

<h1>ACF</h1> <p>Administration for Children and Families</p>	U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES Office of the Assistant Secretary	
	1. Log No: ACYF-PR-88-02	2. Issuance Date: December 23, 1988
	3. Originating Office: Children's Bureau	
	4. Key Words: Nonrecurring Expenses, Adoption Assistance - Title IV-E	

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: Final Rule--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; and 45 CFR 1356.

The attached final rule, published in the Federal Register on December 14, 1988, implements changes related to nonrecurring expenses of adoption made by section 1711 of the Tax Reform Act of 1986 to the Adoption Assistance Program under Title IV-E

INQUIRIES: Regional Administrators, OHDS Regions I-X
Dodie Truman Borup
COMMISSIONER

Attachment: 4130-01

DEPARTMENT OF HEALTH & HUMAN SERVICES
OFFICE OF HUMAN DEVELOPMENT SERVICES

45 CFR Part 1356 Title IV-E Adoption Assistance Program: Nonrecurring Expenses

AGENCY: Office of Human Development Services, Department of Health and Human Services

ACTION: Final Rule

SUMMARY: The Department is issuing this final rule 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 final rule requires States to reimburse the nonrecurring adoption expenses of parents who adopt children with special needs. Federal financial participation (FFP) is available at the matching rate of 50 percent for State expenditures up to \$2,000 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 financial participation is limited to a 50 percent share of a \$2,000 maximum State expenditure.

EFFECTIVE DATE: 12/14/88

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

SUPPLEMENTARY INFORMATION:

I. Program Description

The Adoption Assistance and Child Welfare Act of 1980 (Pub. L. 96-272) was enacted on June 17, 1980. This legislation established Title IV-E (Federal Payments for Foster Care and Adoption Assistance) and made changes to Title IV-B (Child Welfare Services) of the Social Security Act (the Act). The purpose of this legislation was to strengthen the program of foster care for needy and dependent children, encourage the adoption of children with special needs, and improve child welfare services. Title IV-E replaced the Federally assisted foster care program previously in effect under Title IV-A, and created a new Federal adoption assistance program to provide Federal financial participation (FFP) in adoption assistance payments to encourage the adoption of children with special needs.

The Adoption Assistance Program under Title IV-E of the Act is designed to assist States in placing certain children with special needs in adoptive homes, thereby providing families and homes for more children and reducing States' foster care caseloads.

Title IV-E Adoption Assistance is an open-ended entitlement program that reimburses States at the State's Federal medical assistance percentage for adoption assistance payments.

Currently, adoption assistance payments are being made for an average of 33,000 children monthly, at an estimated annual cost to the Federal government of \$62 million.

In order to be eligible for ongoing adoption assistance payments 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:

II.

1. that the child cannot or should not be returned to the home of the parents;
2. 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
3. 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 nonrecurring expenses incurred in the adoption of any child with special needs, not just those receiving ongoing adoption assistance payments.

As long as the child meets all the requirements of section 473(c) and there is no violation of State or local laws, the nonrecurring expenses of a person who adopts a child with special needs (whether an independent adoption or an adoption facilitated by a public or private agency) must be reimbursed by the State agency responsible for the administration of Title IV-E.

4. Section 171l 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 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 for nonrecurring adoption expenses incurred by or on behalf of adopting parents in connection with the adoption of all children who meet the criteria for "special needs." The statute provides 50 percent Federal matching funds to States for the reimbursement to parents of nonrecurring expenses of adoption (as administrative costs of title IV-E).

5. Summary of Major Changes in the Final Rule.

On April 14, 1988, the Department published a Notice of Proposed Rulemaking (NPRM) (53 Fed. Reg. 12346) to implement the amendments to the Title IV-E Adoption Assistance Program included in the Tax Reform Act of 1986 (Pub. L. 99-514).

The Department received 34 letters from individuals, national organizations, and State and local agencies in response to the NPRM. Of the 34 letters received by the Department, 20 were from State agencies, one from a local public agency, one from a private agency, ten from national and regional organizations and two from interested individuals. Following is a discussion of the changes made in the final rule as a result of these comments.

We have made two major changes in the final rule:

First, the NPRM proposed that, for purposes of payment of nonrecurring expenses of adoption, the State must determine that the child is "a child with special needs" based on sections 473(c)(1) and (c)(2)(A), but did not need to meet the categorical eligibility requirements in sections 473(a)(2) or (c)(2)(B). The exception to section 473(c)(2)(B) would have eliminated the requirement that a reasonable, but unsuccessful effort be made to place the child with adoptive parents without providing adoption assistance.

After further analysis, we have concluded that all the requirements of section 473(c) must be met. The State must make a determination that the child cannot or should not be returned to the home of the parents (section 473(c)(1)); that there exists a special factor or condition because of which it is reasonable to conclude that the child cannot be placed with adoptive parents without providing assistance (section 473(c)(2)(A)); and 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 (section 473(c)(2)(B)).

Second, the NPRM proposed that, at State option, the nonrecurring expenses of adoption incurred in intercountry adoptions could be reimbursed. Upon re-examination, we have determined that this cannot be an optional provision. Payments are available to such families as long as the child meets the definition of "a child with special needs." Clarification to questions from respondents also resulted in minor changes which

- specified State agency procedures, including notification of and cooperation with private agencies;
- specified which State agency is responsible for the nonrecurring adoption expenses payment in interstate adoptions; and
- clarified claims procedures in cases where the final decree of adoption was issued prior to or within six months of the effective date of the final rule.

6. Section by Section Discussion of Comments and the Department's Response.

A. General Comments

Of the 34 letters received by the Department, all of the commenters supported, in principle, the expansion of Federal support for nonrecurring expenses for the adoption of special needs children. There was disagreement from some commenters on the method for providing this

benefit, i.e., as a reimbursement program to the families for actual costs rather than as an itemized tax deduction as had been previously available. On this point the law is clear; the tax deduction is no longer available. The new law requires the State agencies administering title IV-E adoption assistance programs to reimburse parents for allowable nonrecurring expenses for the adoption of children with special needs.

One commenter challenged the legislative history referenced in the preamble, stating that the Department failed to address a significant change made by Pub. L. 97-448 to the prior Internal Revenue Code provision (section 222) for claiming the tax deduction in the adoption of a child with special needs. In the commenter's opinion, that amendment had previously eliminated the requirement of categorical eligibility for AFDC, Title IV-E foster care or SSI as a criterion for taking a tax deduction for expenses of adoption of a child with special needs.

We reexamined the legislative history and statutory language and do not agree with the commenter's position. Moreover the comment regarding Pub. L. 97-448 and former Internal Review Code section 222 is irrelevant, since the current law, implemented by these regulations, clearly excludes such categorical eligibility as a criterion.

Eligibility for Title IV-E adoption assistance is not a requirement for the reimbursement of the nonrecurring expenses of adoption of a child with special needs.

B. Section By Section Discussion

Section 1356.40

Comment

In section 1356.40, Adoption Assistance Program: Administrative requirements to implement section 473 of the Act, the NPRM proposed to amend two paragraphs in order to comport with statutory changes. There were no comments on the technical change proposed in paragraph (b)(1) of this section to rescind the phrase "...at the time of or prior to the interlocutory decree..." in relation to the timing of the adoption assistance agreement.

However, there were comments on paragraph (b)(3). There was a question about the requirement that the adoption assistance agreement specify the "nature" of the payment, services and assistance to be provided. Another commenter asked whether there must be a separate agreement for nonrecurring expenses or if the nonrecurring expenses provision could be a part of an adoption assistance agreement for payments or services. A

third commenter was confused by the language of the regulation at paragraph (b)(3) and questioned whether it was the adoption assistance agreement which made the child eligible for assistance under Title XIX.

Response

In paragraph (b)(3), the requirement that the "nature" of the payment, services and assistance be specified was intended to reflect the fact that different types of assistance may be provided under different agreements. Thus, agreements may include provisions for ongoing payments only, for services only, for services and payments, for nonrecurring expenses only, or for payments, services, and nonrecurring expenses. As we discuss in the next section (Section 1356.4l(a)), an agreement for nonrecurring expenses may be either a separate agreement or included in an agreement for ongoing adoption assistance.

Regarding the question about Title XIX eligibility, a child eligible under section 473(a)(2), for whom a Title IV-E adoption assistance agreement is in effect, is deemed to be a dependent child as defined in section 406 of the Act (AFDC) and, therefore, is eligible for medical assistance under Title XIX. Paragraph (b)(3), currently in effect, merely requires that the child's eligibility for Title XIX be stated in the adoption assistance agreement.

It is important to note that a child with special needs who is not eligible for ongoing adoption assistance and for whom the State makes payments for nonrecurring expenses only is not deemed to be a dependent child under section 406. Such a child, therefore, would not be eligible for Title XIX under the nonrecurring adoption expenses program. However, the child may be eligible to receive Title XIX benefits as a result of meeting eligibility criteria under one or more of the various categories of Title XIX.

Comment

One commenter, in response to paragraph (b)(4), suggested a change in the regulatory language, making clear that payments for adoption assistance can be made when parents of a child receiving adoption assistance payments move out of the country, e.g., to Canada.

Response

Title IV-E adoption assistance payments can be continued when a family moves out of the country. The law is clear that, once the child is eligible for adoption assistance payments, the parent can continue to receive

assistance unless one of the conditions cited in section 473 (a)(4) is present. These conditions are:

1. the child reaches the age of 18 or, at State option under certain circumstances, the age of 21;
2. the parent is no longer legally responsible for support of the child;
or
3. the State determines that the child is no longer receiving support from the parent. Therefore, it was unnecessary to amend the regulatory language.

Sections 1356.41(a) and (b)

Comment

Commenters to paragraph (a) asked whether the agreement for nonrecurring expenses could be a part of an adoption agreement for ongoing assistance and services or whether it must be a separate document. The issue of when the agreement must be signed was also raised by commenters.

Response

We have made no changes to paragraph (a) of the NPRM; however, a new paragraph (b) was added to section 1356.41. This paragraph clarifies that the agreement concerning nonrecurring expenses may be a separate agreement or it may be included in the adoption assistance agreement for ongoing payments or services.

We have also clarified that, like an adoption agreement for ongoing payments or services, it must be signed prior to the final decree of adoption with two exceptions:

4. Those cases in which the final decree of adoption was entered into on or after January 1, 1987 and within six months after the effective date of the final rule, or
5. Those cases in which a final decree was entered into before January 1, 1987 but nonrecurring adoption expenses were paid after this date. These exceptions are included to assure the eligibility of all cases which meet statutory and regulatory requirements for the period between the effective date of the statute, the effective date of these rules, and a six month period of time for State implementation. See also Section 1356.41(e)(3).

Section 1356.41(c)

Comment

One commenter proposed that the final rule be clear that States be permitted to assess the parents' financial circumstances, including utilization of assistance from other sources, in determining the amount of reimbursement for nonrecurring expenses of adoption.

Response

Paragraph (b) in the NPRM is now paragraph (c) in the final rule. We believe that Congress intended to encourage the adoption of special needs children by expanding the reimbursement of nonrecurring expenses to parents who adopt any children with special needs, not just those who meet the categorical eligibility requirements of Title IV-E foster care. Accordingly, section 473 clearly provides that eligibility for nonrecurring expenses is related to the child and not the parents. If parents have nonrecurring expenses that are allowable, the reimbursement of these expenses must not depend on the income and resources of the parents. However, the statute does direct that the State agency take into consideration the circumstances of adopting parents and the needs of the child being adopted.

We have interpreted this to mean that adopting parents cannot be reimbursed for out-of-pocket expenses that are otherwise paid, e.g., by employee benefits. Accordingly, paragraph (c) in the final rule reflects this interpretation.

Section 1356.41(d)

Comment

Paragraph (c) of the NPRM proposed that the child need not meet the categorical eligibility requirements in sections 473(a)(2) or 473(c)(2)(B). Two commenters challenged the exception in the NPRM to the requirement at section 473(c) of the Act. That exception would have eliminated the requirement that a reasonable, but unsuccessful, effort be made to place the child with appropriate adoptive parents without providing adoption assistance.

Response

Paragraph (c) in the NPRM is now paragraph (d) in the final rule. Upon reexamination of this issue, we have concluded that there is no statutory basis for excluding any requirement of section 473(c) in determining

whether a child is "a child with special needs." Therefore, the final rule makes clear that section 473(c) must be applied in its entirety. Specifically, paragraph (d) has been rewritten so that no exceptions to the requirements of section 473(c) are permitted in the State's determination of whether a child is "a child with special needs" as described in the Act. In light of the statutory criteria that require efforts to place without adoption assistance, it is evident that all parents adopting special needs children in the future will need to make known their plans for adoption to the State agency prior to the final decree so that the State agency can document such efforts before the final decree of adoption is issued. This will require close cooperation between the State agency and private nonprofit adoption agencies in relation to special needs children adopted through these agencies.

With respect to adoptions that become final between January 1, 1987 and six months following the effective date of these rules, the State agencies are encouraged to document the requirements of section 473 so that payments in eligible cases may be made.

Comment

Several commenters asked whether stepparent adoptions and independent adoptions could qualify for reimbursement of nonrecurring expenses.

Response

The intent of this program is to assist families in the adoption of children with special needs. One factor in determining whether the definition of "a child with special needs" is met is that the State has determined that the child cannot or should not be returned to the home of his parents (section 473(c)(1) of the Act). If the child is living with one parent, the child is not eligible. Thus, cases involving stepparent adoption are not eligible when there is a natural parent in the home. On the other hand, if the natural parent is not present (e.g., because of death, divorce or abandonment), then a case involving a stepparent may qualify if all other requirements are satisfied.

Independent adoptions, as long as they are not in violation of State or local laws, may also qualify if the child meets the statutory definition of "a child with special needs" and the State has entered into an agreement with the prospective adoptive parents prior to the final decree of adoption (with the exception as provided in section 1356.41(e)(3)).

Comment

One commenter asked that the final rule permit licensed private agencies to certify a child as "a child with special needs" based on State criteria.

Response

We have not adopted this suggestion. The State remains the responsible party for carrying out the requirements of the Act. However, the State may wish to enlist the assistance of private agencies in this regard. This is a State decision and does not require a Federal regulation though we encourage the State agencies to engage in cooperative efforts with private agencies.

Comment

There were a number of widely divergent comments on paragraph (d) of the NPRM which proposed to permit States the option of including children adopted from other countries in the nonrecurring expenses reimbursement program. State agencies unanimously protested the inclusion of intercountry adoptions, as did some private organizations. States were concerned that public pressure would effectively force them to include intercountry adoptions. The result, it was feared, would be a significant financial burden for States, particularly since the expenses associated with intercountry adoptions are usually much higher than those of domestic adoptions and generally reach (and often exceed) the maximum of \$2,000. Two States that opposed the option estimated annual costs of \$425,000 to \$750,000 for intercountry adoptions alone.

States and other agencies that objected maintained that already limited funds would be even more limited for children who are citizens of this country. Some commenters thought that the Immigration and Naturalization Act and Federal regulations prohibited the use of public funds for children brought into this country for the purpose of adoption.

On the other hand, all individuals and some private organizations supported the option. Several commenters proposed that it be a requirement, and not an option, that intercountry adoptions and domestic adoptions be treated equally. One commenter stated that adopting parents are citizens who pay taxes which fund this program of reimbursement; therefore, prospective adopting parents should have the choice of whether they adopt a child with special needs from this country or a foreign country.

Response

In our reexamination of the statute and legislative history, we found that there was no basis for excluding reimbursement for intercountry adoptions

based on the Immigration and Naturalization Act. We further concluded that exclusion of intercountry adoptions as a group cannot be a State option. That is, the statute provides no basis for excluding these cases if they otherwise satisfy the statutory requirements. However, we believe that many children brought to this country for the purpose of adoption may not meet the criteria in section 473(c) of the Act.

We want to emphasize that the State must make a determination of each child's eligibility and assure that the definition of "a child with special needs" as stated in section 473(c) of the Act is met. In addition to the fact that the State must determine that the child cannot or should not be returned to the home of the parent, the State must also determine that there exists, with respect to the child, a specific factor or condition because of which it is reasonable to conclude that the child cannot be placed with adoptive parents without providing assistance, and that a reasonable, but unsuccessful, effort has been made to place the child with appropriate adoptive parents without adoption assistance.

As no specific provision is needed for intercountry adoptions, we have deleted paragraph (d) of the NPRM.

Section 1356.41 (e)

Comment:

Paragraph (e) of the NPRM proposed that the State agency be required to notify all appropriate courts and all public and licensed private nonprofit adoption agencies of the availability of funds for expenses incurred by or on behalf of families adopting children with special needs. There were several comments on paragraph (e).

These comments indicated a need for greater clarity as to what was expected of the State agency in terms of notification to all affected parties. One commenter suggested that States notify all parties within 60 days of the publication of the final rule. Several commenters were concerned that prospective adoptive parents might not be aware of this benefit and wanted the final rule to reflect a process or procedure that would insure notification of affected parties, especially parents adopting through a private agency. Several commenters asked how the nonrecurring expenses incurred by parents for adoptions completed between January 1, 1987 and the effective date of the final rule were to be handled.

Response

We have added two new paragraphs to paragraph (e). New paragraph (e)(2) of the final rule clarifies the responsibility of the State agency on the

matter of notice to all affected parties. No timeframe for notification was set in the final rule, but we expect that State agencies will immediately develop a process and procedures to meet the requirements for notification as described in the final rule.

A new paragraph (e)(3) was added in the final rule to address those cases in which

6. the final decree of adoption was entered into on or after January 1, 1987 and within six months after the effective date of the final rule; or
7. the final decree was entered into before January 1, 1987 but nonrecurring adoption expenses were paid after this date. Under paragraph (e)(3), parents in such cases may enter into an agreement with the State and file a claim within two years after the effective date of this final rule. This provision is included in order to assure that the benefit formerly available as a deduction under the Internal Revenue Code will be available to eligible persons.

In cases where the adoption becomes final more than six months after the effective date of the rule, the agreement for reimbursement of nonrecurring expenses must be signed on or before the date when the adoption becomes final. Claims must be filed within two years of the date of the final decree of adoption.

Section 1356.41 (f)

Comment

More than half of the 34 commenters addressed the limitation of \$2,000 set on nonrecurring expenses in paragraph (f) of the NPRM. In general, all States, with one exception, thought the \$2,000 maximum was greater than a State would set as its limit. Some comments indicated confusion in the matter of whose expenses were being reimbursed under the nonrecurring expenses program. For example, some commenters stated that costs of the State agency were greater than \$2,000, apparently not realizing that the \$2,000 is limited to the out-of-pocket expenses of the adoptive parents. Several commenters raised the issue of how sibling groups were to be considered in terms of the \$2,000 maximum, i.e., as a unit or individually. Some commenters suggested indexing the \$2,000 figure, and several other commenters questioned Federal authority to set a limit.

Response

Paragraph (f) of the NPRM has been designated paragraph (f)(1) of the final rule, and new paragraphs (f)(2) and (f)(3) have been added. In regard to the issue of imposition of a Federal limit, legislative history reflects that the statutory amendment to Title IV-E was intended to replace the Internal Revenue Code deduction which imposed a limit of \$1,500. The NPRM proposed a similar limitation on Federal reimbursement in order to control the flow of Federal dollars. Without a clear indication from Congress that it intended this provision to be open-ended, we believe we are carrying out Congressional intent in setting a Federal limit on the amount to be reimbursed by Federal matching funds.

Establish, with acceptable accounting and other controls, a means for providing payment to reviewers for lodging, the appropriate per diem reimbursement, and airfare or other allowable mode of transportation, by means of a contract Domestic travel expenses incurred by the Contractor in direct performance, provided such travel is necessary for the performance of this contract and not exceeding:

Another commenter asked whether the cost of family counseling during the period before the final adoption decree is issued would be considered as an "other expense" allowable for reimbursement.

Response

Paragraph (h) of the NPRM is now paragraph (i) of the final rule. The language of this section has not been changed because the proposed language adequately described the reimbursable expenses. One-time costs associated with physical remodeling, renovation, and alterations of the adoptive parents' home or property are not expenses of the adoption process and thus, are not reimbursable. In regard to the matter of family counseling prior to the final decree of adoption, we consider such services to be separate from the expenses of adoption and therefore not in the category of "other expenses" of adoption. The costs of such services for the child with special needs are the responsibility of the placing agency.

Finally, in response to the suggestion that the reimbursement of "other expenses" be an option, the law provides for the reimbursement of "other expenses." It would contravene the statute if reimbursement of such expenses were optional.

Section 1356.41 (j)

Comment

Paragraph (i) in the NPRM, now paragraph (j) in the final rule, proposed to allow States until the close of the States' second general legislative sessions following publication of this final rule in order to comply with these new requirements. One commenter asked for clarification that the legislative session referred to in the proposed rule was the State session and not the Federal session.

Two commenters addressed the need to move quickly with implementation of this rule and not permit delays in the implementation based on State legislative sessions. Two commenters opposed the position that failure by the State agency to provide reimbursement for expenses beginning with January 1, 1987 would result in noncompliance by the State with section 473 of the Act. Several commenters also asked for clarification of the State's ability to claim FFP for reimbursement of expenditures for nonrecurring expenses back to January 1, 1987.

Response

A minor change in paragraph (j) of the final rule clarifies that the legislative session referred to in the rule is that of the State government. We did not reduce the time in which the States must make legislative changes in order to meet the Federal requirements. We believe the final rule provides a balanced approach to meeting the needs of the State agencies and adoptive parents. On the one hand, States are permitted a reasonable period of time after the publication of the final rule to amend State statutes in order to conform to the Federal law. On the other hand, claims from parents must be paid if they meet the requirements of the law and regulation. States have two years from the date of their expenditures to claim FFP. With respect to the issue of noncompliance, the rule simply clarifies what is already in the law.

Section 471(a)(1) requires a State to have a plan "...which provides...for adoption assistance in accordance with section 473" and section 473 requires payment of nonrecurring expenses. There were no comments on sections 1356.41(j) of the NPRM (new paragraph (k) of the final rule) and 1356.60, and they have not been changed.

8. 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 this rule 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 the family. 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 recordkeeping requirements in a proposed or final rule.

As required by section 3504(h) of the Paperwork Reduction Act of 1980, we will submit a copy of this final rule 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.

9. List of Subjects in 45 CFR

45 CFR Part 1356

Adoption Assistance, Administrative Costs, Nonrecurring Expenses of Adoption.

Catalog of Federal Domestic Assistance Program No. 13.659
Adoption Assistance

Dated:

Sydney Olson

Assistant Secretary for Human Development Services

Approved:

Otis R. Bowen, M.D. Secretary

For the reasons set forth in the preamble, we are amending 45 CFR 1356.40 and adding a new section 1356.41 as follows:

PART 1356 - REQUIREMENTS APPLICABLE TO TITLE IV-E

1. The authority statement for PART 1356 continues to read as follows:

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.

- a. Section 1356.40 is amended by revising paragraphs (b)(1), (b)(3) and (b)(4) as follows:
- b. The adoption assistance agreement for payments pursuant to section 473(a)(2) 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 copy of the signed agreement must be given to each party; and
2. 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
3. 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.

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).

4. A new section 1356.41 is added to read as follows:

1356.41 Nonrecurring Expenses of Adoption

- a. The amount of the payment made for nonrecurring expenses of adoption shall be determined through agreement between the adopting parent(s) and the State agency administering the program. The agreement must indicate the nature and amount of the nonrecurring expenses to be paid.
 - b. The agreement for nonrecurring expenses may be a separate document or a part of an agreement for either State or Federal adoption assistance payments or services. The agreement for nonrecurring expenses must be signed prior to the final decree of adoption, with two exceptions:
 1. Cases in which the final decree of adoption was entered into on or after January 1, 1987 and within six months after the effective date of the final rule; or
 2. Cases in which a final decree was entered into before January 1, 1987 but nonrecurring adoption expenses were paid after January 1, 1987.
5. There must be no income eligibility requirement (means test) for adopting parents in determining whether payments for nonrecurring expenses of adoption shall be made. However, parents cannot be reimbursed for out-of-pocket expenses for which they have otherwise been reimbursed.

6. For purposes of payment of nonrecurring expenses of adoption, the State must determine that the child is a "child with special needs" as defined in section 473(c) of the Act, and that the child has been placed for adoption in accordance with applicable State and local laws; the child need not meet the categorical eligibility requirements at section 473(a)(2).
7. 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. This information should routinely be made available to all persons who inquire about adoption services after the publication date of this final rule.

(e)(2) The State agency must send a notice to all public and private nonprofit adoption agencies directing them to notify all their clients who adopted a special needs child between January 1, 1986 and six months following the effective date of this rule of the availability of reimbursement for nonrecurring expenses paid after January 1, 1987.

(e)(3) For adoptions in which a final decree is entered between January 1, 1987 and six months after the effective date of this rule, or where a final decree was entered before January 1, 1987 but nonrecurring adoption expenses were paid after January 1, 1987, individuals who seek reimbursement must enter into an agreement with the State agency and file a claim with the State agency within two years of the effective date of this rule. For adoptions in which a final decree is entered more than six months after the effective date of this rule, the agreement must be signed at the time of or prior to the final decree of adoption. In such cases, claims must be filed with the State agency within two years of the date of the final decree of adoption.

10. Funds expended by the State under an adoption assistance agreement, 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, for State expenditures up to \$2,000, for any adoptive placement.
 2. States may set a reasonable lower maximum which must be based on reasonable charges, consistent with State and

local practices, for special needs adoptions within the State. The basis for setting a lower maximum must be documented and available for public inspection.

3. In cases where siblings are placed and adopted, either separately or as a unit, each child is treated as an individual with separate reimbursement for nonrecurring expenses up to the maximum amount allowable for each child.
11. 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.
12. When the adoption of the child involves interstate placement, the State that enters into an adoption assistance agreement under section 473(a)(1)(B)(ii) of the Act or under a State subsidy program will be responsible for paying the nonrecurring adoption expenses of the child. In cases where there is interstate placement but no agreement for other Federal or State adoption assistance, the State in which the final adoption decree is issued will be responsible for reimbursement of nonrecurring expenses if the child meets the requirements of section 473(c).
13. 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 or other funds. "Other expenses which are directly related to the legal adoption of a child with special needs" means the costs of the adoption incurred by or on behalf of the parents and for which parents carry the ultimate liability for payment. Such costs may include the adoption study, including health and psychological examination, 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 placement or adoption process.
14. Where State statutes must be amended in order to reimburse parents for nonrecurring expenses in the adoption of eligible children, legislation must be enacted before the close of the second general session following publication of the final rule and must apply retroactively to January 1, 1987. Failure to honor all eligible claims will be considered non-compliance by the State with Title IV-E of the Act.
15. 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.

16. Section 1356.60 is amended by deleting paragraph (c)(4) and redesignating paragraph (c)(5) as (c)(4).
17. Provide appropriate support, e.g. reproduct

EXHIBIT A

SECTION E - INSPECTION AND ACCEPTANCE

- A. INSPECTION - Inspection of the items called for by the contract shall be performed by the designated Project Officer.
- B. ACCEPT