Hearing Summary Report

Note: Upload completed document to the Electronic Rule Filing System.

Hearing Date: 4/8/2019 Today's Date: 4/11/2019

Agency: Ohio Department of Job and Family Services

Rule Number(s): 5101:2-49-11, 5101:2-49-12, 5101:2-49-13, 5101:2-49-19, 5101:2-49-23, 5101:2-49-25 (ERF 184872); 5101:2-49-03, 5101:2-49-04 R/N, 5101:2-49-06, 5101:2-49-07, 5101:2-49-08, 5101:2-49-09, 5101:2-49-09.1, 5101:2-49-10 (ERF 184871).

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 - Public Children Services Association of Ohio (PCSAO) – Rule 5101:2-49-13
2. Susan Garner Eisenman, Attorney At Law – Rule 5101:2-49-03
3. Thomas Taneff, Attorney At Law – Rule 5101:2-49-03
4. Ruth T. Kelly, Attorney At Law – Rule 5101:2-49-03
5. Tim O'Hanlon, Advocate for Adoptive Families – Rule 5101:2-49-03
6. Click here to enter text.
7. Click here to enter text.
8. Click here to enter text.
9. Click here to enter text.
10. Click here to enter text.
11. Click here to enter text.
12. Click here to enter text.
13. Click here to enter text.
14. Click here to enter text.
15. Click here to enter text.
16. Click here to enter text.

Hearing Summary Report

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).

Mary Wachtel submitted written testimony regarding the Title IV-E Adoption Assistance (AA) Rule 5101:2-49-13. Ms. Wachtel's concerns centered around the belief that an adoption assistance subsidy be limited to adoptive parents who financially support their adopted child on an ongoing basis. She suggested the rule language was vague and broad and suggested the Department add language from the Child Welfare Policy Manual to define various forms of "financial support." Ms. Wachtel's comments are attached.

Susan Garner Eisenman (3/29/2019) submitted written testimony on Rule 5101:2-49-03. Ms. Eisenman had four concerns: 1) Who determines "special need?"; 2) Who is an "approved" qualified professional?; 3) Must a child in PCC custody of the agency to be entitled to subsidy?; 4) Is there a "due process" negotiation and appeals process? Ms. Eisenman's comments are attached.

Susan Garner Eisenman (4/8/2019) appeared at the public hearing and thanked the Department for changes made. She further stated she had three more minor requests for language changes. To add in paragraph (A)(1) "in an independent pre-adoption; and to omit "cosmetic disfigurement" and "substantial risk" from the special needs eligibility criteria. Ms. Eisenman's comments are attached.

Thomas Taneff submitted written testimony on Rule 5101:2-49-03. Mr. Taneff's concerns centered around the possibility of denying adoptive parents and their experts the opportunity to participate in the special needs determination process. Mr. Taneff's comments are attached

Ruth T. Kelly submitted written testimony on Rule 5101:2-49-03. Attorney Kelly's comments closely parallel Attorney Taneff's comments. Ms. Kelly's comments are attached

Tim O'Hanlon submitted written testimony on Rule 5101:2-49-03. In summary, Mr. O'Hanlon stated:
1) PCSA's responsibility to collec and disseminate information about the child's special needs is not being addressed in this rule.
Department: This requirement is addressed in OAC Chapter 5101:2-48;

2) Allegations that PCSAs had made inaccurate judgements about a child's special needs.
Department: This rule clearly outlines special needs criteria. OAC Chapter 5101:2-48 addresses PCSA requirements for providing potential adoptive parents with a child's special needs information. OAC Chapter 5101:2-38 addresses PCSA requirements for documenting child characteristics in Statewide Automated Child Welfare Information System (SACWIS);

3) This rule is not the rule that requires PCSAs to inform potential adoptive parents about Title IV-E eligibility.
Department: Rules 5101:2-48-05, 5101:2-48-11 and 5101:2-48-11.1 address this requirement; and 4) special needs definitions are more stringent. The special needs definition is an expanded list and taken from 22 CFR 35.108. Mr. O'Hanlon's comments are attached.

Hearing Summary Report

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.

Mary Wachtel
Comments were received and changes were made to Rule 5101:2-49-13.
The Department's decision was to return to the previous 2014 version of the rule with clarifications to ensure that financial support is clear.

Susan Garner Eisenman 3/29/2019
1) Title IV-E (AA) is a federally funded (63.09% federal/36.91% state) state pass through to the counties for administration of the program. However, the county Public Children Services Agencies (PCSAs) are federally charged with the administration of the program. "Special needs" is defined in rule by reference to 28 CFR 35.108, a listing of definitions in the Code of Federal Regulations added to rule and supported by PCSAs;
2) The word "approved" has been deleted in paragraph (A)(2)(g) (revised 4/4/2019) which leaves a "qualified professional" listing of those who may provide a written statement of the services provided as they relate to the child's diagnosis;
3) PCC custody is not a term relevant to this rule;
4) "Due process" is not in the language of the -03 rule. Rule 5101:2-49-05 contains due process language; however that rule is not currently under discussion.
To further meet expressed concerns, added in paragraph (A) were the words "...in the Statewide Automated Child Welfare Information System (SACWIS)" to clarify the data system that is mandated by the feds and used to input/report a child's special needs; also added in paragraph (A)(1) the words "...independent adoption" as a requirement when a child cannot be returned to his or her parents and is legally available for adoption. Changes noted above were made to the rule.

Susan Garner Eisenman 4/8/2019
In paragraph (A)(1) added "and is legally available for adoption by being in the permanent custody of a PCSA, private child placing agency (PCPA) or a child that meets the special needs criteria who is the subject of an independent adoption pursuant to rule 5101:2-49-02 of the Administrative Code." to clarify circumstances under which a child cannot or should not be returned to his or her parents. No further changes were made to the rule as the eligibility criteria for this federal program directly follows language from the Code of Federal Regulations. Changes noted above were made to the rule.

Thomas Taneff
In regard to due process, that language is not included in Rule 5101:2-49-03, but rather in Rule 5101:2-49-05. The -05 rule is not currently under review. Clarifications have been made through revise filings of this rule that contains the criteria to be met for eligibility for Adoption Assistance subsidy for special needs children. No changes were made to the rule because the criteria for determining eligibility is taken directly from the Code of Federal Regulations.

Ruth T. Kelly
Comments were in step with Attorney Taneff's comments. No changes were made to the rule because the criteria for determining eligibility is taken directly from the Code of Federal Regulations.

Hearing Summary Report

Tim O'Hanlon
No changes were made to the rule because the criteria for disseminating information about a child's special needs, documentation of a child's special needs, and informing potential adoptive parents about a child's special needs are all addressed in other OAC rules. Determining eligibility is taken directly from the Code of Federal Regulations.

The Department worked tirelessly to revise file and refile several rules, several times in order to make changes that would address concerns and help to solve issues.

April 8, 2019
Ohio Department of Job and Family Services
Public Hearing Regarding OAC Rules Pertaining to Comprehensive Health Care for Children in Placement
Public Children Services Association of Ohio Written Testimony
Mary Wachtel, Director of Public Policy

PCSAO appreciates this opportunity to submit written testimony regarding Ohio Administrative Code rules 5101:2-49-13, "Termination of Title IV-E Adoption Assistance," that outlines the ability and conditions when a PCSA may terminate an AA agreement.

We are concerned with language in (A) (2) that defines what support by an adoptive parent includes. In particular, the phrase "or any support" is overly broad and vague. We believe that the federal guidance contained in the Child Welfare Policy Manual, Sect. 8.2A, Question and Answer #2, defines adoptive parental support as "financial support" and further, that the title IV-E agency can determine what constitutes financial support and any support. Based on this, we believe that Section (A) (2) of the proposed revised rule should be changed to delete the phrase "or any support." Alternatively, ODJFS could consider adding language from the guidance document that states, "Payments for family therapy, tuition, clothing, maintenance of special equipment in the home, or services for the child's special needs are acceptable forms of financial support."

Adoption assistance (AA) should be limited to adoptive parents who financially support their adopted child on an ongoing basis. As written, the proposed revised rule allows for AA to continue when the adoptive parent is not providing financial assistance.

Thank you for your consideration.

Mary D. Wachtel, Director of Public Policy

Comments on the Revision of OAC 5101:2-49-03

By Susan Garner Eisenman
Attorney at Law
Columbus, OH

Academy of Adoption & Assisted Reproduction Attorneys, Fellow
Ohio Adoption Law Roundtable, Fellow

March 26, 2019

Law Office of Susan Garner Eisenman
4900 Reed Road – Suite 204
Columbus, OH 43220
Telephone: (614) 326-1200
E-mail: adoptohio@aol.com

Per Ohio and Federal law, adoption is the preferred placement for children who cannot be reared by their families of origin. The courts have repeatedly held that the state has a compelling interest in promoting adoption for children in need of permanency.

The adoption assistance program was established by the Federal government to facilitate adoptive placements. The state of Ohio promised to administer this program in exchange for the receipt of billions of dollars through the IV-E program. The duties of the administrator are guided by the Federal child welfare manual.

The Federal provisions require that the adoption subsidy be negotiated between the intended parents and the agency. Currently, a major part of that negotiation involves a determination of the nature and extent of the child's special needs. Often the discussion includes additional issues and more specific diagnoses based upon the intended parents or their expert testimony. The intended parents may well seek second opinions on the diagnoses affixed by the agency. This negotiation can be a positive process which serves to inform the proposed adoptive parents and prepare them for adoption.

Unfortunately, this proposed revision of OAC 5101:2-49-03 would restructure adoption assistance mediation in ways contrary to the letter and spirit of the Federal mandate. There are four issues of concern:

1) Who can define a special need?
2) Who is an approved expert?
3) Must the child be in PCC custody of the agency to be entitled to subsidy
4) Is there a true due process negotiation and appeals process?

1) <u>Who Can Define a Special Need</u>?

The proposed revisions give the adoption agency carte blanc in defining the existence of and extent of a special need.

The agency only has to recognize the special needs listed in the CSI – "Child's characteristics" section.

These regulatory revisions would allow the agency to have virtual control over the process because the child study inventory is a document prepared by the agency. It is prepared prior to the match phase of the adoption. The prospective adoptive parents and the current foster parent have little or no input into the process. The prospective adoptive parents are not yet identified. The CSI is often prepared by a worker who is not the child's ongoing worker. In

Franklin County, the agency deletes from the child study inventory any diagnosis not supported by a master's level expert.

In my experience, I have routinely seen agencies delete or intentionally fail to document known problems the child has to maximize the placement options and minimize an adoption subsidy request. One worker told me that the deletions occurred to "make the child more adoptable." The child study inventory is often written as an advertisement for an adoptive family. It often understates problems for the child and family. It is not in and of itself the source of complete information about the child.

There is no process for appeal for the omission of information on the CSI.

2) Approved Experts

The current proposed amendment would artificially limit the information that could be brought to a subsidy negotiation or appeal.

Subsection g. of the proposed revision would limit experts to "approved experts." The regulation does not state whose approval is necessary. It is to be feared that the approving authority would be the agency. There is no requirement that the experts be independent. Agencies often have "experts" who are dependent on the agencies for referral and work. Such experts are often known to defer to the dictates of the agency on the issue of special needs. The approval component would also bar the prospective adoptive parents from seeking an independent specialized or national experts.

3) P.C.C. Requirement

The proposed regulation would limit eligible children and families to those in the permanent custody of the public agency or a private agency. The Federal law does not make this a requirement and allows children under TCC to the agency or placed by the juvenile court in legal custody to be eligible.

In recent years, public agencies have attempted to avoid PCC and instead attempted to get foster parent or other caregivers to seek legal custody. This attempt may even be written into the case plan. This arrangement saves the agencies money and forces the hard work of termination of parental rights on to the caregivers.

The proposed amendment will further save the agencies money by denying these adopting former foster parents or legal custodians an adoption subsidy. However, this is not consistent with Federal policy or the best interest of the child.

In my practice, the availability of subsidy allowed an uncle and aunt to adopt 12 nieces and nephews whose parents had failed over a several-year period to comply with their agency case plan. The agency and court placed the children in legal custody of the uncle without any financial support. But for the availability of an adoption assistance negotiation, the placement would have collapsed under its own weight. Instead, 12 siblings found a forever home.

4) Lack of meaningful appeals process

The adoption subsidy negotiation process will be virtually gutted by this proposed regulation. The appeal process from the negotiation will likewise be rendered meaningless. The Federal law requires that there be a due process negotiation appeal process.

CONCLUSION

Enactment of this proposed regulation puts Ohio's IV-E money at risk. It invites lawsuits. It should not be enacted. It is not in the best interest of children and parents.

Susan Garner Eisenman Date 3-26-19
Attorney at Law
Academy of Adoption and Assisted Reproduction Attorneys Fellow
Ohio Adoption Law Roundtable Fellow

B.N. Resume attached

Law Office of Susan Garner Eisenman
4900 Reed Road, Suite 204
Columbus, OH 43220
Phone: (614) 326-1200
Fax: (614) 326-1205
E-mail adoptohio@aol.com

TO: Larry Wolpert / JCARR
Trudy Rammon / JCARR

FROM: Susan Garner Eisenman
Attorney at Law
Ohio Adoption Law Roundtable

DATE: April 8, 2019

RE: 5101:2-49-03

Attached are suggested revisions in the above-referenced OAC section.

Thank you for your consideration of these suggestions.

Eisenman 4/8/2019

5101:2-49-03

(A)(1)The child cannot or should not be returned to his or her parent(s) and is in the permanent custody of a PCSA or a private child placing agency (PCPA) or is in an independent pre-adoption adoptive placement. This requirement is met when the child is legally available for adoption.

(A)(2)(ii)(2)(c) Omit "cosmetic disfigurement"
Rationale – Cosmetic is defined as superficial. The statute speaks to "major bodily functions." This appears to be a contradiction.

(A)(2)(iv)(2)(h) – Last sentence
A child is not deemed to be at substantial risk merely because the social and medical history of the child's biological parent is unknown.

Thomas Taneff
THOMAS TANEFF CO., LPA
Attorney At Law
AV Preeminent® Martindale-Hubbell Peer Rating
2011-2019 Ohio Super Lawyer

250 Civic Center Drive, Suite 210 · Columbus, Ohio 43215-5025
www.tanefflaw.com

Office: 614-241-2181
Fax: 614-241-2160
E-mail: thomas@tanefflaw.com

Associate:
Taylor Sayers, Esq.

April 1, 2019

E-MAIL: rules@jfs.ohio.gov
FAX: 614-752-8298 (Attn Michael Lynch)

Dear Senator Andrew Brenner:

I am concerned about the current proposed revision of OAC 5101:2-49-03.

The revision would place unfair restrictions on the ability of intended parents and their independent experts to participate in the special needs determination. The only needs to be considered are those the agency determines existed prior to the matching process occurring. The only experts allowed to participate are those recognized by the agency. Because the determination would occur prior to matching, the intended parents cannot appeal the agency's decision.

This provision renders the negotiation process one-sided and denies due process as the statewide plan requires.

The revision would also deny subsidy to children in the T.C.C. of the agency for which the agency utilizes the legal custody / private adoption route to permanence.

The revision is contrary to the provisions and spirit of the state's IV-E funding agreement and the federal IV-E provisions. The revision may result in a loss of the state's IV-E funding.

Sincerely yours,

T. Taneff

Thomas Taneff

TT/jb

c:\adoption\1forms\icpc\odjfs.5101.ltr

FARUKI

FARUKI PLL
Respond to Cincinnati Office:
201 East Fifth Street
Suite 1420
Cincinnati, Ohio 45202

Ruth T. Kelly
(513) 238-6287
rkelly@ficlaw.com

March 29, 2019

VIA EMAIL

Dear Mr. Lynch:

I am concerned about the current proposed revision of OAC 5101:2-49-03 which seemingly violates due process rights of intended parents as to the determination of special needs. The revision would place unfair restrictions on the ability of intended parents and their independent experts to participate in the special needs determination. The only needs to be considered are those the agency determines existed prior to the matching process occurring. The only experts allowed to participate are those recognized by the agency. Because the determination would occur prior to matching, the intended parents cannot appeal the agency's decision.

This provision renders the negotiation process one-sided and denies due process as the statewide plan requires. The revision would also deny subsidy to children in the T.C.C. of the agency for which the agency utilizes the legal custody / private adoption route to permanence. The revision is contrary to the provisions and spirit of the state's IV-E funding agreement and the federal IV-E provisions. The revision may result in a loss of the state's IV-E funding.

This revision makes the state the sole arbiter of the nature of the special needs. In addition, this revision denies adoption assistance when the agency declines to the P.C.C. and instead forces the prospective adoptive parents to obtain legal custody and then file a private parental termination and adoption. If enacted, it will be nearly impossible for the intended parents to get an independent review of the issues of special needs. Please consider the very real consequences of OAC 5101:2-49-03 that violate intended parents due process.

Very truly yours,

Ruth T. Kelly /s/
Ruth T. Kelly

RK/kef

Timothy P. O'Hanlon: Final Revised Comments on Draft Rule 5101:2-49-03

Please accept the comments below as final revision and replacement of my previously submitted comments on draft rule 5101:2-49-03. As drafted, revised rule 5101:2-49-03 raises the following problems:

1. They fail to reconcile the PCSAs responsibility to collect and disseminate information about the child's special needs in Chapter 5101:2-48 with the responsibility to document the child's special needs status for purposes of determining the child's eligibility for Title IV-E Adoption Assistance in draft rule 5101:2-49-03. In nearly all cases, the PCSA knows or should know if a child is eligible for adoption assistance long before adoption procedures are initiated. The only other eligibility requirement for IV-E Adoption Assistance besides special needs is the determination by the court that the child was judicially removed from the home of the birth parents.

   When examined in light of Chapter 5101:2-48, the PCSA's responsibility for assisting prospective adoptive parents in verifying whether the child meets at least one the revised "medically" related special needs definitions is not clear in draft 5101:2-49-03. The PCSA should assume responsibility for verifying and documenting the child's special needs status or for assisting helping the prospective adoptive parents to obtain the necessary documentation or verification of the child's special needs status if necessary. (See suggested language below).

2. In a number of cases, PCSAs have made judgments that a child did not meet one of the special needs definitions, but did not provide the prospective adoptive parent with the special needs definitions themselves or the specific kind of documentation or statement from a qualified provider that would be sufficient to verify the child's special needs status. If the child's medical providers are sufficiently informed about the purpose of the information and the type of verification that is required, they are quite willing to submit sufficient documentation of a child's special needs.

Once again, the PCSA's responsibility for documenting the child's special needs based on the information in its case records is not clear in draft 5101:2-49-03. Neither is the PCSAs responsibility for assisting the prospective adoptive parents in obtaining information and documentation in a form that would determine the child's special needs status. (See suggested language below).

3. The draft 5101:2-49-03 revised language does not address the PCSA's opportunity to inform prospective adoptive parents that the child they intend to adopt will be eligible for IV-E Adoption Assistance upon completion of an application. PCSAs, as noted have, or should have, considerable information about a child's special needs and level of care during the two years or more the child is in the agency's care and custody.

   The majority of Ohio children are adopted by their foster parents and another sizable portion by relatives. During the two or more years, the child is in out of home placement a deep emotional bond develops between child and caregiver. The purpose of adoption assistance is to enable suitable parents of all income levels to provide permanent families for special needs children. Informing prospective adoptive parents prior to the initiation of adoption procedures that the child they intend to adopt will qualify for adoption assistance, assures the prospective adoptive parents of modest means that supplemental support will be available to them. The availability of adoption assistance has traditionally been used to recruit parents who otherwise might not have the resources to provide a permanent family for a child with significant care needs.

4. The "medically" related special needs definitions in draft OAC 5101:2-49-03 (A)(2)(g) appear to be more stringent than those in the current rule. A few are similar to the disability standards for children's SSI. Traditionally, Ohio ranks near the top of all states in the percentage of children who are eligible for adoption assistance. The percentage of Ohio children who qualify for adoption assistance has consistently ranked in the mid to high 90s. This should be a source of pride that Ohio recognizes that nearly all foster children have some degree of special needs and have access to Medicaid and a monthly stipend suitable to the child's needs and parents' circumstances. The "medically" related

special needs definitions in draft 5101:2-49-03 appear designed to reduce the number of eligible children. In the midst of an opioid epidemic, which creates an urgent need for adoptive homes, this makes no sense. For the foreseeable future, substantial numbers of children removed from drug ravaged homes will not be reunited with their birth parents.

For decades, conflict surrounding policies and practices has centered on negotiation of IV-E Adoption Assistance agreements, rather than eligibility itself. In accordance with federal and state law, the negotiation of adoption assistance payments is the next step after a child is found to be eligible for the program.

Special needs is a common eligibility requirement for all adoption subsidy programs, both federal and state. Children of course, vary greatly in the severity of their special needs and the resulting level of care they require. The degree and severity of a child's special needs are not eligibility issues. Children with severe special needs and those with relatively mild or moderate special needs may all be eligible for adoption assistance. The level of care reflecting the degree and severity of a child's needs is a matters for negotiating an adoption assistance payment, not for eligibility determinations.

Proposed Language to be added to 5101:2-49-03 as drafted.

Add Paragraph (C)

As a consequence of the PCSAs responsibility in OAC Chapter 5101:2-48 for collecting information about the medical and social history, as well as the medical, mental health and developmental condition of each child in its care, the PCSA shall be responsible for verifying and documenting the child's special needs status under Section (A) of this rule. The child's special needs status and future eligibility for adoption assistance shall be conveyed by the PCSA to child's prospective adoptive parents prior to the initiation of adoption procedures.

In cases where the PCSA determines that the child does not meet one of the special needs categories under Section (A) or that there is insufficient information to confirm the child's special needs status and future eligibility for adoption assistance, the PCSA shall,

(a) **Ensure the prospective adoptive parents are familiar with the special needs definitions in Section (A) of this rule.**

(b) **Inform the prospective adoptive parents that they may seek to confirm the child's special needs status by consulting with a "qualified" professional of their choice and requesting that the qualified professional determine if the child meets at least one of the special needs criteria in Section (A) of 5101:2-49-03.**

(c) **Assist the prospective adoptive parents in clarifying the nature, form and content of information needed by the PCSA to confirm the child's special needs status.**