

Adoption Subsidy

Last session the General Assembly enacted Senate Bill 07-33. The legislative declaration includes the following:

SECTION 1. Legislative declaration.

- (1) The general assembly hereby finds and declares:
 - (a) That although the state of Colorado encourages the adoption of children in foster care, a family that adopts or seeks to adopt a foster child with challenging behaviors and emotional problems is frequently provided inadequate support to address the long-term needs of the child;
 - (b) There will be a decrease in the number of adoptions of children with challenging behaviors and emotional problems and an increase in the number of failed adoptions of these children unless adoptive families are provided with adequate support to meet the unique needs of these children;
 - (c) Adopted children are disproportionately represented in the population of children diagnosed with behavioral or mental disorders. More often than not, these behaviors are related to a history of maltreatment and prolonged stays in foster care;
 - (d) It is in the state's best interest to provide a continuum of services to adoptive families to meet the needs of adopted children with serious challenging behaviors, emotional problems, or mental illness. These services should be provided without requiring the adoptive family to relinquish custody of the adopted child to the state or county and without charging the adoptive family for support payments in excess of the child's monthly adoption subsidy payment for the cost of services.

This legislation resulted in an amendment to C.R.S. 19-1-115 that in summary states that if an adoptive family has obtained an adoption subsidy and if there is a risk of or a disrupted placement thereafter that there are valuable services available to the family at no net cost to them. In view of this recognition of the needs of children who have been in foster care prior to being adopted it is important for their advocates, including guardians

ad litem, to ensure that adoption subsidies are made available to qualifying families. This despite the fact that the county departments of human services have the obligation to make perspective adoptive couples aware of the availability of adoption subsidies and to guide them through the process. In practice, the counties are becoming more concerned with their costs of this program thereby placing them in a conflict of interest position. This often means that if a foster child's guardian ad litem does not advocate for an adequate subsidy for an eligible child it will not be made available to for the child.

Federal Adoption Assistance Program

Congress approved the Adoption Assistance and Child Welfare Act of 1980 creating the first Federal Adoption Assistance Program under Title IV-E of Section 473 of the Social Security Act. 42 U.S.C. § 673 (*attached*). This law has been amended several times. The law requires that in order for the states to receive partial reimbursement [50%] of adoption assistance payments that they are required to have a plan approved by the federal government. Colorado has such a plan.

In summary, in order to be eligible for adoption assistance there must be a finding of deprivation and special needs that act as a barrier to the foster child's adoption. CFR § 1356.40, 1356.41 (*attached*). This makes how the child was removed from his home and the financial status of the birth parents important. Specific findings must be made by the court about the need for an out of home placement. In most cases to qualify for a subsidy the child must be placed in foster care through the county department of human services. Under certain limited circumstances an adoption subsidy is permitted where a private non-profit agency instead of DHS assists the birth parent(s) in a voluntary relinquishment of a special needs child. Additionally, if the child qualifies for SSI he/she is eligible for an adoption subsidy as well.

The adoption assistance available may include the following: Medicaid, reimbursement of nonrecurring expenses, monthly adoption assistance payments and the reimbursement of the out of pocket expenses incurred by the adoptive family in finalizing an adoption of the child.

The law mandates that the amount of the monthly adoption assistance payment shall be determined by the circumstances of the adopting parents and the needs of the child being adopted. However, a means test is not allowed. The amount of the monthly adoption assistance payment may not exceed the maximum foster care rate for the County with responsibility for the subsidy.

There is a requirement that DHS attempt to make a placement with an adoptive family who would be willing to take the child without a subsidy. However, such efforts are generally unnecessary when a child is placed with a relative or there are the existence of significant emotional ties with perspective adoptive parents.

The Federal Government issued a policy announcement on January 23, 2001 (*attached*) that addresses and summarizes the program. This is an excellent resource to the understanding of the program and process.

Colorado Adoption Assistance Program

The Colorado Adoption Subsidy Statutes appear at C.R.S. 26-7-101, *et seq.* (*attached*). The Interstate Compact on adoption assistance appears at C.R.S. 24-60-2401, *et seq.* (*attached*). The applicable regulations can be found at 12 C.C.R. 2509-7.203, *et seq.* & 7.306, *et. seq.*(*attached*).

When the prospective adopting parent(s) and DHS are unable to agree on either eligibility or the terms of a subsidy there is a required administrative process. The adoptive parent(s) request a Fair Hearing before the Division of Administrative Courts. C.C.R. 3.850, *et seq.* (*attached*). After the hearing occurs an Initial Decision is rendered. Thereafter, exceptions to the Initial Decision may be filed with the Colorado Department of Human Service's Board of Appeals before it renders a Final Decision. DHS is not permitted to appeal the Final Decision but if the adoptive parent(s) are dissatisfied with the result they may challenge the Final Administrative Decision by filing suit in the Denver District Court.

Colorado law permits children who are ineligible for a federal Title IV-E subsidy to qualify for subsidy nonetheless. Children in the care of a licensed placement agency are statutorily ineligible for these subsidies [C.R.S. 26-7-103(f)] whereas the applicable regulations also exclude relatives. CCR 7-203.2, *et seq.*

Reimbursement of nonrecurring adoption expenses are authorized by both Federal and State law. These benefits are available to a special needs child even when the child is not otherwise Title IV-E eligible. The adoption expenses include legal fees, adoption fees and other expenses related to the adoption of the child. Some counties have restricted the legal fees to solely the services provided in petitioning and finalizing the adoption. Generally, the ALJs who have conducted fair hearings have approved legal fees incurred in connection with termination proceedings and negotiating an adoption subsidy as well. Federal law allows the states to reimburse up to \$2,000.00 per child of the nonrecurring adoption expenses but Colorado has set a limit of \$800.00 per child for these expenses.

Disputed Subsidies

When the adoptive family and DHS are unable to agree on either eligibility or the terms for subsidy there is a required administrative process. The adoptive family request a Fair Hearing before the Division of Administrative Courts. C.C.R. 3.850, *et seq.* After the hearing occurs an Initial Decision is rendered. Thereafter, Exceptions may be filed. The Colorado Department of Human Service's Board of Appeals renders a Final Decision. DHS is not able to appeal from the Final Decision but if the adoptive family is dissatisfied with the result they may challenge the Final Agency Decision by filing suit in the Denver District Court.

In some instances state law and regulations internally conflict and/or conflict with the federal requirements. The ALJs conducting the administrative proceedings seem more likely to rely exclusively on the Colorado regulations in such instances whereas the courts tend to begin their analysis relying on the federal mandates. This tends to make a cogent understanding of the inter relationship of the laws and regulations less obtuse.

Related Matters

It is very difficult to qualify for a post adoption subsidy. Consequently, in most cases, the subsidy must be negotiated and signed prior to the time the adoption is finalized. When the parties have entered into an adoption assistance agreement it must be reviewed and may be modified from time to time based on the needs of the child. However, the benefits should not be reduced without the consent of the adoptive family.

Beginning in 2003, families adopting a foster child with special needs were able to claim a Federal Adoption Tax Credit without needing to document the expenses incurred. The applicable maximum available tax credit currently exceeds \$11,000.00. Adoption assistance benefits are not taxable income to the adoptive parents.

In a case of an interstate adoption the state agency that has responsibility for placement and care of the child is responsible for entering into the adoption assistance agreement even if the child is placed in an adoptive home in another state. In cases of an otherwise eligible child where a state agency does not have responsibility for placement and care it is the adoptive parents' state of residence that has such responsibility.

There is very little case law construing the adoption assistance laws. *In re C.B.*, 786 A.2d 176 (PA. 2001) reconciled Federal and State law to determine that a subsidy should be made available to an adoptive family of a former foster child with special needs who was privately adopted. Other cases of note are: *Batiste v. Arkansas Dept. of Human Services*, WL 488769 (AK 2005); *Hogan v. Dep't of Soc. and Rehab. Servs.*, 727 A.2d 1242 (Vt. 1998); *Ferdinand v. Dep't for Children and Their Families*, 768 F. Supp. 401 (D.R.I. 1991); *In re Klaus*, 310 N.W.2d 394 (Mich. App. 1981); *Ark. Dep't of Human Services v. Welborn*, 987 S.W.2d 768 (Ark. App. 1999); *Laws v. State of Oklahoma*, 81 P.3d 78 (Okla. App. 2003)