

<b>ACF</b> Administration for Children and Families	<b>U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES</b> <b>Administration for Children, Youth and Families</b>	
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	3. Originating Office: Children's Bureau	
	4. Key Word: Adoption Assistance Eligibility	

**POLICY ANNOUNCEMENT**

**TO:** State Agencies Administering title IV-E of the Social Security Act, Indian Tribes and Indian Tribal Organizations

**SUBJECT:** Title IV-E Adoption Assistance (Eligibility and Ancillary Policies)

**LEGAL AND RELATED REFERENCES:**

Sections 403, 431(b), 471(a)(18), 471(a)(20)(A), 473 and 474(e) of the Social Security Act; Public Law 100-203, Section 9133; Public Laws 99-514, 100-205, 104-188, 104-193, 104-208, 105-33, 105-89, and 106-169; 8 USC 1641(b); 45 CFR Parts 1356.30, 1356.40, and 1356.41; ACYF-PA-88-01; ACYF-PIQ-89-01; ACYF-PIQ-90-02; ACYF-CB-PIQ-98-02; ACYF-CB-PIQ-99-01; and ACYF-CB-IM-00-02.

**WITHDRAWN ISSUANCES:**

- ACYF-PIQ-82-01 (Q&A #1)
- ACYF-PIQ-82-02
- ACYF-PIQ-82-16 (1, 2, 3, and 5)
- ACYF-PIQ-82-18 (2, 3, 4 and 5)
- ACYF-PIQ-85-04
- ACYF-PIQ-85-05 (Q&As 5 and 6)
- ACYF-PIQ-86-05
- ACYF-PA-87-03
- ACYF-PIQ-87-05 (with ACYF-CB-IM-00-02 effective 2/18/2000)
- ACYF-PA-88-01
- ACYF-PIQ-88-06
- ACYF-PIQ-89-02 (Q&As 1, 2 and 5)
- ACYF-PIQ-90-02 (Q&As 1, 2, 4, 5 and 6)
- ACYF-PIQ-91-04
- ACYF-PIQ-92-02

**PURPOSE:**

This announcement provides comprehensive guidelines for States to use in determining a child's eligibility for title IV-E adoption assistance. Although the Children's Bureau has issued numerous policy issuances on this topic in the past, we continue to receive requests for policy clarification in this area. In an effort to be responsive to continuing questions and provide a comprehensive issuance on title IV-E adoption assistance eligibility, we carefully reviewed the statute, as well as all of the current title IV-E adoption assistance eligibility and ancillary policies. As a result, this issuance not only contains current policies, but we also have taken this opportunity to revise some of the existing policies and practices in order to bring them in line with the statute. Those are discussed fully in the appropriate sections below. In addition, the withdrawn policy issuances and the previous and revised policies are highlighted in Appendix B. To the

extent that there are conflicting requirements in earlier issuances that may not have been withdrawn with this issuance, the requirements set forth in this Policy Announcement prevail.

## **BACKGROUND:**

### **Legislative Context**

The Adoption Assistance and Child Welfare Act of 1980 (Pub. L. 96-272), among other things, created the first Federal adoption assistance program under title IV-E at section 473 of the Social Security Act (the Act). The legislative history<sup>1</sup> indicates that Congress was concerned primarily with moving children in State foster care systems into permanent adoptive homes when appropriate. The title IV-E adoption assistance program, therefore, was developed to provide permanency for children with special needs in public foster care by assisting States in providing ongoing financial and medical assistance on their behalf to the families who adopt them.

Under the original program, children who were otherwise eligible for Aid to Families with Dependent Children (AFDC) and removed from their homes and children who were eligible for Supplemental Security Income (SSI) benefits could qualify for title IV-E adoption assistance. Later amendments to the program allowed children who were voluntarily placed for foster care and children of minor parents in foster care to be eligible for the program<sup>2</sup>. When AFDC was abolished in 1996, a 'look back' provision continued to link a child's eligibility to the previous AFDC criteria.

The Tax Reform Act of 1986 (Public Law 99-514) further amended the title IV-E adoption assistance program. An amendment to section 473(a)(1) requires States to reimburse adoptive parents for the nonrecurring expenses incurred in the adoption of a child with special needs, as defined in section 473(c) of the Act.

Title IV-E was further amended in 1996 by section 1808 of the Small Business Job Protection Act (Public Law 104-188) by adding a new State plan requirement (section 471(a)(18) of the Act). This provision prohibits the delay or denial of a foster or adoptive placement based on the race, color or national origin of the prospective foster parent, adoptive parent, or child involved. Section 1808 also includes a penalty structure and corrective action planning provision at section 474(d) of the Act for any State or entity in the State that violates section 471(a)(18).

The title IV-E adoption assistance program was amended most recently by the Adoption and Safe Families Act of 1997, Public Law 105-89. An amendment to section 473(c) allows children who were previously eligible for title IV-E adoption assistance to retain their eligibility for the program in a subsequent adoption in the event of the adoptive parent's death or dissolution of the adoption. There is no comparable provision for title IV-E foster care, however.

The Adoption and Safe Families Act of 1997 also includes a safety provision for children

who are placed in foster homes or with adoptive parent<sup>3</sup>. With respect to the placement of children in adoptive homes, the provision requires that each State (unless the State opts out of the requirement) conduct a criminal records check on prospective adoptive parents prior to approving the adoptive placement for a child. Any State that opts out of the criminal records check requirement must document in **each case** how safety considerations with respect to the adoptive parents have been addressed.

The Foster Care Independence Act of 1999 (Public Law 106-169), enacted on December 14, 1999 added language to section 472(a) of the Act that increased the resource limit for a title IV-E foster child from \$1,000 to \$10,000. This provision is extended to include eligibility for title IV-E adoption assistance under section 473 of the Act.

## **POLICY ANNOUNCEMENT:**

### **Requirements for Title IV-E Adoption Assistance Eligibility**

A State is required to enter into an adoption assistance agreement with the adoptive parents of a child with special needs (as defined in section 473(c) of the Act) and provide adoption assistance if the child meets specific requirements. There are four ways that a child can be eligible for title IV-E adoption assistance:

1. Child is AFDC-eligible<sup>4</sup> and meets the definition of a child with special needs<sup>5</sup>

Adoption assistance eligibility that is based on a child's AFDC eligibility is predicated on a child meeting the criteria for such **both** at the time of removal<sup>6</sup> **and** in the month the adoption petition is initiated<sup>7</sup>. In addition, the State must determine that the child meets the definition of a child with special needs prior to finalization of the adoption.

The method of removal has the following implications for the AFDC-eligible child's eligibility for title IV-E adoption assistance:

- If the child is removed from the home pursuant to a judicial determination, such determination must indicate that it was contrary to the child's welfare to remain in the home; or
- 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.

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

A child is eligible for adoption assistance if, at the time the adoption petition is filed, the child meets the requirements for title XVI SSI benefits, and prior to the finalization of the adoption is determined by the State to be a child with special needs<sup>8</sup>.

There are no additional criteria that a child must meet to be eligible for title IV-E adoption assistance when eligibility is based on a special needs child meeting SSI

requirements. Specifically, how a child is removed from his or her home or whether the State has responsibility for the child's placement and care is irrelevant in this situation. Unlike AFDC eligibility that is determined by the State child welfare agency, only a designated Social Security Administration claims representative can determine SSI eligibility and provide the appropriate eligibility documentation to the State. The child's eligibility for SSI benefits must be established no later than at the time the adoption petition is filed.

3. Child is eligible as a child of a minor parent and meets the definition of a child with special needs<sup>9</sup>

A child is eligible for title IV-E adoption assistance in this circumstance if:

- the 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
- prior to the finalization of the adoption, the child of the minor parent is determined by the State to meet the definition of a child with special needs.

There are no additional criteria that must be met in order for a child to be eligible for title IV-E adoption assistance if the child's eligibility is based on his or her minor parent's receipt of foster care while placed with the minor parent in foster care. As with SSI, there is no requirement that a child must have been removed from home pursuant to a voluntary placement agreement or as a result of a judicial determination. 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, consistent with section 473 of the Act<sup>10</sup>.

4. Child is eligible due to prior title IV-E adoption assistance eligibility and meets the definition of a child with special needs

In the situation where a child is adopted and receives title IV-E adoption assistance, but the adoption later dissolves or the adoptive parents die, a child may continue to be eligible for title IV-E adoption assistance in a subsequent adoption. The only determination that must be made by the State prior to the finalization of the subsequent adoption is whether the child is a child with special needs, consistent with the requirements in section 473(c) of the Act. Need and eligibility factors in sections 473(a)(2)(A) and (B) of the Act must not be redetermined when such a child is subsequently adopted because the child is to be treated as though his or her circumstances are the same as those prior to his or her previous adoption<sup>11</sup>. Since title IV-E adoption assistance eligibility need not be re-established in such subsequent adoptions, the manner of a child's removal from the adoptive home, including whether the child is voluntarily relinquished to an individual or private agency, is irrelevant.

**Special Needs Determinations**

An integral part of establishing adoption assistance eligibility requires the State to

determine that the child is a child with special needs in accordance with all three criteria defined in section 473(c) of the Act:

- First, the State must determine that the child cannot or should not be returned to the home of his or her parents (section 473(c)(1) of the Act); and
- Second, the State must determine that there exists a specific factor or condition because of which it is reasonable to conclude that the child cannot be placed with adoptive parents without providing title IV-E adoption assistance or title XIX medical assistance<sup>12</sup>. Such a factor or condition may include (but is not limited to) ethnic background, age or membership in a minority or sibling group, the presence of a medical condition, or physical, mental or emotional disabilities. For example, in some States ethnic background alone may inhibit the ability of a child to be adopted, while in other States a combination of factors, such as minority status and age, may be factors. It is important to note that in **each case** the State must conclude that, because of a specified factor or factors, the particular child cannot be placed with adoptive parents without providing assistance; and
- Finally, the State must determine that in **each case** a reasonable, but unsuccessful, effort to place the child with appropriate parents without providing adoption assistance has been made<sup>13</sup>. Such an effort might include the use of adoption exchanges, referral to appropriate specialized adoption agencies, or other such activities. The only exception to this requirement is when it would not be in the best interests of the child because of such factors as the existence of significant emotional ties with prospective adoptive parents while in the care of those parents as a foster child. The exception also extends to other circumstances that are not in the child's best interest, as well as adoption by a relative, in keeping with the statutory emphasis on the placement of children with relatives<sup>14</sup>

The State must document in each child's case record the specific factor(s) that make the child difficult to place and describe the efforts to place the child for adoption without providing assistance. In an effort to find an appropriate adoptive home for a child, and meet the requirement that a reasonable, but unsuccessful, effort be made to place the child without adoption assistance, it is not necessary for the agency to "shop" for a family while the child remains in foster care. Once the agency has determined that placement with a certain family is in the child's best interest, the agency should make full disclosure about the child's background, as well as known or potential problems. If the agency has determined that the child cannot or should not return home and the child meets the statutory definition of *special needs* with regard to specific factors or conditions, then the agency can pose the question of whether the prospective adoptive parents are willing to adopt without assistance. If they say they cannot adopt the child without adoption assistance, the requirement in section 473(c)(2)(B) for a reasonable, but unsuccessful, effort to place the child without providing adoption assistance will be met<sup>15</sup>.

### **Determining Need and Deprivation**

If a child's eligibility for title IV-E adoption assistance is based upon his or her eligibility for AFDC as a dependent child, the State must determine that the child would have been AFDC-eligible in the home from which s/he was removed. To meet the AFDC criteria, the child must be **both** a needy child **and** a child who is deprived of parental support or whose principal wage earner parent is unemployed. Need exists in the child's home if the resources available to the family are below \$10,000<sup>16</sup>. Deprivation exists in the home in situations where there is death of a parent, an absent parent, or a parent with a mental or physical incapacity to the extent that the parent cannot support or care for the child. At the point of the removal of a child from his or her home, a termination of parental rights (TPR) alone is not proof that deprivation exists. The factors noted here must be established based on the circumstances in that home.

In addition, the child must meet the need and deprivation requirements at the time of the adoption petition. Once a child is in foster care, need is based upon the resources available to the child. Hence, the resources available to the child must be below the \$10,000 limit at the time of the adoption petition. After a child has been determined deprived in the home from which s/he is removed, a TPR can serve as proof of deprivation at the time of the petition.

### **Adoption Assistance Agreements**

Title IV-E adoption assistance is available on behalf of a child if s/he meets all of the eligibility criteria and the State agency enters into an adoption assistance agreement with the prospective adoptive parent(s) **prior to** the finalization of the adoption. The agreement must be signed by all parties to the agreement (namely, the adoptive parents **and** a State agency representative) in order to meet the requirements for an adoption assistance agreement<sup>17</sup>.

Once an adoption assistance agreement is signed and in effect, it can be terminated under three circumstances only. Namely, (1) the child has attained the age of 18 (or the age of 21 if the State has determined that the child has a mental or physical disability which would warrant continuation of assistance); (2) the State determines that the adoptive parents are no longer legally responsible for support of the child; or (3) the State determines that the adoptive parents are no longer providing any support to the child<sup>18</sup>.

A parent is considered no longer legally responsible for the support of a child when parental rights have been terminated or when the child becomes an emancipated minor, marries, or enlists in the military. We have defined "any support" as various forms of financial support. The State may determine that payments for family therapy, tuition, clothing, maintenance of special equipment in the home, or services for the child's special needs, are acceptable forms of financial support.

Consequently, the State may continue the title IV-E adoption subsidy if it determines that the parent is, in fact, providing some form of financial support to the child even in situations where the child is placed in some form of out-of-home care<sup>19</sup>.

### **Nonrecurring Expenses of Adoption**

The State must enter into an adoption assistance agreement prior to the finalization of the adoption and reimburse (up to \$2000, or at State option a lower limit) the nonrecurring adoption expenses incurred by any parent who adopts a child with special needs. The only eligibility criterion to be applied for reimbursement of the nonrecurring expenses of adoption is that the State determine that the child meets the definition of *special needs*, in accordance with section 473(c) of the Act. 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 their nonrecurring adoption expenses. Nor does the child have to be under the responsibility for placement and care of the State agency in order for the adoptive parents to be reimbursed for the nonrecurring expenses of adoption.

The term *nonrecurring adoption expenses* is defined as the reasonable and necessary adoption fees, court costs, attorney fees and other expenses which are directly related to the legal adoption of a child with special needs, which are not incurred in violation of State or Federal law, and which have not been reimbursed from other sources or funds<sup>20</sup>.

Federal financial participation is available at the matching rate of 50 percent for State expenditures up to \$2000 for each adoptive placement.

### **Discussion of Adoption Assistance Eligibility Issues**

#### **Voluntary Placements**

The statute allows a child who has been removed from home pursuant to a voluntary placement agreement to be eligible for adoption assistance in limited situations. An otherwise eligible child must be placed for foster care via a voluntary placement agreement, and have title IV-E foster care maintenance payments paid on his or her behalf pursuant to that voluntary agreement, to be subsequently eligible for adoption assistance<sup>21</sup>. Therefore, a child must have been under the State title IV-E agency's responsibility for placement and care, or that of another public agency (including Tribes) with whom the title IV-E agency has an agreement at the time of the voluntary placement agreement, to be eligible for a title IV-E foster care maintenance payment and, subsequently, for adoption assistance.

Previous policy (ACYF-PIQ-87-05 and ACYF-PIQ-85-04) allowed title IV-E adoption assistance eligibility for children who were placed via a voluntary placement agreement to a private, non-profit agency (regardless of whether there was a title IV-E agreement with the State agency) if there was a subsequent judicial determination within six months of the date the child last lived with the specified relative to the effect that to remain in the home would be contrary to the child's welfare. These policies have been withdrawn because they are inconsistent with ACYF-PIQ-89-01.

The statute recognizes two types of removals: (1) children who are removed as a result of a voluntary placement agreement with respect to which title IV-E foster care payments were made; and (2) children who are removed as a result of a judicial determination to the effect that to remain in the home would be contrary to the child's welfare. Accordingly, children who are removed as a result of a voluntary placement agreement are removed via an avenue for removal authorized by the statute. However, removal is one of two requirements. The second requirement is that the child have title IV-E foster care maintenance payments paid on his or her behalf pursuant to the agreement. Accordingly, children placed pursuant to a voluntary placement agreement under which a title IV-E foster care maintenance payment is not made are **not** eligible to receive title IV-E adoption assistance.

### **Voluntary Relinquishments**

A voluntary relinquishment does not meet the statutory requirements for either of the two types of removals of a child from his or her home authorized by section 473(a)(2)(A)(i) of the Act. Specifically, when a child is removed from the home by way of a voluntary relinquishment, the removal is neither the result of a voluntary placement agreement nor the result of a judicial determination that to remain in the home would be contrary to the child's welfare, as defined in the statute. However, we have considered a child who has been placed with the State agency or another public agency (including Tribes) with whom the State has a title IV-E agreement via a voluntary relinquishment to meet the section 473(a)(2)(A)(i) requirements for a judicial removal in the following specific circumstance<sup>22</sup>: The State must petition the court within six months of the child living with a specified relative and obtain a judicial determination to the effect that remaining in the home would be contrary to the child's welfare. As such, the child will then be treated as though s/he were judicially removed rather than voluntarily relinquished. If the petition to remove the child from the home and the subsequent judicial determination does not occur, the child cannot be considered judicially removed for the purpose of title IV-E adoption assistance eligibility. Furthermore, if the court merely sanctions the voluntary relinquishment without making a determination that it is contrary to the child's welfare to remain in the home, the child is not eligible for title IV-E adoption assistance.

Previous policy (ACYF-PIQ-87-05) allowed relinquishments to private non-profit agencies. This policy, however, conflicted with ACYF-PIQ-89-01, which restricts the eligibility of relinquished children to those relinquished to the State or local agency only. Accordingly, ACYF-PIQ-87-05 was withdrawn by ACYF-CB-IM-00-02 on February 18, 2000 and the later policy prevails. There are two circumstances under which the nature of a child's removal from his or her home is irrelevant::

- 1) when a child is SSI-eligible at the time adoption proceedings are initiated and the State determines that the child meets the statutory definition of *special needs* prior to the finalization of the adoption; and
- 2) in a subsequent adoption when a child received title IV-E adoption assistance in a

previous adoption that dissolved or in which the adoptive parents died, if the State determines that the child continues to be a child with special needs.

Under these two circumstances, no additional eligibility criteria should be applied to determine title IV-E adoption assistance eligibility, including whether a child had been voluntarily relinquished.

### **Responsibility for Placement and Care**

The eligibility requirements for adoption assistance in section 473(a)(2) of the Act do not specify that the State title IV-E agency must have placement and care responsibility for a child to qualify for adoption assistance. There are some situations, however, in which the criteria dictate that a child be under the placement and care responsibility of the State agency or that of another public agency (including Tribes) with whom the State has a title IV-E agreement in order to be eligible for title IV-E adoption assistance.

These are:

- a child who is placed pursuant to a voluntary placement agreement and who must have had a title IV-E foster care maintenance payment paid on his or her behalf under the agreement<sup>23</sup>; and
- a child who is voluntarily relinquished to the State agency if there is a petition to the court within six months of the date the child was last with the specified relative that leads to a judicial determination that to remain in the home would be contrary to the child's welfare<sup>24</sup>.

### **Judicial Determinations**

To fulfill the eligibility criteria in section 473(a)(2)(A)(i) of the Act when a child's removal from the home is the result of court action, there must be a judicial determination to the effect that to remain in the home would be contrary to the child's welfare. Since a child's removal from the home must occur as a *result* of such a judicial determination, the determination must be made in the first court ruling that sanctions (even temporarily) the removal of a child from the home. If the determination is not made in the first court ruling pertaining to removal from the home, the child is not eligible for title IV-E adoption assistance. The contrary to the welfare finding must be explicit and made on a case-by-case basis. Items such as *nunc pro tunc* orders, affidavits, and bench notes are not acceptable substitutes for a court order. Only an official transcript is sufficient evidence of the judicial determination. A judicial determination regarding reasonable efforts to prevent removal or reunify the family, although required for title IV-E foster care, is **not** a requirement for title IV-E adoption assistance eligibility.

Prior to the publication of the contrary to the welfare requirements in regulation at 45 CFR 1356.21(c), States were allowed up to six months after a child's removal to obtain a contrary to the welfare determination, consistent with the Departmental Appeals Board (DAB) decision #1508. Children removed from their homes and placed in title IV-E foster care after the effective date of this issuance must have the contrary to the welfare

determination in the first court order removing the child from the home.

### **Termination of Parental Rights**

One of the criteria for establishing that a child has special needs is a determination by the State that the child cannot or should not be returned to the home of his or her parents<sup>25</sup>. Previous guidance stated that this means that the State must have reached that decision based on evidence by an order from a court of competent jurisdiction terminating parental rights, the existence of a petition for a termination of parental rights (TPR), or a signed relinquishment by the parents<sup>26</sup>. It has been brought to our attention that there are situations in which adoptions are legal without a TPR. Specifically, in some Tribes adoption is legal without a TPR or a relinquishment from the biological parent(s), and there is at least one State that allows relatives who have cared for a related child for a period of time to adopt without first obtaining a TPR.

After consideration, we believe that our earlier policy in ACYF-PIQ-89-02 (Q/A #1) is an unduly narrow interpretation of the statute and supersede that policy with this issuance. Consequently, if a child can be adopted in accordance with State or Tribal law without a TPR or relinquishment, the requirement of section 473(c)(1) of the Act will be satisfied, so long as the State or Tribe has documented the valid reason why the child cannot or should not be returned to the home of his or her parents.

### **Child's immigrant status**<sup>27</sup>

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Public Law 104-193<sup>28</sup>, limited Federal public benefits to qualified aliens. Adoption assistance under title IV-E of the Act is considered a Federal public benefit for the purposes of the PRWORA<sup>29</sup>, and, thus, is limited to qualified aliens. The definition of a *qualified alien*, at 8 USC 1641(b), includes certain permanent residents, asylees, and refugees. Children who are illegal aliens or undocumented immigrants are not eligible for adoption assistance since they are not qualified aliens.

In addition, section 403 of PRWORA requires a qualified alien entering the United States on or after the date of enactment of PRWORA (August 22, 1996), unless excepted, to live in the United States for five years before becoming eligible for Federal public benefits. In accordance with section 403(c)(2)(F) of PRWORA, however, Federal payments for foster care and adoption assistance are excluded from this five-year residency requirement if the child **and** the foster or adoptive parents with whom s/he is placed are both qualified aliens. Accordingly, if a foster or adoptive parent is not a qualified alien, a child who is otherwise eligible under section 473 of the Act must meet the five-year residency requirement to receive title IV-E adoption assistance.

### **International Adoptions**

As noted earlier in this document, the Federal adoption assistance program under title IV-E was intended to provide permanency for children with special needs in public foster

care by assisting States in providing ongoing financial and medical assistance to the families who adopt them. As a result, the statutory requirements for title IV-E adoption assistance eligibility are geared to needy children in public child welfare systems and are difficult, if not impossible, to apply to children who are adopted from abroad. Therefore, although the statute does not categorically exclude these children from participation in the title IV-E adoption assistance program, it is highly improbable that children who are adopted abroad by U.S. citizens, or are brought into the U.S. from another country for the purpose of adoption, will meet the criteria in section 473 of the Act for title IV-E adoption assistance eligibility. Although these requirements have been discussed in other sections, they are summarized here to clarify why a child who is adopted in or from another country is unlikely to meet the eligibility criteria in the Act.

In addition to meeting the three-part criteria for special needs in section 473(c) of the Act, to be eligible for title IV-E adoption assistance, a child also must be eligible in one of the following manners:

- AFDC-eligible at the time (or within six months) of the voluntary placement agreement or court removal petition, and considered a dependent child at the time of the adoption petition;
- 
- SSI-eligible in the month the adoption petition is filed; or
- 
- foster care costs of the child are being covered by title IV-E foster care maintenance payments being made for his or her minor parent in foster care.

Children who are adopted abroad, or are brought into the U.S. from other countries for the purpose of adoption, are not:

- AFDC-eligible in their own homes;<sup>30</sup>
- SSI-eligible in the month the adoption petition is filed;<sup>31</sup> or
- eligible as a result of their minor parent's receipt of title IV-E foster care maintenance payments.

The above cited reasons, as well as the three criteria that the child must meet in order to determine whether a child meets the definition of *special needs* (see pages 5-6), make it highly improbable, if not virtually impossible, that a child adopted through an intercountry adoption will be eligible for title IV-E adoption assistance. Although it is highly improbable that children adopted through an intercountry adoption will meet the title IV-E adoption assistance requirements, States cannot in policy categorically exclude these children from consideration since the statute does not authorize such an exclusion.

In the case of reimbursement of nonrecurring expenses of adoption, the State need only to determine that the child is a child with special needs, consistent with section 473(c) of

the Act. Accordingly, if a child who is adopted from abroad meets the three criteria for special needs, the State must pay for the nonrecurring adoption expenses for these children, consistent with 45 CFR 1356.41, if requested by the parents prior to the finalization of the adoption.

### **Independent Adoptions**

It also is highly improbable that a child who is adopted through an independent adoption<sup>32</sup> will be eligible for title IV-E adoption assistance since many of these children are voluntarily relinquished at birth directly to an adoptive family. For the purpose of this issuance, an independent adoption is one in which the child is not adopted through a public or private adoption agency. Children who are voluntarily relinquished are eligible only in certain limited circumstances and only when they are relinquished *to the State child welfare agency or another public agency (including Tribes) with which the State agency has a title IV-E agreement*<sup>33</sup>. The only exceptions are: (1) a child who is SSI-eligible at the time the adoption petition is filed; and (2) a child in a subsequent adoption, under specific circumstances, if s/he received title IV-E adoption assistance in a previous adoption. If the State determines that such child is a child with special needs, consistent with section 473(c) of the Act, the State may not apply any further requirements or restrictions to the child's eligibility for title IV-E adoption assistance.

### **Redeterminations of Adoption Assistance Eligibility**

The title IV-E adoption assistance program does not require redeterminations of a child's eligibility. Although the title XIX Medicaid program and the programs that, in part, may qualify a child initially for adoption assistance, such as AFDC and SSI, require redeterminations, they are unnecessary for the purpose of maintaining a child's eligibility for title IV-E adoption assistance. Once a child has been determined eligible and is receiving adoption assistance, a State may terminate the assistance **only** under three circumstances (see the *Adoption Assistance Agreements* section on pages 6 and 7).<sup>34</sup>

### **Notifying Prospective Adoptive Parents about the Availability of Adoption Assistance**

The State title IV-B/IV-E agency is required to actively seek ways to promote the adoption assistance program<sup>33</sup>. This means that it is incumbent upon the State agency to notify prospective adoptive parents about the availability of adoption assistance for the adoption of a child with special needs. There is no prescribed way in which promotion of the program must be accomplished. One example would be to alert potential adoptive parents during a recruitment campaign for adoptive homes (websites, newspapers, flyers, etc.). Another example would be to alert every prospective adoptive parent who inquires to the State agency about adoption.

The primary goal of the title IV-E adoption assistance program is to provide financial support to families who adopt difficult-to-place children from the public child welfare system. These are children who otherwise would grow up in State foster care systems if

a suitable adoptive parent could not be found. Thus, the State or local title IV-E agency is responsible for assuring that prospective adoptive families with whom they place eligible children who are under their responsibility are apprised of the availability of title IV-E adoption assistance.

However, in circumstances where the State agency does not have responsibility for placement and care, or is otherwise unaware of the adoption of a potentially special needs child, it is incumbent upon the adoptive family to request adoption assistance on behalf of the child. It is not the responsibility of the State or local agency to seek out and inform individuals who are unknown to the agency about the possibility of title IV-E adoption assistance for special needs children who also are unknown to the agency. This policy is consistent with the intent and purpose of the statute, and that is to promote the adoption of special needs children who are in the public foster care system.

### **Amount of Adoption Assistance Payments**

The amount of the adoption assistance payment cannot exceed the amount the child would have received if s/he had been in a foster family home, but otherwise must be determined through agreement between the adoptive parents and the State or local title IV-E agency. Unlike other public assistance programs in the Social Security Act, the title IV-E adoption assistance program is intended to encourage an action that will be a lifelong social benefit to certain children and not to meet short-term monetary needs during a crisis. Further, the adoptive parents' income is not relevant to the child's eligibility for the program.

Title IV-E adoption assistance is not based upon a standard schedule of itemized needs and countable income. Instead, the amount of the adoption assistance payment is determined through the discussion and negotiation process between the adoptive parents and a representative of the State agency based upon the needs of the child and the circumstances of the family. The payment that is agreed upon should combine with the parents' resources to cover the ordinary and special needs of the child projected over an extended period of time and should cover anticipated needs, e.g., child care. Anticipation and discussion of these needs are part of the negotiation of the amount of the adoption assistance payment.

Once the adoption assistance agreement is signed and the child is adopted, the adoptive parents are free to make decisions about expenditures on behalf of the child **without further agency approval or oversight**. Hence, once an adoption assistance agreement is in effect, the parents can spend the subsidy in any way they see fit to incorporate the child into their lives. Since there is no itemized list of approved expenditures for adoption assistance, the State cannot require an accounting for the expenditures. The amount of the assistance may be adjusted periodically if the family's or child's circumstances change, **but only with the concurrence of the adoptive family**.

The use of a means test is prohibited in the process of selecting a suitable adoptive

family, or in negotiating an adoption assistance agreement, including the amount of the adoption assistance payment<sup>36</sup>. Once a child has been determined eligible under section 473 of the Act, adoptive parents cannot be rejected for adoption assistance or have payments reduced without their agreement because of their income or other resources. In addition, the State cannot arbitrarily reject a request for an increase in the amount of subsidy (up to the amount the child would have received in foster care) in cases where the adoptive parents make life choices such as resigning one's job to stay at home with the adopted child or to return to school. Adoptive parents can request a fair hearing if the State rejects such requests.

The circumstances of the adopting parents must be considered together with the needs of the child when negotiating the adoption assistance agreement. *Consideration of the circumstances of the adopting parents* has been interpreted by the Department to pertain to the adopting family's capacity to incorporate the child into their household in relation to their lifestyle, standard of living and future plans, as well as their overall capacity to meet the immediate and future needs (including educational) of the child<sup>37</sup>. This means considering the overall ability of the family to incorporate an individual child into their household. Families with the same incomes or in similar circumstances will not necessarily agree on identical types or amounts of assistance. The uniqueness of each child/family situation may result in different amounts of payment.

Adoption assistance payments made on behalf of a child cannot exceed the amount the child would have received if s/he had been in a foster family home. Accordingly, a State may negotiate an adoption assistance agreement that automatically allows for adjustments to the adoption assistance payment when there is an increase in the foster care board rate. Alternatively, a State may renegotiate an adoption assistance agreement if the adoptive parents request an increase in payment due to a change in their circumstance and a higher foster care rate would have been paid on behalf of the child if the child had still been in foster care. As an example, a child is adopted and the adoption assistance agreement is negotiated for \$250 a month, the same amount the child had been receiving in foster care. If, two years later, the State's monthly foster care board rate is increased to \$400, the family can request that the adoption assistance agreement be renegotiated and receive up to \$400 for the child, since this is the amount the child would have received each month if s/he had continued to be in foster care.

If a State's foster care payment schedule includes higher level-of-care rates that are paid across-the-board for certain children, the State may pay up to that amount in adoption assistance if that specific child would have received the higher level-of-care rate in foster care. In addition, if a State's foster care payment standard includes across-the-board higher foster care rates for working foster parents to pay for child care, or includes provisions for periodic across-the-board increases for such items as seasonal clothing, the adoption assistance agreement may include the higher rate. However, special allowances that may be made on behalf of **an individual child in certain situations** in foster care, such as child care or clothing allowances, are not permitted as an allowable **additional** reimbursement in the adoption assistance program. Special

allowances for individual children that are over and above the State's foster care payment standard cannot be included in the amount negotiated in the adoption assistance agreement since the adoption assistance payment cannot exceed the foster care maintenance payment rate for the child.

In situations where a child is placed by the State agency in one State with an adoptive family in another State, it is the placing State that would look at its own established foster care rate structure, as well as State law and policy governing its foster care and adoption assistance payments, to determine the amount of assistance available on behalf of the child. If the placing and paying State's law or policy allows flexibility to pay amounts based upon the foster care board rate in the State in which the child is placed for adoption, this practice would be allowable under title IV-E since the statutory requirement in section 473(a)(3) of the Act would be met.

### **Disruption of Legal Guardianships**

If a child who had been receiving title IV-E foster care maintenance payments prior to a legal guardianship returns to foster care or is placed in an adoptive home after disruption of the legal guardianship, the factors below must be considered in determining the child's eligibility for title IV-E adoption assistance:

- **Title IV-E Demonstration Waiver States:** In States that have an approved title IV-E demonstration waiver from the Department to operate a subsidized legal guardianship program, the title IV-E terms and conditions allow reinstatement of the child's title IV-E eligibility status that was in place prior to the establishment of the guardianship in situations where the guardianship disrupts. Therefore, if a guardianship disrupts and the child returns to foster care or is placed for adoption, the State would apply the eligibility criteria in section 473 of the Act for the child as if the legal guardianship had never occurred.
- **Non-Demonstration Waiver States:** In States that do not have an approved title IV-E demonstration waiver from the Department, the eligibility requirements in section 473 of the Act must be applied to the child's current situation. Therefore, in a situation where the child has returned to foster care from the home of a non-related legal guardian, the child would not be eligible for title IV-E adoption assistance since the child was not removed from the home of a specified relative. If, however, the child has been removed from the home of a related legal guardian, an otherwise eligible child could be eligible for title IV-E adoption assistance. In either situation, however, if a child is determined to be SSI-eligible at or prior to the time of the adoption petition and, subsequent to the adoption, meets the definition of special needs, the child would be eligible for title IV-E adoption assistance. As noted earlier in this issuance, if a child meets these criteria, no further eligibility criteria must be met.

### **Responsibilities of States in Interjurisdictional Adoptions**

If the State agency has responsibility for placement and care of a child, that State is

responsible for entering into the adoption assistance agreement and paying the title IV-E adoption subsidy, even if the child is placed in an adoptive home in another State. If the State agency does not have responsibility for placement and care, it is the adoptive parents' State of residence where the adoption assistance application should be made. In that event, the public child welfare agency in the adoptive parents' State of residence is responsible for determining whether the child meets the definition of special needs, entering into the adoption assistance agreement and paying the subsidy, consistent with the way public benefits are paid in other programs.

Likewise, if a title IV-E adoption dissolves or the adoptive parents die and the child is placed with a State agency that assumes responsibility for placement and care, it is the placing State's responsibility to determine whether the child meets the definition of special needs, and pay the subsidy in a subsequent adoption. If, however, a public child welfare agency is not involved in the subsequent adoptive placement of a child, it is the public child welfare agency in the subsequent adoptive parents' State of residence that is responsible for determining whether the child meets the definition of special needs, entering into the adoption assistance agreement, and paying the subsidy. The State of the child's initial adoption or the State that pays the title IV-E adoption assistance in the child's initial adoption is irrelevant in a subsequent adoption.

### **Fair Hearings**

The last two previous issuances on fair hearings have created considerable confusion in the field. We, therefore, are withdrawing ACYF-PIQ-88-06 and ACYF-PIQ-92-02 with this issuance and providing the following guidance for States regarding fair hearings:

Federal regulations at 45 CFR 1356.40(b)(1) require that the adoption assistance agreement be signed and in effect at the time of, or prior to, the final decree of adoption. However, if the adoptive parents feel they wrongly have been denied benefits on behalf of an adoptive child, they have the right to a fair hearing. Some allegations that constitute grounds for a fair hearing include:

- relevant facts regarding the child were known by the State agency or child-placing agency and not presented to the adoptive parents prior to the finalization of the adoption;
- denial of assistance based upon a means test of the adoptive family;
- adoptive family disagrees with the determination by the State that a child is ineligible for adoption assistance;
- failure by the State agency to advise potential adoptive parents about the availability of adoption assistance for children in the State foster care system;
- decrease in the amount of adoption assistance without the concurrence of the adoptive parents; and
- denial of a request for a change in payment level due to a change in the adoptive parents circumstances.

In situations where the final fair hearing decision is favorable to the adoptive parents,

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

The right to a fair hearing is a procedural protection that provides due process for individuals who claim that they have been wrongly denied benefits. This procedural protection, however, cannot confer title IV-E benefits without legal support or basis. Accordingly, FFP is available only in those situations in which a fair hearing determines that the child was wrongly denied benefits and the child meets all Federal eligibility requirements. For example, if a fair hearing officer determines that a child would have been SSI-eligible at the time the adoption petition is filed, FFP is available only if there had been eligibility documentation for the child from the Social Security Administration, or its designee, at the time of the adoption petition. Accordingly, if a fair hearing officer decides that a child should have received adoption assistance, but, in fact, the child does not meet all the Federal eligibility criteria, the State cannot claim FFP under title IV-E for the child.

**EFFECTIVE DATE:** Upon issuance.

**INQUIRIES TO:** Regional HUB Directors/Regional Administrators, Regions I-X

/s/

James A. Harrell  
Acting Commissioner,  
Administration on Children, Youth and Families

Appendix A: Matrix on Pathways to Adoption Assistance Eligibility

Appendix B: Withdrawn Issuances: Previous and Revised Title IV-E Adoption Assistance Policies at a Glance

### **Footnotes**

<sup>1</sup>Adoption Assistance and Child Welfare Act of 1980 -- Conference Report. Congressional Record, Senate, June 13, 1980, S6936-6945.

<sup>2</sup>Omnibus Budget and Reconciliation Act of 1987 (Public Law 100-203), Section 9133.

<sup>3</sup>Section 471(a)(20)(A) of the Act and 45 CFR 1356.30. <sup>4</sup>This requirement 'looks back' to the title IV-A plan prior to the enactment of Public Law 104-193. Prior to this amendment, section 406(a) defined a "dependent child" as a needy child who, (1) has been deprived of parental support or care due to the death or absence of a parent, or physical or mental incapacity of the parent and is living with a specified relative, and (2) is under age 18, or at the option of the State age 19 if the child is a full-time student reasonably expected to complete the program. Section 407 defined a "dependent child" as a child under age 18, or 19 as indicated above, who is a needy child due to the lack of support or care because the parent who is the principal wage-earner is unemployed.

<sup>5</sup>Sections 473(a)(2)(A)(i), 473(a)(2)(B), and 473(a)(2)(C) of the Act.

<sup>6</sup>The AFDC requirement for living with a specified relative 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, in accordance with section 473(a)(2)(B)(ii) of the Act.

<sup>7</sup>Under previous policy (ACYF-PIQ-87-05 and ACYF-PIQ-85-04), among other things, a child could have been eligible for title IV-E adoption assistance if s/he had been eligible at **either** the time of removal, or at the time of the initiation of adoption proceedings. ACYF-PIQ-87-05 was withdrawn by ACYF-CB-IM-00-02 on February 18, 2000, because there were two versions of the issuance with conflicting interpretations and the interpretations in both issuances numbered ACYF-PIQ-87-05 were in error. ACYF-PIQ-85-04 should have been withdrawn at that time, as well, since it also contained the same policy that is inconsistent with the statutory requirement. We are, accordingly, withdrawing ACYF-PIQ-85-04 with this issuance. Specifically, the withdrawn issuances erroneously based title IV-E adoption assistance eligibility via AFDC on one point in time, rather than both at the time of the child's removal **and** at the time of the adoption petition, as required by the statute. The effect was to allow children who were AFDC-eligible at the time of filing of the petition, but not at removal, to be eligible for title IV-E adoption assistance, which was inconsistent with the requirements in section 473(a)(2)(A) and (B) of the Act.

<sup>8</sup>Sections 473(a)(2)(A)(ii), 473(a)(2)(B)(iii) and 473(a)(2)(C).

<sup>9</sup>Sections 473(a)(2)(A)(iii), 473(a)(2)(B)(iii) and 473(a)(2)(C).

<sup>10</sup>ACYF-PA-88-01.

<sup>11</sup>As amended by Public Law 105-89, The Adoption and Safe Families Act of 1997.

<sup>12</sup>Section 473(c)(2)(A) of the Act.

<sup>13</sup>Section 473(c)(2)(B) of the Act.

<sup>14</sup>Section 471(a)(19) of the Act.

<sup>15</sup>ACYF-PIQ-92-02, Q/A#2.

<sup>16</sup>Section 472(a) of the Act.

<sup>17</sup>45 CFR 1356.40(b).

<sup>18</sup>Section 473(a)(4) of the Act.

<sup>19</sup>ACYF-CB-PIQ-98-02.

<sup>20</sup>45 CFR 1356.41(i).

<sup>21</sup>Section 473(a)(2)(A)(i) of the Act.

<sup>22</sup>ACYF-PIQ-89-01.

<sup>23</sup>Title IV-E foster care payments are authorized only when the State or local title IV-B/IV-E agency, or another public agency with whom the State agency has a title IV-E agreement, has responsibility for placement and care of a child (section 472(a)(2)).

<sup>24</sup>ACYF-PIQ-89-01 limits consideration as a judicial removal to those children relinquished to the State agency under certain circumstances.

<sup>25</sup>Section 473(c)(1).

<sup>26</sup>ACYF-PIQ-89-02.

<sup>27</sup>For more information on alien status and eligibility for Federal public benefits, see ACYF-PIQ-99-01.

<sup>28</sup>As amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Public Law 104-208) and the Balanced Budget Act of 1997 (Public Law 105-33).

<sup>29</sup>63 FR 41658, August 4, 1998.

<sup>30</sup>AFDC was a domestic program and therefore not available on behalf of children in their own homes in another

country.

<sup>31</sup>SSI cannot be established at the time the adoption petition is filed since a child who is adopted from another country cannot meet either the Social Security Administration's alien eligibility requirement or its "presence in the U.S." rule (requiring that an individual who has been outside the U.S. for 30 consecutive days must be present in the U.S. for 30 consecutive days to be eligible for SSI). The Child Citizenship Act of 2000, Public Law 106-395, impacts neither the SSI eligibility for children who are adopted from abroad nor the title IV-E adoption assistance eligibility for these children.

<sup>32</sup>For the purpose of this issuance, an independent adoption is one in which the child is not under the responsibility of a public or private adoption agency.

<sup>33</sup>See discussion under the Voluntary Relinquishment section of this issuance on page 8.

<sup>34</sup>Section 473(a)(4).

<sup>35</sup>45 CFR 1356.40(f)

<sup>36</sup>45 CFR 1356.40(c).

<sup>37</sup>ACYF-PIQ-90-02.

Please send all comments and questions on this subject to [CB Comments](#).  
Updated on February 22, 2001 by [webmaster@acf.dhhs.gov](mailto:webmaster@acf.dhhs.gov)