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Hearing Date: 5/21/2019

Today's Date: 6/5/2019

Agency: ODJFS

Rule Number(s): 5101:2-49-05

If no comments at the hearing, please check the box.

List organizations or individuals giving or submitting testimony before, during or after the public hearing and indicate the rule number(s) in question.

1. MARY WACHTEL
2. TIM O'HANLON
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Consolidated Summary of Comments Received

Please review all comments received and complete a consolidated summary paragraph of the comments and indicate the rule number(s).

May 21, 2019

Ohio Department of Job and Family Services

Public Hearing Regarding OAC Rule 5101:2-49-05, "Initial determination of the Title IV-E adoption assistance (AA) monthly payment amount"

Public Children Services Association of Ohio Written Testimony

Mary Wachtel, Director of Public Policy

PCSAO is providing this written testimony regarding Ohio Administrative Code rule 5101:2-49-05, "Initial determination of the Title IV-E adoption assistance (AA) monthly payment amount." We know that ODJFS received numerous public comments on the proposed rule revisions and appreciate that ODJFS staff worked to clarify and respond to those concerns, within federal guidelines.

Section (D) includes the following provision, ".....The monthly AA payment should combine with the adoptive parent(s) resources and circumstances as provisionally required by the adoptive homestudy and shall provide for the special and **foreseeable future needs** of the child."

We believe the term "**foreseeable future needs**" of the child needs to be clarified. As written, it could be interpreted as needs that are not yet present but may emerge. Addressing needs that emerge after the initial determination of the AA monthly payment amount is accomplished via the subsidy renegotiation process, available at any time the child's needs change (5101:2-49-12). Given this, we request that ODJFS either delete "foreseeable future needs" or clarify that the AA is to be based upon special needs of the child already present .

Thank you for your consideration.

Mary D. Wachtel, Director of Public Policy

Written Testimony by Timothy P. O'Hanlon on Proposed OAC Rule 5101:2-49-05 For Public Hearing on May 21, 2019

Recommendation: Use the actual language of the *Child Welfare Policy Manual*

In the draft rule on possible suspension of adoption assistance payments, ODJFS referred to an exception published in the federal *Child Welfare Policy Manual* to justify the proposed rule change. Why not use the language of the *Child Welfare Policy Manual* in Section 8.2D.4,

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pertaining to negotiation of adoption assistance payments? A number of other states do. Ohio uses the Child Welfare Policy Manual as an authoritative source for amending rules, but has not informed PCSAS or the Bureau of State Hearings. This omission has led to constant conflict and compliance issues. Why use alternative language in state rules that is not fully consistent with the language of the *Child Welfare Policy Manual*?

The language in the *Child Welfare Policy Manual* has always been clearer and more detailed than the language in the OAC. By incorporating the language in the *Child Welfare Policy Manual*, Ohio could be sure it was in compliance with federal law and avoid the conflict over interpretation of negotiation criteria between county agencies and adoptive parents, in state administrative hearings in which hearing officers are not trained to consider the *Child Welfare Policy Manual* and in mediations, where the criteria in the *Child Welfare Policy Manual* do not play a significant role in reaching an agreement.

For example, Insert

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

Add new F.

F. During the negotiation of an adoption assistance agreement, it is important to keep in mind that the circumstances of the adopting parents and the needs of the child must be considered together. The overall ability of a singular family to incorporate an individual child into the household is the objective. Families with the same incomes or in similar circumstances will not necessarily agree

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on identical types or amounts of assistance. The uniqueness of each child/family situation may result in different amounts of payment. Consistency is not the goal. Agreements that are not negotiated to the specific needs of the adoptive child and the circumstances of the family, however, are not permissible.

Comment:

County agencies frequently attempt to calculate adoption assistance payments based upon an itemized list of expenses and ignore family circumstances, such as a parent leaving a well-paying job to provide daily care for a child with intensive needs or a sibling group. The above language makes it clear that the aim of the negotiations is to arrive at a supplemental payment amount that when combined with the parents' resources will enable them to provide a stable, permanent family in which the full range of the child's needs are met.

5101:2-49-05 (F)

Comment: Drop the MAASM

The monthly adoption assistance statewide maximum (MAASM) serves no purpose. The maximum amount of adoption assistance is linked to "FCM amount that was paid or would have been paid if the child was placed in a foster home." The MAASM has nothing to do with the child's needs and family circumstances. It was derived from statewide average of monthly family foster care payments across Ohio at the time. I am aware of PCSAS refusing to negotiate adoption assistance beyond the **MAASM** regardless of the child's needs, level of care, family circumstances and foster care payments. This has led to agency proposals to reduce adoption assistance payments by \$1,000 per month below the child's foster care rate. This practice adversely affects children with extraordinary levels of care.

Comment: Drop the waiver provision. It leads to noncompliance with federal law.

The language restricting a request for a waiver of the MAASM to PCSAs allows the PCSA to refuse to negotiate beyond the MAASM regardless of the child's needs, level of care, family circumstances and foster care payments. Such a policy or practice is clearly out of compliance with the provisions in federal law to negotiate payments based on the

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child's needs and the parents' family circumstances up to the "FCM amount that was paid or would have been paid if the child was placed in a foster home."

Even when parents win hearings on the basis that the agency in attempting to impose the MAASM has failed to engage in a consideration of the child's needs and family circumstances, the agency simply tells the parents that state cannot make the PCSA pay a certain amount of assistance, regardless of what it has failed to consider.

Recommendation: Use the actual language of the *Child Welfare Policy Manual*

In the draft rule on possible suspension of adoption assistance payments. ODJFS referred to an exception published in the federal *Child Welfare Policy Manual* to justify the proposed rule change. Why not use the language of the *Child Welfare Policy Manual* in Section 8.20.4, pertaining to negotiation of adoption assistance payments? A number of other states do. Ohio uses the *Child Welfare Policy Manual* as an authoritative source for amending rules, but has not informed PCSAS or the Bureau of State Hearings. This omission has led to constant conflict and compliance issues. Why use alternative language in state rules that is not fully consistent with the language of the *Child Welfare Policy Manual*?

The language in the *Child Welfare Policy Manual* has always been clearer and more detailed than the language in the OAC. By incorporating the language in the *Child Welfare Policy Manual*, Ohio could be sure it was in compliance with federal law and avoid the conflict over interpretation of negotiation criteria between county agencies and adoptive parents, in state administrative hearings in which hearing officers are not trained to consider the *Child Welfare Policy Manual* and in mediations, where the criteria in the *Child Welfare Policy Manual* do not play a significant role in reaching an agreement.

For example, Insert

D. Agreements that are not negotiated to the specific needs of the adoptive child and the circumstances of the family, however, are not permissible. Title IV-E adoption assistance is not based upon a standard schedule of itemized needs and countable income. Instead, the amount of the adoption assistance payment is determined through the discussion and negotiation process between the adoptive parents and a representative of the PCSA agency based upon the needs of the child and the circumstances of the family. The payment that is agreed upon should combine with

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the parents' resources to cover the ordinary and special needs of the child projected over an extended period of time and should cover anticipated needs, e.g., child care. Anticipation and discussion of these needs are part of the negotiation of the amount of the adoption assistance payment.

Source: Child Welfare Policy Manual 8.2D.4 TITLE IV-E. Adoption Assistance Program, Payments, Rates

AddnewE.

E. During the negotiation of an adoption assistance agreement, it is important to keep in mind that the circumstances of the adopting parents and the needs of the child must be considered together. The overall ability of a singular family to incorporate an individual child into the household is the objective. Families with the same incomes or in similar circumstances will not necessarily agree on identical types or amounts of assistance. The uniqueness of each child/family situation may result in different amounts of payment. Consistency is not the goal. Agreements that are not negotiated to the specific needs of the adoptive child and the circumstances of the family, however, are not permissible.

Source: Child Welfare Policy Manual 8.2D.4 TITLE IV-E. Adoption Assistance Program, Payments, Rates

Comment:

County agencies frequently attempt to calculate adoption assistance payments based upon an itemized list of expenses and ignore family circumstances, such as a parent leaving a well-paying job to provide daily care for a child with intensive needs or a sibling group. The above language The above language makes it clear that the aim of the negotiations is to arrive a supplemental payment amount that when combined with the parents' resources will enable them to provide a stable, permanent family in which the full range of the child's needs are met.

Use of the language in the Child Welfare Policy Manual in the pending settlement of the class action lawsuit against Warren County

See Agreement Substantive Criteria at <https://www.gbfirm.com/adoption-assistance-class-action-settlement/>

The pending settlement in a class action lawsuit against Warren County Children Services has involved policies, procedures and criteria for negotiation of adoption assistance agreements. As part of a settlement agreement, the parties agreed to the criteria for negotiating adoption assistance payments based on the Child Welfare Policy Manual, which contains "official policy issuances" the Ohio Department of Job and Family Services agrees to comply with in its IV-E State Plan as a condition for the receipt of federal funds. As noted in previous testimony, 5101:2-49-05 should incorporate the actual language of the Child Welfare Policy Manual to ensure compliance and avoid frequent confusion and conflict that occurs in counties across the state.

The settlement criteria for negotiating adoption assistance agreed to by both parties refers to family circumstances as follows:

The "circumstances of the family" generally refer to the family's overall capacity to meet the immediate and future needs (including educational needs) of the child. Families with the same incomes or in similar circumstances may not necessarily agree on or receive identical types or amounts of assistance, however the amount of assistance can take into account lost wages or any other challenges or barriers to expanding the family

by adopting the child. The uniqueness of each child/family situation may result in different amounts of payments designed to subsidize different types of expenses on a case by case basis. Consistency of results is not the goal.

Settlement Agreement in Class Action Lawsuit Against Warren County

Criteria for Negotiating Adoption Assistance Payments

The Class Action lawsuit against Warren County Children Services has involved policies, procedures and criteria for negotiation of adoption assistance agreements. As part of a settlement agreement, the parties agreed to the criteria for negotiating adoption assistance payments listed below.

The criteria are based on those set for in the federal Child Welfare Policy Manual, which contains "official policy issuances" the Ohio Department of Job and Family Services agrees to comply with in its IV-E State Plan as a condition for the receipt of federal funds. As noted in previous testimony, 5101:2-49-05 should incorporate the actual language of the Child Welfare Policy Manual to ensure compliance and avoid frequent confusion and conflict that occurs in counties across the state.

The rule, policies and practices should also reflect the criteria in the settlement, particularly, if as expected, the court approves the settlement agreement. The settlement agreement itself does not extend to other counties in the state, but if the court approves the criteria as consistent with federal law, other counties whose policies and practices are inconsistent with the settlement criteria would appear to be subject to challenge.

Criteria for Negotiating Settlement Agreement in Class Action Lawsuit Against Warren County

The Plaintiffs and Warren County Children Services have reached a settlement agreement that must be approved by the federal court. See the terms of the settlement at

<http://www.gbfirm.com/adoption-assistance-class-action-elllement/>

Agreed substantive criteria - 3.27.19

1. Special needs criteria are outlined in 42 U.S.C. 673 (c) and OAC 5101:2-49-03, or any successor rule.

2. If a child has been determined to be eligible for Title IV-E adoption assistance, the County must enter into an adoption assistance agreement with the adopting/adoptive parents. An appropriate adoption assistance agreement contains a provision for Medicaid as well as monthly adoption assistance of \$0 or more, but cannot exceed the amount of foster care maintenance the child would have received if he or she had been in a foster family home, unless a waiver is sought pursuant to OAC 5101:2-49-03(E), if it is in the best interest of the child to seek a higher amount.

3. The payment that is agreed upon should, when combined with the parents' resources, be based upon an individualized assessment of the child's needs and the family's circumstances.

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a. The "child's needs" can include both ordinary and special needs of the child, projected over an extended period of time, including anticipated needs.

i. Needs that could be considered include: child care, educational expenses, medical or psychological care not covered by Medicaid, mileage to and from medical and psychological care, developmentally and/or therapeutically appropriate activities, and any other particular need of that child. This list does not guarantee that subsidizing these items is appropriate in every case.

b. The "circumstances of the family" generally refer to the family's overall capacity to meet the immediate and future needs (including educational needs) of the child. Families with the same incomes or in similar circumstances may not necessarily agree on or receive identical types or amounts of assistance, however the amount of assistance can take into account lost wages or any other challenges or barriers to expanding the family by adopting the child. The uniqueness of each child/family situation may result in different amounts of payments designed to subsidize different types of expenses on a case by case basis. Consistency of results is not the goal.

4. The parents' resources are a factor that can be considered in evaluating the circumstances of the family, however, a means test may not be used to deny families adoption assistance.

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5. Once a child is considered to be eligible, the family adopting that child can be denied adoption assistance where:

i. A family can be denied assistance under OAC 5101:2-49-03(8) where the only special needs factor is that the child has been determined to be at substantial risk, with no manifestation, of a special needs factor or condition.

ii. A determination of \$0 in adoption assistance is also appropriate when the family adopting the child agrees to accept a subsidy of \$0 after being fully informed of their rights under 42 U.S.C. 673, including that they are entitled to request negotiation of a monthly assistance amount based on the child's needs and family's circumstances.

iii. Warren County, pursuant to OAC 5101:2-49-03(A)(2)(e), shall have the child evaluated as to whether severe separation and loss would occur if the child were placed in another setting due to the significant ties with the prospective adoptive parent(s) if no other criteria is met that qualifies them for a monthly adoption assistance amount.

4. There is no list of acceptable or unacceptable expenditures.

6. Once an amount is agreed upon, parents can spend the subsidy in any way they see fit to incorporate the child into their lives and an accounting shall not be required. Likewise, adoptive parents have a responsibility to keep the agency timely informed of circumstances which would make them ineligible

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for Title IV-E adoption assistance payments or eligible for assistance payments in a different amount.

7. Amendment of an adoption assistance agreement is appropriate pursuant to OAC 5101:2-49-12.

a. A change in a family's circumstances could be the result of losing one's job or other loss of income, significant illness in the family, or other change that impacts the family's ability to provide for the adopted child.

b. A change in the adopted child's needs could be the result of a new diagnosis or when the adoptive child is in need of new services or care.

c. Renegotiation can be requested by families at any time.

7. Nothing in this sheet of substantive criteria shall be construed in a manner that violates current or future federal or state statutes or rules concerning adoptions subsidies. Plaintiffs reserve the right to independently challenge any OAC rules that they believe in good faith violate federal law

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Incorporated Comments into Rule(s)

Indicate how comments received during the hearing process were incorporated into the rule(s).
If no comments were incorporated, explain why not.

Response to May 21, 2019 Public Hearing Testimony on Title IV-E Adoption Assistance Program OAC 5101:2-49-05 entitled "Initial determination of the Title IV-E adoption assistance (AA) monthly payment amount." from:

Mary D. Wachtel, PCSAO Director of Public Policy Exhibit G

Thank you for your testimony for the public hearing on Ohio Administrative Code rule 5101:2- 49-05 entitled "Initial determination of the Title IV-E adoption assistance (AA) monthly payment amount."

You expressed concern regarding language in paragraph (D):

"No income eligibility test shall be used when determining the monthly AA payment. The monthly AA payment amount combine with the adoptive parent(s) resources and circumstances as provisionally required by the adoptive homestudy and shall provide for the special and foreseeable future needs of the child. When changes occur to the special needs and circumstances of the child and family, those needs shall be addressed or reviewed pursuant to rule 5101:2-49-12 of the Administrative Code. The child's supplemental security income (SSI) benefits shall be considered along with the adoptive parent(s) resources in the negotiation and determination of the AA payment amount. The special needs of the child shall be based upon rule 5101:2-49-03 of the Administrative Code."

This rule has been reviewed and revised with the collaboration of an external workgroup comprised of various adoption assistance county partners across Ohio. Paragraph (D) was originally revised with the removal of the term "anticipated" and then rewritten due to concerns with the removal of the term "anticipated" regarding needs of the child projected over an extended period of time not being considered in the negotiation process. Concerns of the term being removed from the rule is that it would negate discussion of those needs as part of the negotiation of the amount of adoption assistance payment as outlined in the Child Welfare Policy Manual (CWPM) 8.2D.4. The interpretation and meaning of the term "anticipated" differed which lead to further Federal guidance. The word "foreseeable" was vetted with our Federal partner as a means of interpreting the circumstances of the adopting parent(s) overall capacity to meet the immediate and future needs of the child as outlined in CWPM 8.2A.2 and 45 CFR 1356.40(c). By taking into consideration the "foreseeable" future needs of the child at the initial negotiation process, it allows the adoptive family to fully consider their overall capability to incorporate the child into their household to meet the immediate and future needs of the child.

Response to May 21, 2019 Public Hearing Testimony on Title IV-E Adoption Assistance Program OAC 5101:2-49-05 entitled "Initial determination of the Title IV-E adoption assistance (AA) monthly payment amount." from:

Timothy P. O'Hanlon Exhibit H and Exhibit J

Thank you for your testimony for the public hearing on Ohio Administrative Code rule 5101:2- 49-05 entitled "Initial determination of the Title IV-E adoption assistance (AA) monthly payment amount." Paragraphs (D) and (E) were amended based on Federal guidelines specified in section 1356.40(c) of

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the Code of Federal Regulations (CFR) and section 473(a)(3) of the Social Security Act:

"The amount of the payments to be made in any case under clauses (i) and (ii) of paragraph (1)(B) shall be determined through agreement between the adoptive parents and the State or local agency administering the program under this section, which shall take into consideration the circumstances of the adopting parents and the needs of the child being adopted, and may be readjusted periodically, with the concurrence of the adopting parents (which may be specified in the adoption assistance agreement), depending upon changes in such circumstances. However, in no case may the amount of the adoption assistance payment made under clause (ii) of paragraph (1)(B) exceed the foster care maintenance payment which would have been paid during the period if the child with respect to whom the adoption assistance payment is made had been in a foster family home."

The above mentioned Federal regulation and guidance cited is referred to as a legal and related source of reference for policy question and answers provided in the Child Welfare Policy Manual (CWPM) under section 8.2A.2 and 8.2D.4 for adoption assistance payments and negotiation. Both paragraphs of this rule were amended based on these Federal legislation and statues to ensure Ohio's policy compliance.

The CWPM contains mandatory policies that are based in federal law and/or program regulations. It is an interpretation of federal laws and program regulations initiated by inquiries from states or Administration for Children and Families (ACF) Regional Offices. All the policy information appears in a question and answer format. It contains policy questions and answers applicable to child welfare programs operated by the Children's Bureau. At the end of each Q & A, a source and date referenced along with the legal and related references. It is an additional policy resource that provides additional information about federal legislation and statues but does not supersede Program Instruction, Program Memorandum, Federal Law or SSA.

Response to May 21, 2019 Public Hearing Testimony on Title IV-E Adoption Assistance Program OAC 5101:2-49-05(F) entitled "Initial determination of the Title IV-E adoption assistance (AA) monthly payment amount." from:

Timothy P. O'Hanlon, Adoption Assistance Advocate Exhibit I

Thank you for your testimony for the public hearing on Ohio Administrative Code rule 5101:2-49-05 entitled "Initial determination of the Title IV-E adoption assistance (AA) monthly payment amount," paragraph (F):

"If the child's FCM amount is more than the monthly adoption assistance statewide maximum (MAASM), the PCSA may request from the Ohio department of job and family services (ODJFS) a waiver to exceed the MAASM AA payment amount when the PCSA determines it is in the best interest of the child. The AA payment shall not exceed the FCM amount that was paid or would have been paid if the child was placed in a foster home. The PCSA shall complete a waiver request in the statewide automated child welfare information system (SACWIS)."

You requested the rule delete the statewide waiver provision, MAASM, as it serves no purpose. States are not prohibited from creating a statewide maximum policy by Federal law or Federal

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regulation.

As indicated in the Family, Children and Adult Services Procedure Letter (FCASPL), number 262, "Title IV-E Monthly Adoption Assistance Statewide Maximum and the Waiver request to exceed the Title IV-E Monthly Adoption Assistance Statewide Maximum," dated June 26, 2014, the first adoption assistance statewide maximum was calculated using the state fiscal year 2013 data from SACWIS. FCASPL 262 also indicates any Adoption Assistance agreement that included a payment over the statewide maximum made effective prior to 07/01/2014 does not have to go through the waiver process for any review.

The use of the MAASM waiver is restricted to when the Adoption Assistance payment exceeds the statewide maximum. A waiver would not be denied if the Adoption Assistance amount is less than the monthly cost of care. The denial of the waiver occurs only when the Adoption Assistance amount exceeds the monthly cost of care pursuant to Section 473(a)(3) of the Social Security Act. Paragraph (G) of the rule indicates that notification of the approval or denial is made within ten days of the request. The decision is a final determination and does not grant the PCSA State Hearing rights.

Response to May 21, 2019 Public Hearing Testimony on Title IV-E Adoption Assistance Program OAC 5101:2-49-05(D) entitled "Initial determination of the Title IV-E adoption assistance (AA) monthly payment amount." from:

Timothy P. O'Hanlon, Adoption Assistance Advocate Exhibit K

Thank you for your testimony for the public hearing on Ohio Administrative Code rule 5101:2-49-05 entitled "Initial determination of the Title IV-E adoption assistance (AA) monthly payment amount" paragraph (D):

"No income eligibility test shall be used when determining the monthly AA payment. The monthly AA payment amount should combine with the adoptive parent(s) resources and circumstances as provisionally required by the adoptive homestudy and shall provide for the special and foreseeable future needs of the child. When changes occur to the special needs and circumstances of the child and family, those needs shall be addressed or reviewed pursuant to rule 5101:2-49-12 of the Administrative Code. The child's supplemental security income (SSI) benefits shall be considered along with the adoptive parent(s) resources in the negotiation and determination of the AA payment amount. The special needs of the child shall be based upon rule 5101:2-49-03 of the Administrative Code.

The amendment to the rule to incorporate the provisional requirements of the adoptive parent(s) homestudy as outlined in OAC rules 5101:2-48-12, "Completion of the Adoption Homestudy"; 48-12.1, "Adoption Homestudy Updates"; and 48-12.2, "Required Notification and Adoption Homestudy Amendments" brings attention to the family circumstances as outlined in the homestudy. Being a licensed foster parent(s) or a certified adoptive parent in Ohio requires providing basic accommodations. The intent of including the homestudy as part of the verification of resources and circumstances is for verification of the material elements being sufficient in the home. It is not intended to be the source for determining resources and circumstances of the adopting parents. It has been added to include and verify elements of the family's situation. The home study generally ensures that the parent(s) can provide the basic living necessities for the family, including any members that may be added as a result of the adoption process. By taking into

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consideration the "foreseeable" future needs of the child at the initial negotiation process, it allows the adoptive family to fully consider their overall capability to incorporate the child into their household to meet the immediate and future needs of the child as referenced in section 8.2A.2 of the Child Welfare Policy Manual (CWPM).

ODJFS is following federal guidelines to ensure compliance with Federal and State requirements and cannot speak to the specifics of court settlements that are handled at the county level.

Response to May 21, 2019 Public Hearing Testimony on Title IV-E Adoption Assistance Program OAC 5101:2-49-05 entitled "Initial determination of the Title IV-E adoption assistance (AA) monthly payment amount." from:

Timothy P. O'Hanlon, Adoption Assistance Advocate Exhibit L

Thank you for your testimony for the public hearing on Ohio Administrative Code rule 5101:2-49-05 entitled "Initial determination of the Title IV-E adoption assistance (AA) monthly payment amount."

You cited the "Settlement Agreement in Class Action Lawsuit Against Warren County Criteria for Negotiating Adoption Assistance Payments" as the basis for your comments.

Authorized under section 473 of the Social Security Act and 5101.141 of the Ohio Revised Code, Ohio's Adoption Assistance Program is a federally funded, state supervised, county administered system to facilitate the timely placement of children, whose special needs or circumstances would otherwise make it difficult to place, with adoptive families. Negotiation decisions for AA payments are completed at the county level by the local agency who has the care and placement responsibility of children. The rules for the program are written based on federal regulations and provide guidance for program administration. ODJFS is following federal guidelines to ensure compliance with Federal and State requirements and cannot speak to the specifics of court settlements that are handled at the county level.