

# Advocating for Adoption Subsidies for Opioid Exposed Children

Seth A. Grob, Esq.  
Grob & Eirich LLC  
12596 W. Bayaud Ave., Suite 390  
Lakewood, CO 80228  
(303) 679-8266  
[Seth@GrobEirich.com](mailto:Seth@GrobEirich.com)  
[www.GrobEirich.com](http://www.GrobEirich.com)

## I. Children Exposed in Utero to Opioids May Likely Be at Risk

- i. Neonatal Abstinence Syndrome;
- ii. Attention Deficits;
- iii. Behavioral Regulation Problems;
- iv. Developmental Issues;
- v. Sensory Issues;
- vi. Fine Motor Skill Deficiencies; and
- vii. Substance Abuse.

See Nygaard, Cognitive function of youths born to mothers with opioid and polysubstance abuse problems during pregnancy, *Child Neuropsychology*, Volume 23 (2017) – Issue 2.

(<https://www.tandfonline.com/doi/full/10.1080/09297049.2015.1092509>)

## II. Families Need Adoption Assistance Benefits to Provide for the Needs of These Special Needs Children and to Facilitate Lasting Secure Adoptive Homes

- i. Research from a variety of organizations has noted the importance of adoption assistance benefits:
  1. Support Matters: Lessons from the Field on Services for Adoptive, Foster, and Kinship Care Families, AdoptUSKids (March 2015) (a comprehensive 298-page review of the importance of subsidies);
  2. The Vital Role of Adoption Subsidies: Increasing Permanency and Improving Children’s Lives (While Saving States Money), Evan B. Donaldson Adoption Institute, North American Council on Adoptable Children, and Adoption Support and Preservation (September 2012) (“Another federal program assessment determined that subsidies increase permanent placement of foster care children, leading to both improved child well-being and reduced federal and State spending [and are] a critical component of the continuum of care provided through the State-administered child welfare system.”);
  3. The Value of Adoption Subsidies: Helping Children Find Permanent Homes, North American Council on Adoptable Children (May 2008) (“Studies have consistently found that the availability of adoption subsidies is essential to many families’ ability to adopt children from foster care. ... In a more recent survey of adoptive and prospective

adoptive parents, ... 58 percent said that they could not adopt without a subsidy.”).

### III. Most Children Exposed to Opioids Will Be Eligible for Adoption Assistance<sup>1</sup>

- i. Federal law under the Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272 (1980), requires that an eligible child for adoption assistance must have special needs or conditions which make it difficult to place the child for adoption. While the Act does not specifically define special needs, it provides a list of examples. These include membership in a minority or sibling group, age, medical condition or physical, mental or emotional handicap. 42 U.S.C. § 673(c)(2)(A); Child Welfare Policy Manual § 8.2B.11. States are given considerable flexibility to determine what constitutes special needs. Given, however, the states’ interests in receiving reimbursement for part of the subsidy outlay and their interest in moving children from foster care into adoption, most states have adopted a liberal approach to defining the term.
  1. Some states including Colorado, for example, include “high risk infants (such as HIV positive, *drug-exposed*, or alcohol-exposed in utero” as special needs. 7 Colo. Code Regs. 7.3060.4 (emphasis added).

### IV. Multiple Benefits Are Available Under the Adoption Assistance Program

- i. Monthly Cash Benefits: Monthly maintenance assistance is designed to provide financial support to families who adopt difficult-to-place children. The subsidy is intended to cover the child’s ordinary and special needs expenses, including anticipated needs, projected over an extended period of time and there are no limitations on how adoptive parents make expenditures once they receive such assistance. Child Welfare Policy Manual §§ 8.2D.1 and 8.2D.4; Policy Manual §§ 12 and 12.1. The monthly cash benefit can be up to 100% of the foster care board rate (or if a child is not in foster care, the rate that the child would otherwise qualify), but many states, have lower rates. 42 U.S.C. § 673 (a)(3); Child Welfare Policy Manual § 8.2D.4. See generally, Myers v. Dept. of Human Services, 141 A.2d 608 (Common. Ct. of PA 2016 (subsidy cannot exceed the maximum foster care rate paid to child while in foster care). The benefit must be negotiated with the adoptive parents. 42 U.S.C. § 673(a)(3). 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. Child Welfare Policy Manual § 8.2A.2; Ninemire v. Kansas Dept. of Social and Rehab. Services, 162 P.3d 22 (Ka. 2007) (where adoptive parents proposed budgets did not show any financial deficiencies to pay

---

<sup>1</sup> A review of all of the eligibility requirements for adoption assistance is beyond the scope of this presentation. For a more complete overview of eligibility criteria, See generally, Seth Grob, Adoption Subsidies: Advocating for Children with Special Needs, 7 UC Davis Journal of Juvenile Law and Policy, 83 (2003) and Elizabeth Oppenheim, Adoption Assistance for Children with Special Needs in Adoption Law and Practice, Joan Hollinger (2016).

for the ordinary and special needs of the child, a \$0 monthly subsidy was appropriate).

- ii. Social Services: States vary as to whether post-adoption services are available in addition to the monthly maintenance subsidy. In Colorado, for example, the following are classified as reimbursable case services if they relate directly to a child's special needs: orthodontia; eye glasses or contacts; prescribed medications; speech, occupational and physical therapies if not available through other community and family resources; special medical equipment; psychological exams and outpatient therapy if not provided by Medicaid; and respite care. 7 Colo. Code Regs. § 7.306.52.
- iii. Medicaid: Medicaid is a vitally important health insurance coverage for many adoptive families. In some cases, it is the only health insurance available to the adopted child. Medicaid is automatically available for children who qualify for a subsidy. 42 U.S.C. § 673(b); Child Welfare Policy Manual § 8.2B.8; Policy Manual § 12.0.
- iv. Nonrecurring Adoption Expenses: This benefit, which may be up to \$2,000 per child, covers "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 and which are not incurred in violation of State or Federal law." 42 U.S.C. § 673(a)(6); 45 C.F.R. § 1356.41. Typical costs that may be covered by the reimbursement include legal fees (associated with both the adoption subsidy negotiation process and adoption finalization), court costs, travel, homestudies, physical examinations, and supervision of placement.
- v. Adoption Tax Credit: For special needs children, families who make under \$207,580 will be able to take a flat tax credit for 2018 in the amount of \$13,840 per child. The credit will begin to phase out for taxpayers with modified adjusted gross incomes (MAGI) above \$207,580 and will be completely phased out for taxpayers with MAGI's of \$247,580 and above.
- vi. Once a Subsidy is Negotiated and Agreed Upon, It Can't Be Reduced Without Agreement of the Adoptive Parents: State cannot reduce the subsidy without the agreement of the adoptive parents. Child Welfare Policy Manual § 8.2; See generally, C.H. v. Payne, 683 F. Supp. 2d 865 (District Court, S.D. Indiana) (2010) (ten percent across the board cut and readjustment in adoption assistance payments without consulting individual adoptive parents or considering children's special needs was illegal). The subsidy benefit is supposed to be a life-long benefit for the child typically until the child reaches age 18.
- vii. State Cannot Adopt a General Policy Terminating the Subsidy Prior to the Child Reaching the Age of 18 (sometimes 21 depending on the state). Child Welfare Policy Manual § 8.2B.9. A child receiving a subsidy remains eligible for the subsidy through age eighteen unless the parents are no longer legally responsible for the support of the child or if the child is no longer receiving any support from such parents. Thus, where a child has been emancipated, has married or joined the military, is not receiving any form of financial assistance from the parents, or where the adoptive parents have died or relinquished parental rights and the child is not subsequently adopted, the subsidy benefits would cease. 42 U.S.C. §

673(a)(4)(B). See, e.g., In re Klaus, 310 N.W.2d 394, 398 (Mich. Ct. App.1981) (holding that the state cannot terminate subsidy based upon parents' failure to timely file annual report where failure was not willful).

## **V. Interstate Placements**

- i. Where Child is in State Care: If the State agency has responsibility for placement and care of a child, that State is responsible for determining eligibility, 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. Legal and Related References: Social Security Act - section 473; Child Welfare Policy Manual 8.2A.1.
- ii. Where Child is Placed with a Private Adoption Agency: 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 eligibility requirements, entering into the adoption assistance agreement and paying the subsidy, consistent with the way public benefits are paid in other programs. Generally, the state responsible for paying the subsidy will look at its own rate structure. Legal and Related References: Social Security Act - section 473; Child Welfare Policy Manual 8.2A.1.