

# Adoption Subsidies: Advocating for Children with Special Needs

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## I. Overview

*Robert is a three-year-old child who was shaken violently when he was an infant. Due to the trauma, he was placed in a legal risk medical adoptive home at the age of four months. At the age of two, his parents' rights were severed, thereby freeing him for adoption. His medical condition was extremely dire at the time of the adoption. He was blind, significantly developmentally delayed, unable to communicate, or control his muscles. He could not chew food and had to be fed through a G tube. Additionally, he had undergone multiple surgeries to replace both hips and to ameliorate the frequent seizures he experienced.*

*The foster parents who had cared for Robert since he was several months old expressed an interest in adopting him. They initially requested a subsidy from the county department of human services in the amount of \$1,000/month and Medicaid to care for Robert's special needs. At the time of the child's placement, the foster mother gave up her outside employment and the associated income to provide around the clock care. Part of this loss of outside income was defrayed by receiving foster care payments in the amount of a little more than \$1,000/month. However, at the time of the adoption, the department rejected the family's request and offered a considerably lower monthly maintenance subsidy. The department's counteroffer made it extremely difficult for the family to adopt without depleting their life savings to care for Robert and significantly changing their lifestyle.*

*The family then retained an attorney to assist them in appealing the department's decision. After months of litigation, the case was resolved. The family was awarded \$1,000/month in cash assistance, Medicaid, \$5,000 for the remodeling of their home to accommodate wheelchair access and Robert's special needs, \$5,000 for a power lift to help transport Robert in the family's vehicle, \$3,000 toward the purchase of a new vehicle to better accommodate his wheelchair, and financial assistance for respite care. Thus, the subsidy package in the first year alone totaled more than \$26,000 plus Medicaid.*

*The subsidy award allowed the family to adopt Robert and to make his life as comfortable as possible. While the subsidy could not alter the long-term effects suffered while being shaken as an infant, it allowed Robert to be raised by a nurturing and loving*

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*family. The subsidy also allowed the family to maintain their standard of living and have the financial resources to care for Robert.*

This case is representative of the many cases in which attorneys for children and for prospective adoptive parents can make a meaningful difference. Increasingly, prospective adoptive families and children need advocates to ensure that an appropriate adoption subsidy package is provided. Among other things, subsidies allow these children to be adopted rather than face a life of limbo in foster care.

The purpose of this article is to explain the federal adoption subsidy program<sup>1</sup> and how attorneys can better represent special needs children and prospective adoptive families in securing an appropriate adoption assistance agreement. This article will review federal law, including statutes, regulations and policy interpretation questions, as well as relevant reported federal and state cases to inform practitioners of the growing body of law that has developed in this important area. Particular attention will be focused on eligibility requirements, benefits, when a family can request a subsidy after an adoption has been finalized, duration of benefits, liability of adoptive parents for support of special needs children, institutionalized post-adoption, the relationship between adoption subsidies and child support obligations, and appeal rights. Additionally, practical tips in handling these types of cases will be provided to assist the practitioner in successfully representing an adoptive family or child involved in the subsidy process.

## II. History of the Federal Adoption Assistance Program

The federal government became involved in adoption assistance in 1980.<sup>2</sup> Under the Adoption Assistance and Child Welfare Act (“Act”), the federal government provided financial incentives to states who maintained an adoption assistance program and met the federal

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<sup>1</sup> The primary focus of this article is the federal Adoption Assistance and Child Welfare Act of 1980 through which states receive approximately half of their funding from the federal government to support subsidies for Title IV-E eligible special needs children. 42 U.S.C. §§ 620-28, 670-76 (2001). In January 2001, the United States Department of Health and Human Services Administration on Children, Youth, and Families issued Policy Announcement ACYF-CB-PA-01-01 which provides a comprehensive review of Title IV-E eligibility and ancillary policies. Practitioners should review this policy announcement along with the United States Department of Human Services Child Welfare Policy Manual to obtain additional answers to questions related to the federal program. U.S. Dep’t of Health and Human Servs., Child Welfare Policy Manual, *available at* <http://www.acf.hhs.gov/programs/cb/laws/cwpm/index.jsp> (last modified Nov. 22, 2002). Practitioners should also review their state law and regulations which often provide for a separate state adoption subsidy program for those children who do not qualify for Title IV-E adoption assistance. With many state programs, establishing that a child has special needs which create a barrier to adoption is the primary eligibility requirement. Services can consist of monthly cash benefits and other service subsidies. The North American Council on Adoptable Children has profiles of all state programs and has recently issued a comprehensive policy analysis of all adoption subsidy programs in the United States. *See* N. AM. COUNCIL ON ADOPTABLE CHILDREN, SUPPORT FOR FAMILIES OF CHILDREN WITH SPECIAL NEEDS: A POLICY ANALYSIS OF ADOPTION SUBSIDY PROGRAMS IN THE UNITED STATES (2002). Where appropriate, Colorado’s adoption assistance program will be referenced to illustrate the eligibility, services and benefits available under one particular state program.

<sup>2</sup> PUB. L. NO. 96-272 (1980).

requirements.<sup>3</sup> These fiscal incentives have resulted in all states enacting legislation creating state administered adoption subsidy programs that meet federal program requirements.<sup>4</sup>

The federal program was initiated in response to the growing number of children with special needs who lingered in foster care because families or single persons with low or moderate incomes were unable to afford the high costs of providing permanent care.<sup>5</sup> Prior to the enactment of the Act, few states had passed legislation reimbursing adoptive parents for the costs associated with raising special needs children.<sup>6</sup> The primary means by which these parents historically could afford to care for such children was to continue to provide foster care and be reimbursed for this service.<sup>7</sup>

Rather than have these children remain in long-term foster care, the Act attempted to encourage adoptions by removing these fiscal barriers. It did so by providing federal reimbursement to states for adoption assistance benefits paid to families adopting children with special needs.<sup>8</sup> The Act's results have been impressive. Tens of thousands of these children have been adopted during the past two decades rather than remaining in permanent foster care as a result of the myriad of services and cash assistance being made available to assist adoptive parents in providing care.<sup>9</sup>

### III. Eligibility

There are specific requirements that must be met before a child is deemed eligible for a federal adoption subsidy. It is important for attorneys to have a general understanding of these eligibility requirements so that if a state agency determines that a child is not eligible for a subsidy in light of contradictory evidence, the attorney can attempt to negotiate with the agency or seek a review pursuant to the fair hearing process.<sup>10</sup> This section will review basic eligibility information to assist the practitioner.<sup>11</sup>

Generally, to be eligible for adoption assistance, the following must be present: (1) a child must meet the definition of a child with special needs; and (2) the child must be eligible for Aid to Families with Dependent Children ("AFDC") or Supplemental Security Income for the Blind and Disabled (SSI).<sup>12</sup> It is important to note that the use of a "means test" to determine eligibility is

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<sup>3</sup> *Id.*

<sup>4</sup> Most states also have state programs that are state-funded only. These programs are critical because they often cover children who do not meet the specific requirements of the federal law. In Colorado, for example, almost 20% of subsidized adoptions are not supported by federal dollars. All of the non-federal subsidized adoptions in Colorado are solely for children who are wards of the state. Telephone Interview with Sharon Ford, Adoption Administrator, Colorado State Department of Human Services (July 5, 2000).

<sup>5</sup> See, e.g., Mary Lee Allen et al., A Guide to Adoption Assistance and Child Welfare Act, in *FOSTER CHILDREN IN THE COURTS* (Mark Hardin ed. 1983).

<sup>6</sup> Elizabeth Oppenheim et al., *Adoption Assistance for Children with Special Needs*, in *ADOPTION LAW AND PRACTICE* § 9.01(2) (MB 2000).

<sup>7</sup> *Id.*

<sup>8</sup> PUB. L. NO. 96-272.

<sup>9</sup> N. AM. COUNCIL ON ADOPTABLE CHILDREN, *supra* note 1, at 30-31.

<sup>10</sup> See *infra* Part VII.

<sup>11</sup> For an excellent detailed discussion of federal eligibility requirements, see Oppenheim, *supra* note 6.

<sup>12</sup> 42 U.S.C. § 673(a)(2)(A)-(C) (2001). Alien children are subject to additional requirements which are not discussed in this article. When encountering cases involving alien children, consult the following two federal policy interpretation questions: The Effects of the Provisions to Restrict Welfare and Public Benefits for Aliens in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 on Title IV-B and IV-E of the Social Security Act, Pol'y Interpretation Question ACYF-PIQ-99-012 (U.S. Dep't of Health and Human Servs. Jan. 14, 1999); Entitlement of

strictly prohibited by federal law.<sup>13</sup> Adoptive parents' income is irrelevant for determining a child's eligibility for the subsidy program and is only relevant as one of several factors for determining the amount of the subsidy after eligibility has been determined.<sup>14</sup>

### A. *Special Needs*

The special needs requirement has three parts as explained below. All of these parts must be satisfied for a child to be eligible for federal assistance.<sup>15</sup>

#### 1. Condition of Child

First, federal law requires that a child have special needs or conditions which make it difficult to place the child up for adoption without assistance. While the Act does not specifically define special needs, it provides a list of examples.<sup>16</sup> These include membership in a minority or sibling group, age, medical condition or physical, mental or emotional handicap.<sup>17</sup> States are given considerable flexibility to determine what constitutes special needs.<sup>18</sup> Given, however, the states' interests in receiving reimbursement for part of the subsidy outlay and their interest in moving children from foster care into adoption, most states have adopted a liberal approach to defining the term.<sup>19</sup>

It is important for prospective adoptive parents to document the child's special needs if the state agency is reluctant to determine that the child meets the state's definition. Oftentimes, having the child's medical or mental health providers draft a letter detailing the child's condition, including the child's diagnosis and prognosis, will resolve any stalemate.

#### 2. Child Cannot or Should Not be Returned Home

The special needs requirement also requires a determination by the state agency that a child cannot or should not be returned to the home of his parents.<sup>20</sup> This criteria can be met through a court ordered termination of parental rights, the existence of a petition for termination of parental rights, a signed relinquishment by the parents, or in the case of an orphaned child, verification of the death of the parents.<sup>21</sup> This criteria can also be satisfied if a child can be adopted in accordance with State or Tribal law without a termination or relinquishment so long as the State or Tribe has

Resident Alien Children to Receive Foster Care Maintenance and Adoption Assistance Payments Under Title IV-E of the Social Security Act, Pol'y Interpretation Question ACYF-PIQ-88-05 (U.S. Dep't of Health and Human Servs. Sept. 7, 1988).

<sup>13</sup> Title IV-E Adoption Assistance, Pol'y Interpretation Question ACYF-CB-PA-01-01 (U.S. Dep't of Health and Human Servs. Jan. 23, 2001).

<sup>14</sup> *Id.*

<sup>15</sup> 42 U.S.C. § 673.

<sup>16</sup> *Id.* § 673(c)(2)(A).

<sup>17</sup> *Id.*

<sup>18</sup> Title IV-E Adoption Assistance, *supra* note 13.

<sup>19</sup> Colorado, for example, provides subsidies for children who have a physical disability, mental retardation, emotional disturbances, hereditary factors that have been documented by a physician or psychologist, high risk infants (such as HIV-positive or drug-exposed) or other conditions that act as a serious barrier to the child's adoption. Conditions may include but are not limited to a healthy child over the age of seven or a sibling group that should remain intact. 7 COLO. CODE REGS. 7.203.22 (2002).

<sup>20</sup> 42 U.S.C. § 473(c)(1).

<sup>21</sup> Title IV-E Adoption Assistance, *supra* note 13.

documented the valid reason why the child cannot or should not be returned to the home of his or her parents.<sup>22</sup>

### 3. Reasonable Efforts to Place Child Without Subsidy

Finally, the state must make all reasonable efforts to place the child for adoption without a subsidy unless the best interests of the child would not be served by such efforts.<sup>23</sup> This requirement is often misapplied. Although this criteria was established to provide a fiscal control to prevent unnecessary payments to a child who would be adopted without a subsidy, it was never intended to delay adoption or to uproot children from long-term caretakers. Indeed, the specific federal statutory language provides that a search should not be conducted if it would be contrary to the best interests of the child.<sup>24</sup> Therefore, in situations where a child has significant emotional ties with long-term foster parents seeking to adopt, the practitioner should insist that the adoption be finalized in a timely manner. The fact that the foster parents might have limited means and are unable to adopt without a subsidy should not give the state agency freedom to pursue alternative adoptive families willing to adopt without a subsidy. Such action would clearly be detrimental to the child's welfare.<sup>25</sup>

To prohibit states from "shopping" a child to a family willing to take a child without a subsidy, the United States Department of Health and Human Services first issued clarification in 1992 and then reaffirmed its position in 2001.<sup>26</sup> Its interpretation provides that the state agency should first determine the most suitable placement for a child and then pose the question of whether the prospective adoptive parents are willing to adopt without a subsidy.<sup>27</sup> If the prospective adoptive parents say they cannot adopt the child without a subsidy, then the agency would meet the requirement that there was a reasonable, but unsuccessful, effort to place the child without providing adoption assistance.<sup>28</sup> Adoption by a relative will also qualify as an exception to the reasonable search requirement due to the statutory emphasis on the placement of children with relatives.<sup>29</sup>

If a child is deemed to be severely disabled, the state agency is also not warranted in conducting an exhaustive and time-consuming search for a non-subsidized adoptive placement. The statute merely requires a "reasonable" search.<sup>30</sup> Given legislation requiring a child's right to a

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<sup>22</sup> *Id.*

<sup>23</sup> 42 U.S.C. § 673(c)(2)(B).

<sup>24</sup> *Id.*

<sup>25</sup> See generally JOSEPH GOLDSTEIN, ET AL., THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE (1996).

<sup>26</sup> Title IV-E Adoption Assistance, *supra* note 13; Fair Hearings and Extenuating Circumstances, Pol'y Interpretation Question ACYF-PIQ-PA-02-02 (U.S. Dep't of Health and Human Servs. June 25, 1992).

<sup>27</sup> Title IV-E Adoption Assistance, *supra* note 13

<sup>28</sup> *Id.*; see also *Gruzinski v. Dep't of Pub. Welfare*, 731 A.2d 246 (Pa. Commw. Ct. 1999) (holding that a state agency cannot deny adoption assistance where an "appropriate" adoptive home was available and willing to adopt without a subsidy when the most suitable family for the child needed a subsidy); *Adoption Arc, Inc. v. Dep't of Pub. Welfare*, 727 A.2d 1209, 1214-15 (Pa. Commw. Ct. 1999) (holding that the reasonable effort search requirement of placing child on the adoption exchange for three months to identify family willing to take the child without a subsidy is waived where child was placed in the custody of the adoptive parents at a very tender age and formed familial bonds with the adoptive parents).

<sup>29</sup> 42 U.S.C. § 471(a)(19) (2001); Title IV-E Adoption Assistance, *supra* note 13.

<sup>30</sup> 42 U.S.C. § 473(c)(2)(B).

permanent home within twelve months,<sup>31</sup> seriously delaying the adoption, pending an exhaustive search would be contrary to the legislative intent and the child's interests.<sup>32</sup>

### *B. SSI or AFDC Relatedness*

There are also financial criteria for eligibility for the federal adoption program.<sup>33</sup> These criteria look solely to the circumstances of the child and not that of the prospective adoptive parents. These criteria include a connection to either the AFDC program as it was in effect on July 16, 1996<sup>34</sup> or the SSI program.<sup>35</sup>

#### 1. SSI Relatedness

A child who is either receiving or eligible for SSI prior to the finalization of adoption meets the financial eligibility criteria for the federal adoption assistance program.<sup>36</sup> Eligibility for SSI includes a means test as well as criteria establishing that a child has an impairment or combination of impairments causing marked and severe functional limitations.<sup>37</sup> Due to the means test requirement, it is highly suggested that prospective adoptive parents seek adoption assistance even if the child receives or is eligible for receiving SSI.<sup>38</sup> Upon the finalization of the adoption, the prospective adoptive parents' income will often disqualify the child from receiving SSI, thereby making it necessary to rely solely upon the adoption subsidy to adequately provide for the child.

#### 2. AFDC Relatedness

If the child is not eligible for SSI, then the child must meet the AFDC relatedness test as it existed on July 16, 1996.<sup>39</sup> This can be met by children who are in foster care and are eligible for or

<sup>31</sup> 42 U.S.C. § 675(5)(C).

<sup>32</sup> See, e.g., COLO. REV. STAT. ANN. § 19-1-102(1.6) (West 2001) ("The general assembly recognizes the numerous studies establishing that children undergo a critical bonding and attachment process prior to the time they reach six years of age. Such studies further disclose that a child who has not bonded with a primary adult during this critical stage will suffer significant emotional damage which frequently leads to chronic psychological problems and antisocial behavior when the child reaches adolescence and adulthood. Accordingly, the general assembly finds and declares that it is appropriate to provide for an expedited placement procedure to ensure that children under the age of six years who have been removed from their homes are placed in permanent homes as expeditiously as possible.").

<sup>33</sup> 42 U.S.C. §§ 673(a)(2)(A)-(B). During the passage of the Adoption and Safe Families Act, it appeared that Congress would eliminate these financial criteria. However, when the bill became law, these eligibility criteria remained.

<sup>34</sup> In 1996, Congress eliminated the AFDC program and replaced it with the Temporary Assistance for Needy Families program. Nonetheless, eligibility is still based on the criteria of the AFDC program as it was in effect on July 16, 1996.

<sup>35</sup> 42 U.S.C. § 673(a)(2).

<sup>36</sup> *Id.* §§ 473(a)(2)(A)(ii), (B)(iii), (C).

<sup>37</sup> *Id.* § 1382.

<sup>38</sup> Children can simultaneously be eligible for both SSI and adoption assistance, although they cannot receive the full benefit from both programs at the same time. Typically, the SSI benefit is reduced by the amount of the adoption subsidy.

<sup>39</sup> When eligibility is based on AFDC criteria, the criteria must be met both at the time of removal and in the month the adoption petition is initiated. Further, if the child is removed from the home pursuant to a judicial determination, such determination must state that it would be contrary to the child's welfare to remain in the home. If the child is removed from the home pursuant to a voluntary placement agreement, that child must actually receive Title IV-E foster care payments to be eligible for Title IV-E adoption assistance. See Title IV-E Adoption Assistance, *supra* note 13; Availability of Federal Financial Participation under IV-E for Children Who Are Voluntarily Relinquished to the State Agency, Pol'y Interpretation Question ACYF-PIQ-89-01 (U.S. Dep't of Health and Human Servs. Feb. 9, 1989); TIM O'HANLON, ADOPTION SUBSIDY: A GUIDE FOR ADOPTIVE PARENTS (1998). It should be noted that a judicial

are receiving Title IV-E foster care maintenance payments.<sup>40</sup> Alternatively, the child must demonstrate AFDC eligibility in the month in which the child was placed out of the home<sup>41</sup> and at the time the adoption proceedings were initiated.<sup>42</sup> It is not necessary that the child actually received AFDC but rather that the child was eligible for this assistance.<sup>43</sup> The AFDC eligibility criteria include: (1) financial need<sup>44</sup>; (2) deprivation of parental support<sup>45</sup>; and (3) residence with a specified relative.<sup>46</sup>

If the child was not receiving AFDC at the time of the initial removal or within the previous six months prior to the removal, it is arguable that the state agency has the responsibility to reconstruct the case, including gathering all necessary information to determine if the child would have been eligible for AFDC had the application been made.<sup>47</sup> Given the extensive state resources available, the state agency is in a much better position than the adoptive parents to gather the necessary financial and other relevant data to determine eligibility. The prospective adoptive parents often have little, if any, information relating to the child's previous placement with his parents or other specified relatives.

### C. Children Placed in Private Non-Profit Agencies Are Eligible for Adoption Assistance

It is a misnomer that only children in the care, custody or control of the state are eligible for assistance under Title IV-E.<sup>48</sup> Rather, children placed for adoption by a private nonprofit agency<sup>49</sup> may also be eligible under the federal program. A child who is voluntarily relinquished to a private, nonprofit agency, is eligible for federal assistance so long as all of the following has occurred: (1) the child is voluntarily relinquished to a private, nonprofit agency; (2) there is 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 (3) there is a subsequent judicial determination to the effect that remaining in the home would be

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determination is not necessary where a child has been determined to be eligible for SSI or where a child is living with a relative who has filed a petition for adoption and is not dependent on the state.

<sup>40</sup> For Title IV-E foster care eligibility, see 45 C.F.R. § 1356.71 (2002).

<sup>41</sup> Removal from the home can be accomplished by either voluntary placement or by court order.

<sup>42</sup> Title IV-E Adoption Assistance, *supra* note 13.

<sup>43</sup> *Id.*

<sup>44</sup> Need exists in the child's home if resources available to the family are below \$10,000. *Id.*

<sup>45</sup> Deprivation of parental support can include the death of a parent, continued absence of a parent from the home, unemployment of a parent, or the physical or mental incapacity of a parent. *Id.* Moreover, the existence of a termination order can be used to verify deprivation of the child for continued eligibility purposes at the time the adoption petition is filed. *Id.*

<sup>46</sup> Specified relatives are father, mother, grandfather, grandmother, brother, sister, stepfather, step mother, stepbrother, stepsister, uncle, aunt, first cousin, nephew or niece. 42 U.S.C. § 606(a)(1) (2001). This requirement may be satisfied at any point beginning six months prior to the month in which the child's removal was initiated or the voluntary placement agreement was signed. Title IV-E Adoption Assistance, *supra* note 13.

<sup>47</sup> See O'HANLON, *supra* note 39.

<sup>48</sup> See, e.g., Gruzinski v. Dept. of Public Welfare, 731 A.2d 246, 254 (Pa. Commw. Ct. 1999). However, some states, including Colorado, often limit state-only subsidy programs to children who are wards of the state.

<sup>49</sup> Ward v. Pa. Dep't of Pub. Welfare, 756 A.2d 122 (Pa. Commw. Ct. 2000); Adoption Arc, Inc. v. Dep't of Pub. Welfare, 727 A.2d 1209, \*\*17 (Pa. Commw. Ct. 1999); Title IV-E Adoption Assistance for Children who are Voluntarily Relinquished to Private, Nonprofit Agencies, Pol'y Interpretation Question ACYF-CB-IM-01-08 (U.S. Dep't of Health and Human Servs. Nov. 6, 2001). Special needs children, however, who are adopted abroad with the assistance of a private non-profit adoption agency are not eligible for a subsidy other than being eligible for receiving reimbursement of nonrecurring adoption expenses. Title IV-E Adoption Assistance, *supra* note 13.

contrary to the child's welfare.<sup>50</sup> Moreover, the Pennsylvania Supreme Court extended eligibility to foster parents who had taken temporary legal custody of the child pending adoption where the child had previously been in the state's custody and had been adjudicated a dependent child.<sup>51</sup>

*D. Child is Eligible as a Child of a Minor Parent and Meets the Definition of a Child with Special Needs*

Children born to minor parents in foster care have different and easier eligibility requirements for federal assistance.<sup>52</sup> If a child's parent is in foster care and receiving Title IV-E foster care maintenance payments that cover both the minor parent and the child at the time the adoption petition is initiated and the child has special needs, the child is automatically eligible for Title IV-E assistance.<sup>53</sup> However, if the child and minor parent have been separated in foster care prior to the time of the adoption petition, the child's eligibility for title IV-E adoption assistance must be determined based on the child's current and individual circumstances.<sup>54</sup> This includes a finding that he was removed from the home pursuant to a voluntary placement agreement or as a result of a judicial determination along with having the other requirements as set forth herein satisfied.<sup>55</sup>

*E. Child of Birth Parents Who Later Adopt Are Not Eligible For Federal Subsidy*

In rare circumstances, a biological parent whose parental rights have been terminated may later adopt his or her biological children.<sup>56</sup> This scenario may arise where an adolescent child is beyond the control of adoptive parents and later finds and reunites with one or both birth parents. When a birth parent is allowed to take the child back and proceeds to legally adopt the child, a federal subsidy is not permitted.<sup>57</sup> This is due to the fact that a child is only considered special needs if the child cannot or should not be returned to the home of the biological parent or parents.<sup>58</sup> In this situation, the child would be returned to the home of the birth parent—thus not satisfying this eligibility factor.

## IV. Benefits

Multiple benefits are available under the federal and state adoption assistance programs. These can include monthly cash payments, social services, non-recurring adoption expenses, and Medicaid.

<sup>50</sup> Title IV-E Adoption Assistance for Children who are Voluntarily Relinquished to Private, Nonprofit Agencies, *supra* note 49.

<sup>51</sup> C.B. and J.B. v. Commonwealth, 786 A.2d 176, 185-86 (Pa. 2001).

<sup>52</sup> Title IV-E Adoption Assistance, *supra* note 13.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Allowability of Title IV-E Adoption Assistance or Foster Care Maintenance Payments for Children Who are Adopted or Placed with Biological Parents Whose Parental Rights have Been Terminated, Policy Interpretation Question ACYF-PIQ-89-04 (U.S. Dep't of Health and Human Servs. Aug. 8, 1989).

<sup>57</sup> *Id.* It should be noted, however, that children who receive a subsidy and whose adoption is later disrupted, remain eligible for title IV-E adoption assistance in a subsequent adoption so long as they are not readopted by their birth parents. The only requirement is that a child continues to have special needs. Title IV-E Adoption Assistance, *supra* note 13.

<sup>58</sup> See *supra* Part III.A.2.

### A. Monthly Cash Payments

Monthly cash benefits are typically negotiated between the adoptive parents and the state agency.<sup>59</sup> The cash subsidy should be based upon the circumstances of the adoptive parents and the needs of the child.<sup>60</sup> The circumstances of the adoptive parents pertain to the parents' ability to incorporate the child into their household in relation to their lifestyle, standard of living and future plans and their overall capacity to meet the immediate and future needs of the child.<sup>61</sup> Further, the payment 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.<sup>62</sup>

Accordingly, it is inappropriate for the state agency to solely base their negotiation and subsidy on the income and assets of the adoptive family.<sup>63</sup> The underlying purpose of the adoption assistance program is to provide incentives for families of any economic stratum to adopt special needs children.<sup>64</sup>

Federally reimbursed cash subsidies may be equal to the amount the child received while in foster care.<sup>65</sup> It should be noted that if one state has placed a child in another state and is paying the other state's higher foster care rate, authorized under its regulations, the adoption assistance rate can be the higher rate.<sup>66</sup> There are considerable differences among states in setting the subsidy "ceiling." Some states set the ceiling below the rate for foster care while others allow the ceiling to rise to the level that the child would have received in foster care.

In those states that set the subsidy rate lower than the foster care rate, there arguably may be a constitutional challenge on the basis that the state law conflicts with federal law.<sup>67</sup> The Supreme Court has previously held that the test to determine whether state law is preempted by Federal law requires first, an identification of the federal objective, and second, a determination of whether state law stands as an obstacle to the realization of the federal objective.<sup>68</sup> Federal law was enacted to promote and encourage adoptions of special needs children.<sup>69</sup> By offering an adoption subsidy

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<sup>59</sup> It is also highly recommended that the court appointed guardian ad litem be involved in this process given the guardian ad litem's intimate familiarity with the child's needs. If an administrative appeal is filed due to an impasse in the subsidy negotiations, it is sometimes necessary for the guardian ad litem to file a motion to intervene in the administrative action. *See generally* FED. R. CIV. P. 24.

<sup>60</sup> 42 U.S.C. § 673(a)(3) (2001).

<sup>61</sup> Title IV-E Adoption Assistance, *supra* note 13; Title IV-E Adoption Assistance Agreements and the Use of a Means Test, Pol'y Interpretation Question ACYF-PIQ-90-02 (U.S. Dep't of Health and Human Servs. Oct. 2, 1990).

<sup>62</sup> Title IV-E Adoption Assistance, *supra* note 13.

<sup>63</sup> *Id.* However, the state agency can take the income of the adoptive parents into account to determine the amount of the payment. *Id.*

<sup>64</sup> Based upon the specific prohibition of the use of a means test in the process of selecting suitable adoptive parents, the author has secured sizable adoption assistance packages for several families earning in excess of \$100,000 per year.

<sup>65</sup> 42 U.S.C. § 673(a)(3). The subsidy, however, may not exceed 100% of the foster care rate. *In re B.M.*, 787 So. 2d 331, 335 (La. 2001).

<sup>66</sup> Title IV-E Adoption Assistance, *supra* note 13.

<sup>67</sup> U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.").

<sup>68</sup> *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

<sup>69</sup> *See, e.g.*, 42 U.S.C. §§ 603, 622, 629, 671, 675 (indicating that the purpose of the Adoption and Safe Families Act of 1997 is to promote adoption of children in foster care); *id.* § 625(a)(1)(E) (indicating that child welfare services of which adoption assistance is a part means public social services directed toward placing children in suitable adoptive

amount well below the current foster care rate, a state creates a financial disincentive for foster families to adopt. Indeed, many families in such states opt not to adopt because of the financial constraints of the subsidy program in comparison to the more lucrative and supportive foster care program. Encouraging permanent foster care over adoption is expressly contrary to the federal objective. To date, there are no reported cases challenging a state subsidy ceiling set below the foster care rate as being in conflict with federal law.<sup>70</sup>

Once the adoption is complete and the subsidy contract has been signed, the adoptive parents are free to spend the subsidy as they deem appropriate without further agency approval or oversight.<sup>71</sup> The State cannot require an accounting for the expenditures.<sup>72</sup> If subsequent problems arise, the adoptive parents can seek additional assistance up to the current foster care rate that the child would have received if the child was placed in foster care.<sup>73</sup> In contrast, if the child's condition improves, the amount of the assistance may be adjusted periodically but only with the concurrence of the adoptive family.<sup>74</sup>

### B. Social Services

As part of the adoption assistance agreement, the state agency and the prospective adoptive parents can agree to the provision of a number of post-adoption services that are necessary to maintain the adoptive placement.<sup>75</sup> These services are often in addition to the monthly maintenance subsidy and are usually critical to providing the family the support necessary to avoid the adoption's disruption.<sup>76</sup>

Services vary between states, but may include day care; respite care; in-home supportive services; counseling; referral and assistance in obtaining help in the community; and other child welfare services.<sup>77</sup> In Colorado, for example, the following are classified as reimbursable case services if they relate directly to a child's special needs: orthodontia; eye glasses or contacts; prescribed medications; speech, occupational and physical therapies if not available through other community and family resources; special medical equipment; psychological exams and outpatient therapy if not provided by Medicaid; and respite care.<sup>78</sup> In addition, Colorado provides for medical subsidies which are payments made directly to vendors for treatment of a physical or developmental disability or an emotional disturbance.<sup>79</sup>

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homes); 45 C.F.R. 1356.40(f) (2002) (requiring state agencies to actively seek ways to promote the adoption assistance program).

<sup>70</sup> Cf. *In re Martorana*, 619 So. 2d 1121, 1124 (La. Ct. App. 1993) (holding that the state agency may provide subsidies at less than the rate of foster care for the child). It should be noted that the author recently advanced a preemption argument on the basis that a Colorado county that had instituted a policy capping the maximum subsidy rate at about half of the foster care rate violated federal law. That case was ultimately settled and a confidentiality agreement prevents the disclosure of the settlement's terms and conditions.

<sup>71</sup> Title IV-E Adoption Assistance, *supra* note 13.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> 42 U.S.C. § 1397 (2001).

<sup>76</sup> See, e.g., N. AM. COUNCIL ON ADOPTABLE CHILDREN, *supra* note 1, at 32-33.

<sup>77</sup> Title IV-B of the Social Security Act, 42 U.S.C. §§ 620-29(i).

<sup>78</sup> 7 COLO. CODE REGS. § 7.306.52 (2002).

<sup>79</sup> *Id.* § 7.306.51. The author has successfully argued that the medical subsidy should cover private psychotherapy even though the child received Medicaid and could have identified a therapist under that insurance plan. In such cases, a private psychologist with a particular specialty was identified by the family as being the best resource for the child.

### C. Non-Recurring Adoption Expenses

Retaining an attorney to handle the adoption and the subsidy negotiations with the agency can prove expensive. Similarly, prospective adoptive families often incur other costs associated with the adoption including agency fees, homestudy expenses and court costs. To defray some of these expenses, federal law requires states to pay a one-time reimbursement of non-recurring adoption expenses that are handled with the assistance of the state agency or through another public or nonprofit private agency.<sup>80</sup> Reimbursable non-recurring adoption expenses include adoption fees, court costs, attorney fees, adoption study including health and psychological examinations, supervision of the placement prior to adoption, transportation and the reasonable costs of lodging and food for the child and/or the adoptive parents when necessary to complete the adoption process.<sup>81</sup>

The federal government reimburses the state for half of these expenses, up to \$2,000 per child.<sup>82</sup> Federal law does not limit the maximum reimbursable amount that a state may set although no state has opted to provide reimbursement at a rate higher than \$2,000.<sup>83</sup> However, most states have opted to set a lower rate<sup>84</sup> which is permissible so long as the basis for the lower maximum is fully documented and available for public inspection.<sup>85</sup>

### D. Medicaid

Medicaid is available to all children with a federal subsidy.<sup>86</sup> In addition, many states have chosen to provide Medicaid coverage for children receiving a state-only subsidy.<sup>87</sup> Medicaid covers many medical expenses including, for example, mental health treatment, private duty nursing services, dental services, physical therapy and related services, prescription drugs, eyeglasses and case management services.<sup>88</sup> Securing Medicaid for special needs children is extremely important for parents whether or not they have private insurance. These children often have considerable medical and psychological treatment needs and two insurance policies can provide greater coverage. Moreover, for those families who have private health insurance, it is possible that the family's insurance situation may change in the future requiring the family to rely solely upon the Medicaid.

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Alternatively, if the child has developed a relationship with a therapist prior to the adoption, a medical subsidy can insure continuity of treatment.

<sup>80</sup> 42 U.S.C. § 673(a)(1)(B)(i)-(ii). The only eligibility criterion to be applied for reimbursement of the nonrecurring expenses of adoption is when the State determines that the child meets the definition of special needs. A child does not have to be eligible for AFDC, title IV-E foster care or SSI in order for the adoptive parents to receive reimbursement for nonrecurring adoption expenses. Title IV-E Adoption Assistance, *supra* note 13.

<sup>81</sup> 45 C.F.R. § 1356.41 (2002).

<sup>82</sup> Therefore, if a prospective adoptive family is adopting a pair of siblings, a state can seek reimbursement up to \$4,000 and pass these resources on to the family.

<sup>83</sup> N. AM. COUNCIL ON ADOPTABLE CHILDREN, *supra* note 1, at 30-31.

<sup>84</sup> Colorado, for example, provides that the maximum reimbursement for non-recurring adoption expenses is \$800. *Id.* at 31.

<sup>85</sup> 45 C.F.R. § 1356.41(f)(2).

<sup>86</sup> 42 U.S.C. § 673(b) (2001).

<sup>87</sup> *See, e.g.*, 7 COLO. CODE REGS. § 7.306.42 (2002). If Medicaid is provided to children with a state-only subsidy and the family relocates out-of-state, it is within the discretion of the state where the family has moved whether to continue to provide Medicaid. Many states, however, are party to the Interstate Compact on Adoption and Medical Assistance which provide for reciprocity of Medicaid coverage when families move out-of-state. OPPENHEIM, *supra* note 6, § 9-A.06.

<sup>88</sup> 42 U.S.C. § 1396.

*E. Benefits Continue When Adoptive Family  
Moves Out of State*

Adoptive families are often unclear about the effect on the subsidy if they move out of state. Federal law is clear that an adoption assistance agreement shall remain in effect regardless of the state in which the adoptive parents are residents at any given time.<sup>89</sup> If the adoptive parents move out of state, the state agency that executed the original agreement is responsible for complying with the contractual terms.<sup>90</sup>

*F. Negotiating and Signing the Agreement Prior to the Finalization of the Adoption.*

Negotiating a subsidy agreement can be a time-consuming process which must occur before the adoption is finalized.<sup>91</sup> If a final adoption hearing has been scheduled and an agreement has not yet been reached, the hearing should be continued until such time as a written contract has been fully executed. In preparation for these negotiations, the practitioner must be mindful of several important considerations.

All of the children's current and prospective special needs should be identified. It is important to gather as much information about the child and the birth parents that is available. Information should include a current health status assessment of the child, including any physical or psychological needs; a written health history, including neonatal, psychological, physiological and medical care history; and a genetic and social history of the child. If this information is not available or is outdated, current evaluation or assessment may be warranted. Up to date evaluations that should be considered include developmental assessments, educational assessments, psychological testing, physical examinations and genetic testing.

If the state agency is unwilling to provide certain information relating to the child or birth parents, formal discovery may be necessary.<sup>92</sup> This often entails intervening in the companion dependency and neglect action and serving discovery, including requests for production of documents and interrogatories, pursuant to the state rules of civil procedure.<sup>93</sup> Alternatively, if an administrative appeal is initiated concerning a denial of the subsidy request,<sup>94</sup> discovery can often be served in the administrative case.

Once the child's needs have been identified, it is important for the advocate to work with the family to develop a plan to meet those needs. This plan should consist of cash assistance and/or specific therapeutic and medical interventions. The family should be deliberate and thorough in identifying specific community-based services or assistance that are necessary to address all of the child's particular needs. Identifying specific service providers and their specialized area of expertise is often helpful in convincing the state agency to provide the requested services.

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<sup>89</sup> *Ferdinand v. Dep't for Children and Their Families*, 768 F. Supp. 401, 404 (D.R.I. 1991) (holding that adoptive parents' out-of-state residency did not affect their eligibility for the adoption assistance program); Interstate Compact for Adoption, Pol'y Interpretation Question ACYF-PIQ-81-03 (U.S. Dep't of Health and Human Servs. Oct. 20, 1981).

<sup>90</sup> 42 U.S.C. § 675(3)(B).

<sup>91</sup> 45 C.F.R. § 1356.40(b).

<sup>92</sup> *See, e.g.*, COLO. R. CIV. P. 26-37.

<sup>93</sup> *Id.*; COLO. REV. STAT. ANN. § 19-3-507(5) (West Supp. 2002); COLO. R. CIV. P. 24 (“[G]randparents, relatives, or foster parents who have the child in their care for more than three months who have information or knowledge concerning the care and protection of the child may intervene as a matter of right following adjudication with or without counsel.”).

<sup>94</sup> *See infra* Part VII.

Before the subsidy request is ultimately submitted to the agency, it is imperative that the family and the practitioner understand all of the potential benefits available under the federal and state programs. It is critical that the practitioner review the state's written adoption assistance policy and regulations. Only by having a clear understanding of all of the benefits and services available, can an informed and comprehensive request be made.

Finally, it is suggested that the attorney draft a formal letter outlining the subsidy request. This letter should review the child's needs, the family's circumstances and the specific services and cash benefits the family is seeking to address the child's special needs. Similarly, referencing specific state and federal regulations and policy memoranda that support the request, is often helpful in documenting that the subsidy request is within the agency's mandate. Subsequently, a conference with the agency representative, the prospective adoptive family and their counsel, and the guardian ad litem is often helpful to resolve any disputes. Throughout this process, the attorney must continually focus on ensuring that the needs of this one particular child or children and the family are being met. It is also important to recognize that the state may have an ulterior motive in protecting its budget to meet the special needs of all disabled children within its jurisdiction.<sup>95</sup> This inherent conflict permeates many of these cases.<sup>96</sup>

If an agreement is ultimately reached, the terms must be reduced to writing and signed by all parties prior to the finalization of adoption.<sup>97</sup> The agreement should include detailed language outlining the child's needs, both presently and prospectively.<sup>98</sup> Some states only provide for services and subsidies to be negotiated and reevaluated in the future if they relate directly to the barrier or barriers identified at the time the initial subsidy was approved.<sup>99</sup>

The agreement should contain language about the specific services that will be provided under the agreement. If the child is to receive private psychotherapy, for example, specific language should be included in the agreement outlining appropriate providers, the number of days per month, the number of hours per session, the duration and the costs involved. By providing such detailed language, the agreement can be better enforced at an administrative fair hearing or in a court of competent jurisdiction if the state agency later refuses to comply with its terms and conditions.<sup>100</sup> Finally, the document should specify any reporting deadlines for the adoptive parents, when the benefits will commence and terminate, what effect the death of the adoptive parents will have on the stipulated terms, the circumstances under which the benefits can be increased or decreased, the adoptive parents' hearing and appeal rights, and that the benefits will continue if the adoptive parents move across state lines.

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<sup>95</sup> See generally 7 COLO. CODE REGS. § 7.306.43 ("The County department shall negotiate with the adoptive parents to request the amount that is needed by the family to meet the child's specific needs. This may be less than the amount for which the child qualifies.").

<sup>96</sup> *Id.*

<sup>97</sup> 45 C.F.R. § 1356.40(b) (2002).

<sup>98</sup> Some states limit medical and social service subsidies for conditions diagnosed prior to the finalization of adoption. See, e.g., 7 COLO. CODE REGS. § 7.306.511(B).

<sup>99</sup> *Id.*

<sup>100</sup> The Department of Health and Human Services has stated that fair hearings are available when services or maintenance subsidies are denied pursuant to a written adoption assistance agreement. Fair Hearings, Pol'y Interpretation Question ACYF-PIQ-83-4 (U.S. Dep't of Health and Human Servs. Oct. 26, 1983). Alternatively, the agreement is a contract that is binding on the parties and may be enforceable under state contract law. See *Fried v. Peralies*, 500 N.Y.S.2d 542, 544 (N.Y. App. Div. 1986).

In many situations, it may be necessary for the attorney to draft an “addendum” to the state contractual subsidy form to account for the unique aspects of an individual case.<sup>101</sup> This addendum should be signed by both the adoptive parents and the representative from the state agency.<sup>102</sup> Under no circumstances, should adoptive parents be limited to the state’s “boiler plate” contract which often does not account for differences between families and children.<sup>103</sup>

### V. Requesting a Subsidy After the Finalization of Adoption

While subsidy agreements should ordinarily be signed prior to the finalization of adoption, there are limited circumstances where an adoptive parent may request and be granted an adoption subsidy after the finalization of an adoption.<sup>104</sup> These situations include, but are not limited to: (1) 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; (2) Denial of assistance based upon a means test of the adoptive family; (3) Erroneous determination that a child is ineligible for adoption assistance; or (4) Failure to advise the adoptive parents of the availability of the adoption assistance for children in the state foster care system.<sup>105</sup>

If any of these grounds exist, the adoptive parents should formally request an adoption subsidy program from the state from which the child came.<sup>106</sup> Even if the state agency agrees that extenuating circumstances exist that warrant a subsidy, it must deny the request.<sup>107</sup> Thereafter, the adoptive parents should request a fair hearing and obtain a favorable ruling in that forum.<sup>108</sup> If the state and the parents are in agreement at that stage, a trial type evidentiary hearing would not be necessary. Rather, a stipulation with supporting documentary evidence can be presented to the fair hearing officer for review and a determination made on the written record.<sup>109</sup> If, however, there is a

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<sup>101</sup> Federal law does not require a specific format for the agreement nor does it limit what can be contained in the agreement. It merely requires, at a minimum, that the agreement include the nature and amount of any payments, services, or assistance to be provided. 42 U.S.C. § 675 (3)(A) (2001).

<sup>102</sup> 45 C.F.R. § 1356.40(b).

<sup>103</sup> See, e.g., Colo. Dep’t of Human Servs., Colorado form CW-SA-3 (2000).

<sup>104</sup> Title IV-E Adoption Assistance, *supra* note 13.

<sup>105</sup> *Id.* It is clear that both public and private agencies have an affirmative duty to fully explain the subsidy program for children each in their respective custody and that failure to do so is grounds for receiving a post-adoption subsidy. See, e.g., Ferdinand v. Dep’t for Children and Their Families, 768 F. Supp. 401, 404 (D.R.I. 1991); Hogan v. Dep’t of Soc. and Rehab. Servs., 727 A.2d 1242, 1244 (Vt. 1998) (holding that where private agency failed to disclose information about subsidy program, adoptive family can pursue a post-adoption subsidy and use a post-adoption diagnosis to justify the SSI disability criteria for Title IV-E eligibility). For special needs children not in the foster care system or when the state is otherwise unaware of the pending adoption, however, the State does not have a responsibility to seek out and inform the prospective adoptive parents of the availability of the federal subsidy. Title IV-E Adoption Assistance, *supra* note 13. It is the adoptive family’s responsibility under such circumstances to request adoption assistance on the child’s behalf. *Id.*

<sup>106</sup> Fair Hearings and Extenuating Circumstances, *supra* note 27, clarified by Title IV-E Adoption Assistance, *supra* note 13.

<sup>107</sup> Title IV-E Adoption Assistance, *supra* note 13.

<sup>108</sup> See *infra* Part VII.

<sup>109</sup> Fair Hearings and Extenuating Circumstances, *supra* note 27, clarified by Title IV-E Adoption Assistance, *supra* note 13.

dispute concerning the existence of wrongly denied benefits, it is unclear whether the adoptive parents or the State would have the burden of proving such circumstances at a fair hearing.<sup>110</sup>

### A. Retroactivity

If adoptive parents are successful in achieving a post-adoption subsidy, the issue then arises as to whether they can receive the subsidy retroactively to the date of the child's adoptive placement. Federal law gives states the discretion whether to provide retroactive benefits to the date of the child's placement with the adoptive family.<sup>111</sup> If states opt to provide this benefit, federal reimbursement is available for adoptive placements made on or after October 1, 1986.<sup>112</sup> States vary on whether to allow retroactive payments.<sup>113</sup>

Several reported cases have addressed the issue of retroactivity where a state has not addressed this issue in its statutes or regulations. The Pennsylvania appellate courts have continuously held that retroactive payments are available to adoptive families who receive a subsidy after the finalization of their adoption dating back to the date of the adoption.<sup>114</sup> In contrast, the Florida, New York and South Dakota appellate courts, refused to find that either state law or federal law provided for retroactive adoption assistance payments.<sup>115</sup>

#### 1. Interest

Adoptive parents should seek interest on any retroactive benefits received. An argument can be advanced that without an interest award, the retroactive subsidy is worth considerably less than the child would have received but for the agency's error. There are no reported decisions discussing this precise issue. However, the New York Supreme Court refused to find that adoptive parents

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<sup>110</sup> Fair Hearings and Extenuating Circumstances, *supra* note 26, indicated that adoptive parents would have the burden of providing that their adoptive child was wrongly denied benefits. However, this announcement was withdrawn by the issuance of Title IV-E Adoption Assistance, *supra* note 13, in 2001. This latter announcement does not indicate who carries such burden. Federal law is also not clear on who has the burden of proof to establish the child's eligibility for a Title IV-E subsidy once circumstances are proven that the child was wrongly denied benefits. Given that the state or local agency, and not the applicant, is responsible for determining eligibility for federal programs, including Title IV-E adoption assistance, it should follow that the agency should be responsible for determining eligibility. Indeed, it would be very difficult for an adoptive family to reconstruct eligibility criteria years after an adoption has been finalized. *See* O'HANLON, *supra* note 39, at 33-35. *But see* 7 COLO. CODE REGS. § 7.306.59 (2002) ("[T]he adoptive parents have the burden of proving extenuating circumstances and adoption assistance eligibility at a state level Fair Hearing. The state and/or its designee can provide factual information to assist the family in establishing eligibility for Title IV-E Subsidized Adoption.").

<sup>111</sup> Title IV-E Adoption Assistance, *supra* note 13.

<sup>112</sup> *See generally* Fair Hearing and Extenuating Circumstances, *supra* note 26, *clarified by* Title IV-E Adoption Assistance, *supra* note 13.

<sup>113</sup> O'HANLON, *supra* note 39, at 39.

<sup>114</sup> Allegheny County Office of Children, Youth, and Families v. Dep't of Pub. Welfare, 800 A.2d 367, 372-73 (Pa. Commw. Ct. 2002); Gruzinski v. Dep't of Pub. Welfare, 731 A.2d 246, 258 (Pa. Commw. Ct. 1999).

<sup>115</sup> Greenfield v. Dep't of Children and Family Servs., 794 So.2d 739, 741 (Fla. Dist. Ct. App. 2001); Hosmer v. N.Y. State Office of Children and Family Servs., 735 N.Y.S.2d 289, 290 (N.Y. App. Div. 2001); *In re Laws*, 598 N.W.2d 554 (S.D. 1999); *see also* Ferdinand v. Dep't for Children and Their Families, 768 F. Supp. 401, 402 n.2 (D.R.I. 1991) (stating that although the parties had not briefed the issue of retroactive relief, such relief would be barred by the Eleventh Amendment).

were entitled to interest on an amount awarded after appealing an initial denial decision.<sup>116</sup> The court denied the interest because the right to interest is purely statutory.<sup>117</sup>

### B. Breach of Fiduciary Duty

Where a public or private agency breaches its duty to inform the adoptive family about the subsidy program or fails to disclose relevant facts regarding the child, the family should also consider filing a civil suit against the agency. There are numerous reported cases pertaining to adoptive parents suing agencies for failing to disclose information about the child's background prior to the adoption.<sup>118</sup> In contrast, only one reported decision relates to adoptive parents bringing suit against a private adoption agency for breaching its duty to disclose information regarding the adoption assistance program. In *MacMath v. Maine Adoption Placement Services*, the Maine Supreme Court held that the failure of an adoption agency to inform prospective adoptive parents of the availability of public subsidies for special needs children was not a breach of fiduciary duty.<sup>119</sup> The court reached this decision on the basis that no fiduciary relationship existed between the agency and the family.<sup>120</sup>

Attorneys representing prospective adoptive families should also be wary of a possible malpractice suit for failing to inform one's client about the availability of the subsidy program. Because a fiduciary relationship exists between an attorney and the client, and because attorneys practicing in the adoption arena should know about the program, failure to fully inform an adoptive family about adoption subsidies and the myriad of benefits available may result in liability.

## VI. Duration and Termination of Benefits

Adoptive parents are often concerned about the duration of the subsidy benefits and want some assurance that the subsidy will not be unilaterally and prematurely terminated by the state agency. Federal law provides that a child is eligible for a subsidy until the age of eighteen or twenty-one if the state determines that the child has a mental or physical handicap which warrants the continuation of the assistance.<sup>121</sup> Further, a child receiving a subsidy remains eligible for the subsidy unless the parents are no longer legally responsible for the support of the child or if the child is no longer receiving any support from such parents.<sup>122</sup> Thus, where a child has been emancipated,

<sup>116</sup> *Patrick v. Perales*, 568 N.Y.S.2d 379, 379 (N.Y. App. Div. 1991); *see also* *Div. of Youth and Family Servs. v. County of Middlesex*, 455 A.2d 1119, 1121 (N.J. Super. Ct. App. Div. 1982) (holding that the Division of Youth and Family Services, which administers the adoption assistance program for the state, is not entitled to prejudgment interest on amount due from county for county's share of cost of subsidized adoption program where relevant statute made no provision for interest on delinquent county payments).

<sup>117</sup> *Patrick*, 568 N.Y.S.2d at 379-80.

<sup>118</sup> *See* Marianne Blair, *Liability of Adoption Agencies and Attorneys for Misconduct in the Disclosure of Health Related Information*, in *ADOPTION LAW AND PRACTICE* § 16.01 (MB 2000).

<sup>119</sup> *MacMath v. Me. Adoption Placement Servs.*, 635 A.2d 359, 361 (Me. 1993).

<sup>120</sup> *Id.* at 360.

<sup>121</sup> 42 U.S.C. § 673(a)(4)(A) (2001); *Duration of Adoption Assistance Payments*, Pol'y Interpretation Question ACYF-PIQ-81-2 (U.S. Dep't of Health and Human Servs. Dec. 8, 1981).

<sup>122</sup> 42 U.S.C. § 673(a)(4)(B). States may not expand beyond federal law the situations in which a child is no longer eligible for a Title IV-E subsidy. *See, e.g., In re Klaus*, 310 N.W.2d 394, 398 (Mich. Ct. App. 1981) (holding that the state cannot terminate subsidy based upon parents' failure to timely file annual report where failure was not willful); *J.P. v. Mo. Dep't of Soc. Servs.*, 752 S.W.2d 847, 851 (Mo. Ct. App. 1988) (holding that termination of the subsidy based on receiving disability benefits in excess of the maximum foster care rate was in error).

has married or joined the military, is not receiving any form of financial assistance from the parents, or where the adoptive parents have died or relinquished parental rights and the child is not subsequently adopted, the subsidy benefits would cease.<sup>123</sup>

In some cases, special needs children manifest extreme acting out behaviors that necessitate placement in a psychiatric hospital, a residential child care facility or foster care. Even during these out-of-home placements, federal law makes it clear that the benefits should continue during this period.<sup>124</sup> There may be situations, however, where the adoptive parents can be assessed a fee for the costs of the out-of-home placement<sup>125</sup> or where the subsidy amount is renegotiated and reduced based upon the change in circumstances.<sup>126</sup>

#### A. Annual Redetermination

Federal law permits the amount of the subsidy to be readjusted periodically based on changes in circumstances and with the concurrence of the adoptive parents.<sup>127</sup> Thus, while not required by federal law, many states require adoptive parents to complete annual renewals of their adoption assistance agreements to determine if there are changes in the needs of the child that affect eligibility for or the amount of the subsidy.<sup>128</sup> If a child regresses and requires additional assistance or if the adoptive family's financial circumstances worsen, adoptive parents may seek an increase in the subsidy amount.<sup>129</sup> Alternatively, if a child no longer has special needs and is higher functioning or if the family's financial circumstances improve considerably, the state agency may seek to decrease

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<sup>123</sup> Child Support Obligations of Adoptive Parents with Children Receiving Title IV-E Adoption Assistance and Continuing Adoption Assistance Payments, Pol'y Interpretation Question ACYF-PIQ-98-02 (U.S. Dep't of Health and Human Servs. Sept. 3, 1998) [hereinafter Child Support Obligations]. If the adoptive parents die or their parental rights are terminated and the child is subsequently adopted, the child will remain eligible for adoption assistance benefits as if the child were in the same circumstances, financial and otherwise, as the last time the child was determined eligible for the federal subsidy. 42 U.S.C. § 673(a)(1)(C).

<sup>124</sup> Child Support Obligations, *supra* note 123; Continuing Eligibility for Title IV-E Adoption Assistance, Pol'y Interpretation Question ACYF-PIQ-85-12 (U.S. Dep't of Health and Human Servs. Nov. 25, 1985); *see also* Ark. Dep't of Human Servs. v. Welborn, 987 S.W.2d 768, 770 (Ark. Ct. App. 1999) (holding that the state cannot terminate subsidy where parents placed children in residential care facility in another state and assigned their subsidy check to the other state as child support, even if parents were not providing emotional support to the children).

<sup>125</sup> Where a child has been either involuntarily or voluntarily placed out of the home, federal law gives states discretion to refer Title IV-E adoption assistance cases to the Title IV-D agency to establish and collect child support to recoup some of the agency's costs. States are directed to evaluate cases on an individual basis, considering the best interests of the child and circumstances of the family. Questions that should help guide the agency's decision include whether the parent is working towards reunification with the child, whether the referral would impede the parent's ability to reunify with the child and whether the parent has agreed to temporarily accept a reduction in the adoption assistance payment? Child Support Obligations, *supra* note 123. The few state courts that have considered whether adoptive parents who have a subsidized agreement should be responsible for the costs associated with a child's out of home placement have split on the issue. *See, e.g., In re Crystal T.*, 546 N.W.2d 77, 85 (Neb. Ct. App. 1996) (holding that no parental contribution towards a child's out of home placement was required where the subsidized agreement provided that the Department of Social Services would pay the costs of such treatment). *But see* County of Ramsey v. Wilson, 526 N.W.2d 384, 388-89 (Minn. Ct. App. 1995) (holding that the adoption subsidy was income attributable to the child subject to reimbursement requirement for cost of care provided in out of home placement).

<sup>126</sup> Child Support Obligations, *supra* note 123. In *In re Klaus*, 310 N.W. at 398-99, the Michigan Court of Appeals defined changed circumstances to mean at least an alteration of circumstances which causes the adoption to cease being a financial burden to the parents in the absence of the subsidy and includes circumstances in which the subsidy funds are wrongfully diverted for uses other than the support of the children.

<sup>127</sup> 42 U.S.C. § 673(a)(3).

<sup>128</sup> Child Support Obligations, *supra* note 123.

<sup>129</sup> 42 U.S.C. § 673 (a)(3).

the amount of the subsidy.<sup>130</sup> If a decrease is sought and the adoptive parents disagree, they should avail themselves of the fair hearing process.<sup>131</sup>

## VII. Appeals and Fair Hearings

One of the most important safeguards adoptive parents have when they disagree with the state agency's decision to deny a particular subsidy request, reduce the subsidy amount or terminate the benefits, is to appeal the agency's decision to an impartial decision maker through the administrative hearing process.<sup>132</sup> When an appeal is initiated prior to the finalization of adoption, it is suggested that prospective adoptive parents, who have the child placed with them, seek in the state court a restraining order preventing the state agency from removing the child during the pendency of the administrative appeal. This better ensures that the child will not be arbitrarily moved because of retribution from the agency. The additional benefit is that the family's anxiety level is significantly reduced, because they no longer fear that the agency will engage in a "drive-by pickup" of the child without adequate notice.

Administrative hearings are relatively informal proceedings in which the rules of evidence do not strictly apply.<sup>133</sup> Nevertheless, it is important that all critical witnesses<sup>134</sup> testify and all exhibits are offered at this time, rather than trying to supplement the record at a later date.<sup>135</sup> Moreover, having someone knowledgeable about the subsidy program to testify as an expert in this field is often helpful to the adoptive parents' case, since many hearing officers are not intimately familiar with the federal and state programs. Once a written decision is rendered, many states provide for an automatic administrative review of the hearing, usually by a division in the state department of human services.<sup>136</sup> This review is based upon the record and the relevant state regulations.<sup>137</sup> Following this review, judicial review through the state and appellate courts is provided.<sup>138</sup>

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<sup>130</sup> Unless adoptive parents agree in the initial agreement to have their subsidy reduced or terminated based upon certain changed circumstances, according to federal law, the subsidy cannot be reduced or terminated. This is true regardless of the child's improvement or the family's financial circumstances. Practitioners should, therefore, consider striking any language in an adoption assistance agreement which authorizes the agency to reduce or terminate a subsidy during an annual review based on a change of circumstances.

<sup>131</sup> See *infra* Part VII.

<sup>132</sup> 42 U.S.C. § 671(a)(12). See, e.g., *Schmidt v. State*, 586 N.W.2d 148, 153 (Neb. 1998) (holding that the state agency is required to provide a fair hearing before an impartial decision maker to review the initial agency decision denying the subsidy). The dispute may concern the provision of services and/or money grant amounts. Fair Hearings, *supra* note 100.

<sup>133</sup> See, e.g., COLO. REV. STAT. ANN. § 24-4-105(6) (West 2001).

<sup>134</sup> Witnesses may include, but not be limited to, adoptive parents, child, therapist, teacher, pediatrician, social worker, and a representative from a particular service provider.

<sup>135</sup> See, e.g., COLO. REV. STAT. ANN. § 24-4-106(6).

<sup>136</sup> See, e.g., *id.* § 24-4-105(14)(II).

<sup>137</sup> *Id.*

<sup>138</sup> See, e.g., *id.* § 24-4-106. If a litigant is challenging the state or county subsidy program as being in conflict with federal law or unconstitutional, it is often necessary to raise these claims in the state courts rather than at the administrative level. In most states, hearing officers are precluded from addressing these issues. Accordingly, litigants will have to decide initially whether to go through the administrative process to create the record to support these challenges on appeal in the state court or to file directly in the state court and seek a declaratory judgment. If this latter approach is pursued, litigants will likely need to rebut the argument from the state agency that exhaustion of administrative remedies is necessary prior to filing directly with the state court. A third possible approach is to file directly in federal court. See *Ferdinand v. Dep't for Children and Their Families*, 768 F. Supp. 401 (D.R.I. 1991). It is

Filing an appeal of the state agency's initial decision often results in the agency compromising and granting most, if not all, of the adoptive parents' requests. This may be due to the agency's concerns about having an adverse written decision rendered by a hearing officer or the state court which will adversely impact future cases, paying legal counsel to defend its position, or being ultimately responsible for retroactive benefits and interest and/or opposing counsel's legal fees. Alternatively, resolution may be realized prior to hearing due to a clarification of the respective parties' position, the child's needs, or the family's circumstances.

### VIII. Adoption Subsidies and Child Support

When the adoptive parents' marriage dissolves, and they have been receiving a subsidy for a special needs child, the issue arises as to what impact, if any, the subsidy has on determining a parent's child support obligation. Should the subsidy that is kept by the custodial parent be calculated as parental income, thereby reducing the noncustodial parent's responsibility? Two courts considering this issue have refused to attribute the subsidy monies as parental income.<sup>139</sup> Rather, the subsidy was considered a benefit for the child that covered the additional costs of raising him or her beyond the everyday expenses.<sup>140</sup> Accordingly, parents have a joint responsibility to provide for the ordinary and everyday care of the child and may not rely upon the subsidy to offset their contribution.<sup>141</sup>

### IX. Conclusion

Obtaining an appropriate subsidy package for a child and his adoptive parents is extremely rewarding work. Not only does it give the family the necessary resources to care for a special needs child well into the future, but it allows the child to become part of a permanent family. The benefits of adoption are well documented. Children's placements in adoption are much less likely to disrupt as compared to permanent foster care.<sup>142</sup> Further, providing adoption assistance has the additional benefit of reducing overall costs to the state.<sup>143</sup> When negotiating and advocating for particular assistance benefits with a state agency or before a hearing officer, these benefits need to be highlighted. Only through continued advocacy, education and zealous representation in these matters, will states continue to liberalize the granting of subsidies so that all special needs children,

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unclear whether the federal courts are still an appropriate forum to raise these issues. *See Sutter v. Arties M.*, 503 U.S. 347, 355-56 (1992).

<sup>139</sup> *Collado v. Vega*, 1999 WL 185259 (Conn. Super. 1999) (mem.); *A.E. v. J.I.E.*, 686 N.Y.S.2d 613, 615 (N.Y. Sup. Ct. 1999). The U.S. Department of Human Services has taken no position on whether adoption assistance payments should be considered income.

<sup>140</sup> *A.E.*, 686 N.Y.S.2d at 615-16.

<sup>141</sup> *Id.*

<sup>142</sup> *See, e.g.*, DEBRA RATTERMAN, COLORADO DEPARTMENT OF HUMAN SERVICES, A JUDICIAL BENCHBOOK ON COLORADO CHILD WELFARE LAW 403-05 (2d ed. 1999) ("[W]hile about ten percent of adoptions are later disrupted, the rate of disruption for permanent foster care is fifty percent.").

<sup>143</sup> The Congressional Budget Office (CBO) estimates that moving a child from foster care into an adoptive placement costs \$5,000 less per year than maintaining a child's foster care placement. H.R. REP. NO. 105-77, pt. IV-C, at 20 (1997). States also receive an incentive payment if they exceed the base number of foster child adoptions from the previous year in the amount of \$6,000 for a special needs child. 42 U.S.C. § 673(b) (2001).

whose parents' rights are terminated, will be adopted, rather than linger in nonpermanent placements.