(A)(ii)(VIII) (2011).

<sup>59</sup>AAICAMA, COBRA Option/Reciprocity as of September 2009 (Sept. 2009), <http://bit.ly/joqWal>.

<sup>60</sup>42 U.S.C. § 673b(b)(4). Federal law also conditioned Title IV–B and Title IV–E demonstration waivers on providing this coverage (*id.* § 1320a–9(a)(4) (2006)). Title IV–E waiver authority has expired, but some states are operating under existing waivers, and Congress is considering legislation to reauthorize demonstration waivers.

<sup>61</sup>See AAICAMA, *supra* note 59.

<sup>62</sup>42 U.S.C. § 671(a)(12); 45 C.F.R. §§ 205.10, 1355.30(p)(2) (2011).

<sup>63</sup>CHILD WELFARE POLICY MANUAL, *supra* note 2, §§ 7.3, 8.4G.

<sup>64</sup>*Goldberg v. Kelly*, 397 U.S. 254 (1970). See North American Council on Adoptable Children, *supra* note 4, for each state’s description of its fair hearing process.

<sup>65</sup>*Ferdinand v. Department for Children and Their Families*, 768 F. Supp. 401 (D. R.I. 1991); CHILD WELFARE POLICY MANUAL, *supra* note 2, § 8.4G.

<sup>66</sup>*E.C.*, 2006 U.S. Dist. Lexis 25119.

<sup>67</sup>ASW, 424 F. 3d 970.

<sup>68</sup>See, e.g., North American Council on Adoptable Children, The Value of Adoption Subsidies, Helping Children Find Permanent Families (May 2008), <http://bit.ly/kDdvZv>.

<sup>69</sup>*E.C.*, 2006 U.S. Dist. Lexis 25119; *C.H.*, 683 F. Supp. 2d 865; ASW, 424 F. 3d 970.

have felt intimidated by the adoption assistance application process, and some families may fear that they will not be allowed to adopt their child if they insist on exercising their rights. While providing assurance and, when necessary, advocacy so that the adoption is not jeopardized, advocates can help families get the support that the child needs. Advocates who assist families with adoption should make sure that all adoption problems are resolved before the adoption is final-

ized. Thus advocates can ensure that individual children receive the assistance for which they are eligible and that adoption assistance policies, notwithstanding changes proposed in the current budget climate, comply with the law and fulfill the purpose for which the adoption assistance program was created.

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