

<h1>ACF</h1> Administration for Children and Families	U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES Office of the Assistant Secretary	
	1. Log No: ACYF-PR-88-01	2. Issuance Date: May 03, 1988
	3. Originating Office: Children's Bureau	
	4. Key Words: Nonrecurring Expenses, Adoption Assistance - Title IV-E	

PROPOSED PROGRAM REGULATION

TO : State Agencies Administering or Supervising Administration of Titles IV-E and IV-B of the Social Security Act, Indian Tribes and Indian Tribal Organizations and Other Interested Organizations

SUBJECT: Notice of Proposed Rulemaking -- Title IV-E Adoption Assistance Program; Nonrecurring Expenses

LEGAL AND RELATED REFERENCES: Tax Reform Act of 1986 (Pub.L. 99-514); Section 473 of the Social Security Act (the Act); and 45 CFR 1356

ATTACHMENT: Attached is a copy of the Notice of Proposed Rulemaking (NPRM) published in the Federal Register on April 14, 1988 which addresses the title IV-E Adoption Assistance Program; Nonrecurring Expenses.

DISCUSSION: The attached NPRM proposes regulations to implement the changes made by section 1711 of the Tax Reform Act of 1986 (Pub.L. 99-514) to the Adoption Assistance Program under title IV-E of the Social Security Act.

COMMENT PERIOD: Written comments to the NPRM must be submitted on or before June 13, 1988. Written comments should be mailed to:

Associate Commissioner, Children's Bureau
P.O. Box 1182
Washington, D.C. 20013
Attention: Dan Lewis

We specifically invite comments from the public on the proposed dollar limit on State expenditures for which Federal reimbursement is available (paragraph (f)). Discussion and

information on the expenses incurred by families in the adoption of special needs children is requested.

INQUIRIES :

Beverly Stubbee
Director or Carolyn Puricelli-Boyd,
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P.O. Box 1182
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COMMISSIONER
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45 CFR Part 1356

Title IV-E Adoption Assistance Program; Nonrecurring Expenses

Thursday, April 14, 1988

*12436 AGENCY: Office of Human Development Services, HHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department is issuing this Notice of Proposed Rulemaking (NPRM) in order to implement the changes made in the Adoption Assistance Program under title IV-E of the Social Security Act by the Tax Reform Act of 1986 (Pub. L. 99-514).

This rule proposes to require States to reimburse the nonrecurring adoption expenses of parents who adopt children with special needs. Federal financial *12437 participation (FFP) is available at the matching rate of 50 percent up to a \$2,000 expenditure for each adoptive placement. States may set either a lower or a higher maximum and are thus not precluded from spending more or less than \$2,000. However, Federal participation is limited to a 50 percent share of up to a \$2,000 State expenditure level.

DATE: Comments must be received on or before June 13, 1988.

ADDRESSES: Comments may be mailed to the Associate Commissioner, Children's Bureau, Administration for Children, Youth and Families, P.O. Box 1182, Washington, DC 20013, Attention: Dan Lewis.

Comments received in response to this rule may be reviewed in Room 2030B of the Donohoe Building, 400 Sixth St. SW., Washington, DC between the hours of 9:00 a.m. and 5:30 p.m., Monday through Friday except Federal holidays, beginning two weeks after the date of publication in the Federal Register.

FOR FURTHER INFORMATION CONTACT: Beverly Stubbee, (202) 755-7447.

SUPPLEMENTARY INFORMATION:

I. Background of section 1711 of the Tax Reform Act of 1986

The Tax Reform Act of 1986 (Pub. L. 99-514) repealed section 222 of the Internal Revenue Code which permitted an itemized deduction of up to \$1,500 of expenses incurred by an individual in the legal adoption of a child with special needs who was eligible for adoption assistance as provided under title IV-E of the Social Security Act (the Act). Deductible expenses included reasonable and necessary adoption fees, court costs and attorney fees.

As an alternative to the repealed section 222 of the Internal Revenue Code, the Tax Reform Act of 1986 amended title IV-E of the Act to require States to make payments of nonrecurring adoption expenses incurred by or on behalf of adopting parents in connection with the adoption of special needs children. The statute provides 50 percent Federal matching funds to a State, as an administrative cost of title IV-E, for payment of such nonrecurring adoption expenses. As set forth in the report of the Committee on Ways and Means of the House of Representatives, the legislative history indicates that Federal benefits for families adopting children with special needs are more appropriately provided through an expenditure program, rather than through an itemized deduction. The Committee recognized that the itemized deduction provided relatively greater benefit to higher income taxpayers who presumably have less need for Federal assistance, and provided no benefit to taxpayers who did not itemize deductions in their tax returns.

Further, this statutory change also accomplished another purpose of the Congress, which was to give agencies with responsibility and expertise in the area of adoption assistance direct control over the assistance provided to families that adopt children with special needs. See H.R. Rep. No. 99-426, 99th Cong. 1st Sess. 875 (1985).

These changes made by the Tax Reform Act are effective for tax years beginning on or after January 1, 1987, and for expenditures made after December 31, 1986. Parents who incur nonrecurring expenses of adoption on or after January 1, 1987 may apply for reimbursement of these expenses from their appropriate State agency.

Payments for nonrecurring expenses of adoption must be made available to any adopting parents of a child with special needs as long as the child meets the State's definition of "special needs" based on section 473(c) of the Act and has been placed for adoption in accordance with applicable State and local laws.

There must also be a signed agreement between the adopting parents and the State or local agency specifying the amount to be reimbursed by the agency for these nonrecurring expenses of adoption. Payment for nonrecurring expenses shall be made without regard to the adopting parents' income or financial resources. The amount shall be agreed upon between the State agency and the parents.

In order to comply with the revised requirements, some States may need to amend their statutes so that nonrecurring expenses of all adopting parents of children with special needs can be paid by the State and claimed as administrative costs of title IV-E. Such States will have until the close of the second general legislative session following the date of publication of the final rule to make any necessary changes in State statutes.

Failure to provide reimbursement for eligible claims from January 1, 1987 will result in a State being considered out of compliance with section 473 of the Act.

II. Program Description

The Adoption Assistance Program under title IV-E of the Act is designed to assist States in placing certain "special needs" children in adoptive homes, thereby providing families and homes for more children and reducing States' foster care caseloads. In order to be eligible for adoption assistance under title IV-E, a child must be eligible for either Aid to Families with Dependent Children (AFDC), title IV-E Foster Care or Supplemental Security Income for the Blind and Disabled (SSI) and meet the definition of "a child with special needs" according to section 473(c) of the Act. A child is considered a child with special needs only when the State has determined

1. that the child cannot or should not be returned to the home of the parents; and
2.
 - A. that there exists with respect to the child a specific factor or condition (such as his ethnic background, age, or membership in a minority or sibling group, or the presence of factors such as medical conditions or physical, mental, or emotional handicaps) because of which it is reasonable to conclude that the child cannot be placed with adoptive parents without providing assistance, and
 - B. that, except where it would be against the best interests of the child a reasonable, but unsuccessful, effort has been made to place the child without providing adoption assistance.

The amendment to title IV-E in the Tax Reform Act expanded FFP in adoption assistance to include payments made by States for the nonrecurring expenses of adoption of any child with special needs, not just those who are title IV-E eligible and receiving adoption assistance payments.

Summary of Proposed Regulatory Changes

This NPRM proposes a process by which FFP for nonrecurring expenses of adoption shall be made available to any parent who adopts a child with special needs; imposes a limitation on the amount of Federal reimbursement available for expenses borne by the parents; specifies the terms of the nonrecurring expenses agreement; defines the eligibility of the child; and outlines the fiscal requirements that control FFP in the States' payments.

A. Discussion of Proposed Limitation on Federal Reimbursement

Limits on Federal Reimbursement

This NPRM proposes to limit Federal matching (at a 50 percent rate) to a maximum State expenditure of \$2,000 for each adoptive placement. For States that wish to exceed the \$2,000 maximum, FFP will be limited to 50 percent of \$2,000. States may also set a reasonable maximum that is less than \$2,000, consistent with practices within the State. (See discussion in section 2 below.)

The \$2,000 figure was based on information from the field of adoption. We drew heavily on information made available by the National Committee for *12438 Adoption (NCFA) whose member agencies represent private, nonprofit adoption agencies, the majority of which are sectarian in affiliation. The NCFA agencies are located in 45 States across the country and place healthy children as well as children with special needs. In the March-April 1987 issue of National Adoption Reports, a publication of NCFA, the results of a survey of its member agencies were reported. According to the 120 agencies that responded, most of the adoptive placements of children with special needs were arranged without fees of any kind to the adoptive parents. When expenses were borne by the families, they included legal services/fees and some costs of the agencies in the preparation and supervision of the adoptive placement. Average costs were in the \$1,500 range.

Although no comparable data are available from proprietary agencies or independent agents, we believe that the number of children with special needs placed by such agents is very small and would not skew the data upon which our estimates are based. The legislative history of section 1711 contemplated that limits would be set. We believe the limit set is reasonable in terms of the usual types of costs incurred by adopting parents of special needs children.

We recognize that some families might incur higher costs and some may find their expenses less than what was reported by NCFA.

We believe that the \$2,000 reimbursable by the States to families will be sufficient in most cases to meet the majority of nonrecurring expenses of adoption. We note that under the repealed section of the Internal Revenue Code, the maximum amount realizable by a family would have been \$750 (for a family itemizing deductions in the 50 percent tax bracket). We specifically invite comment from the public on the dollar limit being proposed and ask for discussion and information on the expenses incurred by families in their adoption of special needs children.

State Option on Limiting the Amount of Reimbursement

The NPRM also proposed to permit States the option of setting a reasonable maximum based on State practice that is less than \$2,000 on the amount to be paid to adoptive parents for nonrecurring expenses of adoption. The legislative intent to permit States this authority is clearly stated in the House Committee on Ways and Means Report:

This general authority for a State to set limits on the amount of assistance to be provided to adoptive parents will also apply under the bill to "nonrecurring" adoption expenses * * * .

In other words, as under present adoption assistance agreements, a State may set limits on the amount of the expenses to be financed by the State * * * (See H.R. Rep. No. 99-426, 99th Cong. 1st Sess. 876 (1985))

However, a State maximum lower than \$2,000 must not be overly restrictive and must be based on reasonable charges, consistent with State and local practices, for special needs adoption within a State. The basis for setting a lower maximum must be documented and explained.

Section by Section Discussion of Proposed Changes in Part 1356

In section 1356.40, Adoption Assistance Program: Administrative requirements to implement section 473 of the Act, the NPRM proposes amending paragraphs (b) (1), (3) and (4) to comport with statutory changes. In paragraph (b)(1) the phrase "* * * at the time of or prior to the interlocutory decree * * *" is rescinded because the statutory amendment removed the reference to an interlocutory decree. Also as a result of the statutory amendment, the work "nature" has been added in paragraph (b)(3) to the language describing the payments, services, and assistance which the adoption assistance agreement must address. The second clause in paragraph (b)(3), however, in relation to eligibility for title XIX of the Act, is applicable only to children eligible for adoption assistance in accordance with section 473(a)(1)(B)(ii).

A technical change has been made to s 1356.40(b) so that it comports with section 475(3)(B) of the Act and section 101(a)(4)(A) of Pub. L. 96-272. The current regulation requires that the adoption agreement remain in effect if a family changes its State of residence. In fact, section 101(a)(4)(A) of Pub. L. 96-272 requires the adoption agreement to remain in effect not only if a family moves to another State, but also if the family adopting the child lives in a State different from the one placing the child. We believe the proposed regulation makes these two situations clear as it requires the adoption agreement to remain in effect "regardless of the State of which the adoptive parents are residents at any given time." Section 1356.40(c) has been removed since statutory amendments struck out the term "interlocutory decree." Sections 1356.40 (d), (e), (f), and (g) are redesignated as paragraphs (c), (d), (e), and (f), respectively.

A new section, 45 CFR 1356.41, has been added to address nonrecurring expenses of adoption as an expenditure made for the proper and efficient administration of the title IV-E Adoption Assistance Program. Paragraph (a) of s 1356.41 specifies that the amount of payment for nonrecurring expenses of adoption shall be determined through agreement between the State or local agency and the adopting parents.

Paragraph (b) of s 1356.41 proposes to prohibit the imposition of income eligibility requirements (means test) on adopting parents of children with special needs for State payment of nonrecurring expenses of adoption.

Paragraph (c) of s 1356.41 proposes to require that the child for whom nonrecurring expenses of adoption are being paid must be a child with special needs as defined by the State agency in its title IV-E Adoption Assistance Program (section 473(c)), except that the requirement for an effort to place the child with adoptive parents without providing adoption assistance is not applicable.

Paragraph (d) of s 1356.41 proposes, at State option, the payment of nonrecurring expenses of adoption of children with special needs from foreign countries. This provision also requires that a State make clear in its definition of a "child with special needs" whether it will include or exclude such children for the payment of nonrecurring expenses.

Paragraph (e) of s 1356.41 requires the State agency to notify all appropriate courts and all public and licensed private nonprofit adoption agencies within the State of the availability of funds for expenses incurred by or on behalf of families adopting children with special needs. This requirement makes clear the obligation of the State agency to inform all interested parties of the availability of this new program to replace the tax deduction formerly available under the Internal Revenue Code and where and how interested persons may apply for these funds.

Paragraph (f) of s 1356.41 limits the amount of nonrecurring adoption expenses that can qualify for Federal matching to a maximum State expenditure of \$2,000 for any adoptive placement. Title IV-E funds are available at the administrative cost matching rate of 50 percent. The limitation on the amount of Federal funds available to reimburse these costs is explained in section III above. Also as discussed above, this provision also permits States to set a reasonable maximum lower than \$2,000 on the amount to be paid to adoptive parents for nonrecurring expenses of adoption.

*12439 Paragraph (g) of s 1356.41 limits FFP for nonrecurring expenses of adoption incurred by or on behalf of adoptive parents to expenses that are not otherwise reimbursed from other sources. It also provides that such payments shall be made either directly through the State agency or through another public or licensed nonprofit private agency.

Paragraph (h) of s 1356.41 restates the statutory definition of the term "nonrecurring adoption expenses." It also adds, for specificity, a definition of the term "other expenses" as used in the statutory definition. We propose to define "other expenses" as the costs incurred by or on behalf of the parents for the adoption study, including health and psychological examination and consultation, supervision of the placement prior to completion of adoption, and transportation and reasonable costs of lodging and food for the child and adoptive parents when necessary to complete the placement or adoption process.

Paragraph (i) of s 1356.41 proposes to allow States until the end of their legislative sessions following publication of the final rule to make amendments to their statutes in order to comply with Federal law.

Paragraph (j) of s 1356.41 proposes to define when an expenditure is considered made, in order to determine the period of time during which the State must make its claim for Federal reimbursement.

Finally, paragraph (c) of s 1356.60 of the current regulations will be deleted. The proposed s 1356.41 in accordance with statutory requirements directs States to claim reimbursement for nonrecurring expenses of adoption as administrative costs under title IV-E. Thus, the prohibition on reimbursement of nonrecurring adoption costs and administrative costs set forth in s 1356.60(c)(4) should be deleted.

Impact Analysis

Executive Order 12606: The Family Executive Order 12606 requires Federal agencies, in formulating and implementing policies and regulations, to assess the impact on family formation, maintenance and general well being. We believe these proposed regulations will serve to strengthen and preserve family life and send a message of support and encouragement to all families who adopt children with special needs. This proposed regulation should have a significant positive impact in matters related to family life. Although no precise figures are available, as many as 20,000 families may receive reimbursement under this program for costs related to adopting special needs children.

Executive Order 12291

Executive Order 12291 requires that a regulatory impact analysis be prepared for major rules, which are defined in the Order as any rule that has an annual effect on the national economy of \$100 million or more or certain other specified effects. Nothing in either the statute or the proposed rule is likely to create substantial costs. The Department has determined that these regulations are not major rules within the meaning of the Executive Order because they will not have an effect on the economy of \$100 million or more or otherwise meet the threshold criteria.

Regulatory Flexibility Act

Consistent with the Regulatory Flexibility Act of 1980 (5 U.S.C. Ch. 5), the Department tries to anticipate and reduce the impact of rules and paperwork requirements on small businesses. For each rule with a "significant economic impact on a substantial number of small entities" an analysis is prepared describing the rule's impact on small entities. Small entities are defined in the Act to include small businesses, small non-profit organizations, and small governmental entities.

The primary impact of these regulations is on the States, which are not "small entities" within the meaning of the Act. For these reasons, the Secretary certifies that these rules will not have a significant impact on a substantial number of small entities.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1980, Pub. L. 96-511, all Departments are required to submit to the Office of Management and Budget (OMB) for review and approval any reporting or record keeping requirements in a proposed or final rule.

As required by section 3504(h) of the Paperwork Reduction Act of 1980, we will submit a of this NPRM to OMB for its review of the information collection requirements. However, we do not believe there are any new information collection requirements as State agencies administering the title IV-E Adoption Assistance Program are already utilizing a format for adoption assistance agreements which may also be used with applicants for reimbursement of nonrecurring expenses of adoption.

Organizations and individuals desiring to submit comments on information collection requirements should direct them to the agency official designated for this purpose whose name appears in this preamble, and to the Office of Information and Regulatory Affairs, OMB, New Executive Office Building (Room 3208), Washington, DC 20503. ATTN: Desk Officer for HHS.

List of Subjects in 45 CFR Part 1356

Adoption assistance, Administrative costs, Nonrecurring expenses of adoption.(Catalog of Federal Domestic Assistance Program No. 13.659 Adoption Assistance)

Dated: February 4, 1988.

Sydney Olson,
Assistant Secretary for Human Development Services.

Approved: March 14, 1988.

Otis R. Bowen,
Secretary.

For the reasons set forth in the preamble, we are proposing to amend 45 CFR 1356.40 and to add a new section 1356.41 as follows:

PART 1356--REQUIREMENTS APPLICABLE TO TITLE IV-E

The authority statement for Part 1356 continues to read as follows:

Authority: Adoption Assistance and Child Welfare Act of 1980, Pub. L. 96-272 as amended, 42 U.S.C. 670 et seq., 94 Stat. 501, 42 U.S.C. 620 et seq., 94 Stat. 516 et seq., section 1102 of the Social Security Act as amended, 42 U.S.C. 1302.

Section 1356.40 is amended by revising paragraphs (b)(1), (b)(3) and (b)(4) as follows:

s 1356.40 [Amended]

* * * * * (b) The adoption assistance agreement must meet the requirements of section 475(3) of the Act and must:

(1) Be signed and in effect at the time of or prior to the final decree of adoption. A of the signed agreement must be given to each party; and

* * * * * (3) Specify the nature and amount of any payment, services and assistance to be provided under such agreement and, for purposes of eligibility under title XIX of the Act, specify that the child is eligible for Medicaid services; and

(4) Specify, with respect to agreements entered into on or after October 1, 1983 that the agreement shall remain in effect regardless of the State of which the adoptive parents are residents at any given time.

* * * * * 12440 3. Section 1356.40 is further amended by removing paragraph (c) and redesignating paragraphs (d), (e),(f) and (g), respectively as paragraphs (c), (d), (e) and (f).

A new s 1356.41 is added to read as follows:

s 1356.41 Nonrecurring expenses of adoption.

The amount of the payment made for nonrecurring expenses of adoption shall be determined through agreement between the adopting parent(s) and the State or local agency administering the program. The agreement must indicate the nature and amount of the nonrecurring expenses to be paid.

There must be no income eligibility requirement (means test) for adopting parents in determining whether payments for nonrecurring expenses of adoption shall be made.

For purposes of payment of nonrecurring expenses of adoption, the State must determine that the child is a "child with special needs" as defined by the State based on sections 473(c) (1) and (2)(A) of the Act, and that the child has been placed in accordance with applicable State and local laws; the child need not meet the categorical eligibility requirements at section 473 (a)(2) or 473(c)(2)(B).

At State option, the State may pay nonrecurring expenses of the adoption of children with special needs from foreign countries, through a licensed or approved domestic nonprofit adoption agency. Such payments are eligible for FFP up to the maximum amount stated in 45 CFR 1356.41(f) or the State maximum, whichever is lower. The State shall make clear in its definition of "a child with special needs" whether such children will be included or excluded.

The State agency must notify all appropriate courts and all public and licensed private nonprofit adoption agencies of the availability of funds for the nonrecurring expenses of adoption of children with special needs, as well as where and how interested persons may apply for these funds.

Funds expended with respect to nonrecurring adoption expenses incurred by or on behalf of parents who adopt a child with special needs shall be considered an administrative expenditure of the title IV-E Adoption Assistance Program. Federal reimbursement is available at a 50 percent matching rate up to a \$2,000 State expenditure for any adoptive placement. States may set a reasonable lower maximum.

Federal financial participation for nonrecurring expenses of adoption is limited to costs incurred by or on behalf of adoptive parents that are not otherwise reimbursed from other sources. Payments for nonrecurring expenses shall be made either directly by the State agency or through another public or licensed nonprofit private agency.

The term "nonrecurring adoption expenses" means 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 of funds. "Other expenses which are directly related to the legal adoption of a child with special needs" means the costs incurred by or on behalf of the parents for the adoption study, including health and psychological examination or consultation, supervision of the placement prior to adoption as well as transportation and the reasonable costs of lodging and food for the child and/or the adoptive parents when necessary to complete the placement or adoption process.

(i) A State needing to amend its statute so that nonrecurring expenses of all adopting parents of children with special needs can be reimbursed by the State will have until the close of the second general legislative session following the date of publication of the final rule to make any necessary changes in State statute. Such legislation must apply to all claims effective January 1, 1987. Failure to provide reimbursement for eligible claims from January 1, 1987 will result in the State being considered out of compliance with the Act.

A State expenditure is considered made in the quarter during which the payment was made by a State agency to a private nonprofit agency, individual or vendor payee. s 1356.60 [Amended]

Section 1356.60 is amended by removing paragraph (c)(4) and redesignating paragraph (c)(5) as (c)(4).

53 FR 12436-01