(a)]		
HFS 58.11 (2) (a) 2. [HFS 58.08 (2) (a) 2.]	The language should be changed to reflect the statutory language in terms of the considerations not being limited to those specified in the section. **(8)**	The Department agrees and has modified the proposed rule..
Appendix A [HFS 58.09]	Remove all references to this complicated and time-consuming additional requirement. **(4)**	Currently, the Department believes that this is an important exception to the cooperation requirement. Any real potential for emotional or physical harm to the relative or the child should initiate a process whereby their cooperation can be excused. In addition, the Department of Workforce Development is proposing to have the statute changed to require this good cause option in Kinship Care and other cases so the Department would have to implement it later anyway.
Appendix A, s. (10) (a) [HFS 58.09 (10) (a)]	Add a sentence at the end requiring the agency to notify the applicant that an extension can be granted. **(8)**	The Department agrees and has revised the proposed rule.

1999 Session

FISCAL ESTIMATE
DOA-2048 N(R10/96)

☒ ORIGINAL ☐ UPDATED
☐ CORRECTED ☐ SUPPLEMENTAL

LRB or Bill No./Adm. Rule No.: HFS 58

Amendment No. if Applicable:

Subject

ELIGIBILITY OF KINSHIP CARE RELATIVES TO RECEIVE KINSHIP CARE BENEFITS

Fiscal Effect

State: ☐ No State Fiscal Effect

Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation.

☐ Increase Existing Appropriation ☐ Increase Existing Revenues
☐ Decrease Existing Appropriation ☐ Decrease Existing Revenues
☐ Create New Appropriation

☐ Increase Costs - May be possible to Absorb Within Agency's Budget ☐ Yes ☐ No

☐ Decrease Costs

Local: ☐ No local government costs

1. ☐ Increase Costs ☐ Permissive ☐ Mandatory
2. ☐ Decrease Costs ☐ Permissive ☐ Mandatory
3. ☐ Increase Revenues ☐ Permissive ☐ Mandatory
4. ☐ Decrease Revenues ☐ Permissive ☐ Mandatory
5. Types of Local Governmental Units Affected:
   ☐ Towns ☐ Villages ☐ Cities
   ☐ Counties ☐ Others ____
   ☐ School Districts ☐ WTCS Districts

Fund Sources Affected
☐ GPR ☐ FED ☐ PRO ☐ PRS ☐ SEG ☐ SEG-S

Affected Ch. 20 Appropriations
s. 20.435 (3) (cz) and (kc), Stats.

Assumptions Used in Arriving at Fiscal Estimate

County departments of social services or human services and tribal child welfare agencies have been authorized since July 1996 under s. 48.57 (3m), (3p) and (3t), Stats., to make a monthly payment of $215, called a kinship care benefit, to an approved non-parent relative of a child to help the relative provide care and maintenance for the child. The statutes were amended in April 1998 to make the Department responsible for administration of the program in Milwaukee County. The statutes were amended again in June 1998 to direct the Department to promulgate rules which set forth criteria for determining the eligibility of a relative to receive the monthly payment.

The program is administered by counties and tribes, and by the Department in Milwaukee County, any of which may contract with a public or private agency to administer all or part of the program.

These are the rules. They will not affect the expenditures or revenues of state government or local governments. The total costs of the monthly payments and the costs of program administration were taken into consideration by the Legislature when the program was authorized. The state pays the costs of the monthly payments, reimbursing counties, tribes and the Department under a sum certain appropriation. The costs of program administration are also borne by state government.

Long-Range Fiscal Implications

Agency/Prepared by: (Name & Phone No.)	Authorized Signature/Telephone No.	Date
H&FS/ Mark Mitchell, 266-2860	John Kliesow, 266-9622	4-9-99

WISCONSIN COUNCIL ON CHILDREN and FAMILIES

"For these are all our children . . . we will all profit by, or pay for, whatever they become." James Baldwin

RESEARCH • EDUCATION • ADVOCACY

Joint Committee for Review of Administrative Rules

Hearing on Clearinghouse Rule 99-071
Relating to the Kinship Care Program

Testimony by: Carol W. Medaris
Wisconsin Council on Children and Families
November 14, 2001

The Wisconsin Council on Children and Families advocates for children statewide, on a variety of issues affecting children's health and welfare. The rule before us today deals with a most vulnerable group of children: those whose parents are either unable or unwilling to adequately care for them or protect them from harm. This may be for a variety of reasons, including mental or physical health, alcohol problems, or other family problems. The Legislative Audit Bureau (LAB) in an evaluation in 1998, set forth a variety of circumstances in which relatives caring for children might create eligibility for kinship care:

- when the parent is incarcerated, or incapacitated by alcohol or drug abuse;
- when the parent is a teenager unprepared for the responsibilities of motherhood who determines that her infant would be better supervised and cared for by her own mother;
- when the parent believes that a child cannot live safely with other adults who share the parent's residence;
- when a family has been evicted from its residence, so that children are sent elsewhere until the parent can afford a residence large enough for a family; or
- when a relative and a parent agree that the relative is better able to provide the necessary supervision to a rebellious teenager.

(See Attachment 1, LAB Report 98-16, pages 3-7.)

A MEMBER OF THE NATIONAL ASSOCIATION OF CHILD ADVOCATES

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Children in these situations have few good choices. Should they remain in the inadequate environment of their birth home? Should they be placed in foster care, a system that is generally short of good, prospective caretakers? But, children who are the subject of this rule have a third choice, because a family member has stepped forward and offered to raise them, at least temporarily -- a relative that has no legal obligation to provide any care for the child, but is simply responding to the needs of his/her extended family.

This rule would meet that generous gesture by providing great uncertainty as to whether even the minimal statutory amount of $215 per month will be available to the child's relative. Without this support, the relative's own family faces greater economic jeopardy and the relative may feel forced to relinquish care of the child, placing the child once again in either an inadequate birth home or foster care (or, for older children, perhaps on the street). In my experience, most relatives do continue to care for the children, even if it means subtantial sacrifice on the part of their families.

Ms. Arsenault's memo shows the uncertainty faced by these families very well. (See Attachment 2, Fiscal Bureau memo to Senator Moore, August 30, 2001.) The Joint Committee on Finance, faced with a waiting list of 184 cases in December, 2000, approved an additional $187,800 in TANF funds in January to support all the waiting cases with benefits for the months of February through June, 2001. But counties and tribes did not receive the money until June, 2001, and a subsequent report showed a waiting list in June of 152 counties. Apparently the Department could not tell whether these numbers were in addition to the number for December or were cases still awaiting funding that was due them from the January appropriation.

In any case, families are waiting a long time for benefits, and the efforts of Joint Finance to fund those waiting apparently cannot keep up. In his testimony before the Senate Committee on September 5, 2001, Mark Mitchell from the Department said that the waiting list numbered 190 as of July, 2001. He also testified that there was not a problem of insufficient funds being authorized, but simply a function of allocating funds based upon anticipated caseloads when the actual numbers turn out differently. He claims that the Department can "cure" this by redistributing funds between counties in November of the year. Unfortunately, as Mr. Mitchell also admitted, counties are reluctant to provide benefits to applicants when they are unsure that they will be reimbursed. Such a system is a disaster for families in need of ongoing support for the care of additional family members -- children who often bring very special needs with them.

Instead of seeking to make the system work better for these families, the Department seeks to institutionalize waiting lists by incorporating them into

the administrative rule. Secs. 58.06(2) and 58.12. The Department states that statutory authority is clear, but only the Department thinks so. For legal support, Mr. Mitchell presented only a decision issued by the Department that declared waiting lists authorized by state statutes. That decision overturned an earlier hearing decision by the DOA Administrative Law Judge who found the opposite: that no such authority exists.

Opposed to this latest decision by the Department, a Legislative Council memorandum states that the statutes are not clear on the issue. (See Attachment 3, Legislative Council memo to Senator Moore, August 31, 2001) In addition, prior DOA Administrative Law Judge decisions found the statutes not clear and determined that waiting lists were not authorized based upon legislative history. Also, the actions by Joint Finance to supplement Kinship Care funds on at least the two occasions when presented with waiting lists indicates a legislative intent that waiting lists are not acceptable. Finally, the legislature has rejected budget language by the last governor that would have stated a lack of entitlement in the kinship care program.

Yet, the Department would institute kinship care waiting lists by administrative fiat.

It is my considered opinion that a court would be likely to find waiting lists not authorized by state statute, based upon the reasoning in several of the hearing decisions referred to above. But beyond that, the public policy of encouraging relatives to care for children when their parents are unable or unwilling to do so should be supported. A recent report by the Urban Institute finds that 1.8 million children live with relatives instead of their parents, and 22 percent of them face multiple social and economic risks. (See Attachment 4, Ehrle, Geen, and Clark, "Children Cared for by Relatives: Who Are They and How Are They Faring?" February, 2001.) The report concludes,

> Ideally, a service system to support these families would capitalize on the benefits children gain from being placed with kin while at the same time providing the resources relatives need to create environments that promote children's well-being.

Waiting lists, and the uncertainty of public funding, do not provide that necessary support.

AN EVALUATION

Kinship Care Program

Department of Health and Family Services

98-16

December 1998

1997-98 Joint Legislative Audit Committee Members

Senate Members:	Assembly Members:
Mary A. Lazich, Co-chairperson	Carol Kelso, Co-chairperson
Peggy Rosenzweig	Stephen Nass
Gary Drzewiecki	John Gard
Robert Wirch	Gregory Huber
Kimberly Plache	Robert Ziegelbauer

Attachment 1

SUMMARY

The Kinship Care program provides cash assistance to individuals who have taken responsibility for their relatives' children when the parents are unable or unwilling to do so, and who therefore may prevent or eliminate the need for the children's placement in licensed foster homes. The program was created in January 1997 to replace assistance formerly available to these families under the discontinued Aid to Families with Dependent Children program for children living with non-legally responsible relatives (AFDC/NLRR). The amount of assistance is $215 per month for each eligible child.

Kinship Care is administered at the state level by the Department of Health and Family Services and at the local level by child protective services agencies, which are operated by county departments of social services or human services, and by tribal governments. Its fiscal year 1998-99 budget was $24.2 million, which was funded by federal Temporary Assistance to Needy Families (TANF) block grant funds and general purpose revenue.

Concern about the adequacy of the program's funding arose in 1998. Local agencies reported that June 1998 benefits were paid for 8,016 children, or 349 more than the 7,667 estimated during budget preparation in early 1997. An additional 594 children were on waiting lists for Kinship Care in June 1998, 468 of whom were in Milwaukee County. In response, in September 1998, the program's original budget of $22.3 million was supplemented by a reallocation of $1.9 million from the TANF block grant. This amount is expected to prevent the recurrence of waiting lists through the end of the current biennium.

Reasons for the unexpectedly high demand for program benefits cannot be determined precisely. Because the eligibility requirements for Kinship Care are more restrictive than those for AFDC/NLRR had been, the program's first biennial budget was based on assumptions that fewer families would participate in Kinship Care. However, the number of children statewide for whom Kinship Care assistance has been requested now approximately equals the number of children who had been receiving AFDC/NLRR, reversing several years of decline in the AFDC/NLRR caseload. Demand has grown particularly fast in Milwaukee, where more than 5,400 children were either receiving or on a waiting list for Kinship Care benefits in June 1998.

As we examined program growth, we found other problems that indicate a need for additional legislative attention to the Kinship Care program. First, the Kinship Care statutes, ss. 48.57(3m) and (3n), Wis. Stats.,

require that only two types of income—disabled children's Supplemental Security Income and any child support paid for the child—affect a child's eligibility for the program or the amount paid to the caretaker relative. However, local agencies have adopted varying practices, such as setting income eligibility thresholds for caretaker relatives and reducing benefits for children receiving Social Security Survivors benefits. We include recommendations that the Department take action to enforce its prohibition against locally adopted eligibility criteria, and that the Legislature re-examine the program's financial eligibility criteria.

Another area for legislative consideration is related to the criteria for determining whether a child meets the statutory eligibility requirement of being "at risk" of becoming a child in need of protection or services. The statutory record is unclear regarding whether children who are not in immediate danger can be considered to be at risk. For example, it is not clear in either statutes or administrative rule whether a child who is left with grandparents while his or her mother resides in a homeless shelter after being evicted could be considered at risk of becoming a child in need of protection or services. The Legislature has already directed the Department to promulgate administrative rules that include assessment criteria for determining eligibility for Kinship Care payments, and the Department expects to submit these rules to the Legislature in January 1999. With them will come the opportunity to deliberate and clarify statutory intent relating to the eligibility of children who are not yet in need of protection or services for Kinship Care assistance.

We also found that the Department has provided the Kinship Care program with only minimal monitoring and oversight. For example, although local agencies began to create waiting lists for program benefits as early as August 1997, the Department did not quantify the problem statewide until more than a year later, as it prepared its request for the 1999-2001 biennial budget. The Department has no current plans to continue to monitor waiting lists or other unfunded demand for program services.

Finally, we found that minimal effort has been made to monitor local agencies' assessment costs or the adequacy of their efforts to obtain reimbursement for Kinship Care benefits from children's parents through child support assignments. This lack of information regarding program operations and expenditures limits the Department's and the Legislature's ability to ensure that program funds are appropriately used and to make well-informed policy and budget decisions. Therefore, we include recommendations for improving the Department's administration and oversight of program activities.

****

INTRODUCTION

Kinship Care replaced AFDC for those children who reside with relatives.

Children may reside with adults other than their parents because they are not safe in their own homes, because their parents are deceased, because their parents are unwilling or unable to care for them, or for other reasons. Licensed foster home placement is the only suitable alternative for some of these children, but others have relatives who are willing to care for them. The Kinship Care program provides cash assistance in the amount of $215 per month for each eligible child under the age of 18 who is living with a caretaker relative. The program was created in January 1997 to replace assistance formerly available under the discontinued Aid to Families with Dependent Children program for children living with non-legally responsible relatives (AFDC/NLRR). It is administered at the state level by the Department of Health and Family Services and at the local level by child protective services agencies, which are operated by county departments of social services or human services, and by tribal governments within their jurisdictions.

Kinship Care funding totaled $19.1 million in fiscal year (FY) 1997-98 and $24.2 million in FY 1998-99. The Temporary Assistance to Needy Families (TANF) block grant plan provided $39.8 million, of which 50.7 percent was federal funds and 49.3 percent was state general purpose revenue (GPR). These funds were supplemented with $3.5 million in GPR. The original appropriation for FY 1998-99 was $22.3 million; an additional $1.9 million was transferred to the program in September 1998, in response to the growth of caseload beyond original projections.

In June 1998, 594 children statewide were on waiting lists for Kinship Care assistance.

Local agencies reported that Kinship Care monthly benefits were paid in June 1998 for 8,016 children, or 349 more than the 7,667 estimated during budget preparation in early 1997. An additional 594 children had been placed on waiting lists because the program's original appropriation was insufficient to meet demand. The $1.9 million in TANF funds was reallocated to provide for the program's needs through the end of the biennium.

The budgetary shortfall during the program's first biennium raised questions regarding the unexpectedly high demand for Kinship Care benefits. Therefore, we evaluated the implementation of the Kinship Care program to determine:

- how the assumptions used to prepare the budget compared to the program's actual experience in the first year;

- how program requirements and guidelines may be affecting program use; and

- whether the program has been implemented consistently among local agencies.

In the course of this evaluation, we examined state statutes and departmental guidelines controlling the program, documents related to budget projections, and caseload and expenditure information reported by local agencies. In addition, we interviewed local and departmental staff with responsibility for the program's budget and operations and contacted national sources regarding kinship care policy and trends.

Program Participants

Children are placed in the care of relatives when parents are unable or unwilling to care for them.

Children may live with relatives as the result of unavoidable circumstances, such as a parent's death or disability, or because other circumstances create a situation in which they could be better cared for by a relative than by a parent. Examples of situations in which children live with relatives, which might create eligibility for Kinship Care depending upon other circumstances, include:

- when the parent is incarcerated, or incapacitated by alcohol or drug abuse;

- when the parent is a teenager unprepared for the responsibilities of motherhood who determines that her infant would be better supervised and cared for by her own mother;

- when the parent believes that a child cannot live safely with other adults who share the parent's residence;

- when a family has been evicted from its residence, so that children are sent elsewhere until the parent can afford a residence large enough for a family; or

- when a relative and a parent agree that the relative is better able to provide the necessary supervision to a rebellious teenager.

Relatives have no legal financial responsibility for children of the extended family.

Federal and state governments have for many years provided financial assistance to individuals who have taken responsibility for their relatives' children. Although relatives have no greater legal responsibility for the children's financial support than do unrelated foster parents, some accept this responsibility without needing or requesting financial assistance. Others may need financial assistance to care for children of their absent

relatives. In any case, the willingness of relatives to care for these children may prevent or eliminate the need for more costly placement in licensed foster homes.

The former AFDC program provided cash assistance to children whether they were in the care of relatives or their own parents. Of the 41,897 families who were receiving AFDC benefits in March 1997, the last month of that program's full operation in Wisconsin, 31,560 families consisted of non-disabled parents caring for their own minor children. These families were eligible for the new Wisconsin Works (W-2) employment program, one of whose central purposes was to provide parents with incentives and assistance to become economically self-supporting.

Former AFDC children living with relatives or disabled parents are not eligible for W-2 benefits.

However, the remaining 10,337 families were "child-only" cases: families in which the only AFDC recipients were children living with relatives or disabled parents. For these families, an employment program was inappropriate, and therefore they were not made eligible for W-2. For children of disabled parents, a new Caretaker Supplement program, or C-Supp, replaced AFDC. This program provides disabled parents with $100 per month for each eligible dependent child. Application for these benefits automatically takes place when parents apply for Medical Assistance for the child. As of August 1998, 5,848 households were receiving these payments.

Eligibility Criteria and Benefit Levels

As noted, for children in the care of relatives, Kinship Care replaced AFDC/NLRR. The new program is similar to AFDC/NLRR in that state and federal requirements do not limit eligibility to those caretaker relatives who are in financial need, and disabled children receiving Supplemental Security Income are not eligible. Like AFDC/NLRR, Kinship Care is available to children whose residence with relatives has been arranged voluntarily within the family; availability is not limited to children whose placement has been arranged by a court or other public agency, as is true for the foster care program.

Kinship Care eligibility is more restricted than was AFDC for children living with relatives.

In other ways, the two programs differ. AFDC/NLRR was administered by local economic support agencies as a financial assistance program; the staff who decided a family's eligibility were economic support specialists who determined only that the child was in the care of a relative. In contrast, Kinship Care is administered by local child protective services agencies, which must conduct an assessment of the family's situation before deciding that a child is eligible for assistance. These assessments, usually conducted by social workers, determine:

Legislative Fiscal Bureau
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August 30, 2001

TO: Senator Gwendolynne Moore
Room 409 South, State Capitol

FROM: Yvonne Arsenault, Fiscal Analyst

SUBJECT: Kinship Care Waiting Lists

As your office requested, this memorandum: (a) discusses the allocation of supplemental funding provided by the Joint Committee on Finance to the kinship care program in January, 2001; (b) identifies those counties that reported having relatives on a waiting list for monthly kinship care payments in December, 2000, and in June, 2001; and (c) discusses the adjustments to the county and tribal contracts for calendar year 2001, based on the funding amounts provided in 2001 Wisconsin Act 16 (the 2001-03 biennial budget act).

Supplemental Funding for Waiting Lists. In January, 2001, the Joint Committee on Finance approved a s.16.515 request to provide supplemental funding to the Department of Health and Family Services (DHFS) to fund the reported kinship care waiting list on December 1, 2000. DHFS provided an additional $197,800 in temporary assistance for needy families (TANF) funds to 15 counties and two tribes for a five-month period, from February, 2001, through June, 2001 to support 184 cases that were reported to be on waiting lists on December 1, 2000. Counties and tribes received the money in June, 2001, and were instructed by DHFS to make retroactive payments to appropriate relatives beginning February 1, 2001. Table 1 on the following page indicates the counties that received this additional funding.

Attachment 2

TABLE 1

Funding for Kinship Care Waiting Lists
February through June, 2001

County	Number on Waiting List	Total Funding
Adams	4	$4,300
Brown	17	18,275
Chippewa	7	7,525
Dane	53	56,975
Dunn	8	8,600
Fond du Lac	14	15,050
Green	7	7,525
Green Lake	4	4,300
Jefferson	7	7,525
Juneau	6	6,450
Manitowoc	6	6,450
Marinette	1	1,075
Ozaukee	4	4,300
Shawano	23	24,725
Waushara	2	2,150
Menominee	9	9,675
Oneida	12	12,900
Total	184	$197,800

2001 Act 16. Funding for the kinship care program for the 2001-03 biennium was budgeted using the average caseloads from January, 2000, through February, 2001, adjusting this number to reflect the known waiting lists, and then applying the $215 monthly payment. As of December, 2000, there were 212 cases on the kinship care waiting list. This figure was used in the budget calculation.

Based on the budget funding calculation and legislative intent, DHFS will distribute the additional funds for non-Milwaukee counties that were provided in the budget to counties with waiting lists in December, 2000. Table 2 identifies the counties and funding amounts that would be distributed under this plan.

TABLE 2

Proposed Kinship Care Contract Adjustments for 2001

County	Number on Waiting List	Total Funding
Adams	5	$6,450
Brown	14	18,060
Chippewa	7	9,030
Crawford	2	2,580
Dane	55	70,950
Dunn	4	5,160
Fond du Lac	15	19,350
Green	7	9,030
Green Lake	4	5,160
Jefferson	9	11,610
Juneau	1	1,290
Manitowoc	9	11,610
Marinette	4	5,160
Ozaukee	4	5,160
Shawano	7	9,030
Washburn	2	2,580
Waukesha	24	30,960
Waupaca	6	7,740
Waushara	2	2,580
Wood	14	18,060
Menominee	7	9,030
Oneida	10	12,900
Total	212	$273,480

Counties report monthly to DHFS the number of cases on a waiting list for kinship care payments as of the last day of the month. In June, 2001, 19 counties and tribes reported having a total of 152 cases on the kinship care waiting list. Table 3 indicates the counties that report having a waiting list and the total funding required to support payments to the relatives on the waiting list for the six months between July, 2001, and December, 2001, depending on the point in time that is used to determine the funding allocation. For example, in December, 2000, Chippewa County had seven relatives on a waiting list for kinship care payments; in June, 2001, there were two relatives on the waiting list. If the additional funding were distributed based on the December waiting list information, the county would receive $9,030 for the period of July, 2001, through December, 2001. If the June waiting list information was used, the county would receive $2,580 for the same time period. Table 3 shows that, if DHFS used the June, 2001, waiting lists it would allocate $77,400 less to counties for calendar year 2001 allocations than if it used the December, 2000 waiting list.

TABLE 3

Comparison of the Number of Relatives on a Waiting List for Kinship Care in December, 2000 and June, 2001

County	December, 2000 Number on Waiting List	December, 2000 Total Funding	June, 2001 Number on Waiting List	June, 2001 Total Funding	Difference Number on Waiting List	Difference Total Funding
Adams	5	$6,450	5	$6,450	0	$0
Brown	14	18,060	14	18,060	0	0
Chippewa	7	9,030	2	2,580	-5	-6,450
Crawford	2	2,580	0	0	-2	-2,580
Dane	55	70,950	0	0	-55	-70,950
Door	0	0	1	1,290	1	1,290
Dunn	4	5,160	0	0	-4	-5,160
Fond du Lac	15	19,350	0	0	-15	-19,350
Green	7	9,030	1	1,290	-6	-7,740
Green Lake	4	5,160	0	0	-4	-5,160
Jackson	0	0	1	1,290	1	1,290
Jefferson	9	11,610	24	30,960	15	19,350
Juneau	1	1,290	0	0	-1	-1,290
Kewaunee	0	0	1	1,290	1	1,290
Manitowoc	9	11,610	6	7,740	-3	-3,870
Marinette	4	5,160	4	5,160	0	0
Ozaukee	4	5,160	1	1,290	-3	-3,870
Rock	0	0	5	6,450	5	6,450
Shawano	7	9,030	2	2,580	-5	-6,450
Washburn	2	2,580	0	0	-2	-2,580
Waukesha	24	30,960	27	34,830	3	3,870
Waupaca	6	7,740	10	12,900	4	5,160
Waushara	2	2,580	0	0	-2	-2,580
Wood	14	18,060	6	7,740	-8	-10,320
Lac du Flambeau	0	0	36	46,440	36	46,440
Menominee	7	9,030	0	0	-7	-9,030
Oneida	10	12,900	2	2,580	-8	-10,320
Stockbridge Munsee	0	0	4	5,160	4	5,160
Total	212	$273,480	152	$196,080	-60	-$77,400

There are some concerns regarding the waiting list numbers reported for June. DHFS cannot determine whether these numbers are in addition to those identified in December, 2000, for which additional funding was provided by the Joint Committee on Finance. In addition, since the supplemental funding was distributed to the counties identified in Table 1 in June, 2001, it is likely that many counties have not yet made the retroactive adjustments to the waiting list information and that the June figures are inflated.

There are a number of items that should be considered when discussing the allocation of kinship care funds for the remainder of calendar year 2001. First, the funds provided to counties in

the January s.16.515 request, approved by the Joint Committee on Finance, were one-time funds. Therefore, if additional funding is not provided to these counties for the remainder of the calendar year, it is possible that some of these counties and tribes will be unable to support their current caseload. However, since the counties did not receive the additional funding from DHFS until June, it is not known how many of the relatives identified in December, 2000, are still on the waiting list and would need the additional funding.

Second, the number of relatives on a waiting list for kinship care payments is generally higher at the end of the calendar year than at the beginning of the year. Kinship care allocations to counties are distributed on a calendar year basis and thus, some counties choose to provide payments to all relatives on the waiting list in January when the county receives the allocation for that calendar year. This explains why the December, 2000, waiting list figures were used in the funding estimates for the 2001-03 biennium – it was expected that those numbers best represent the total number of cases on a waiting list for the year.

Finally, the number of relatives on a waiting list fluctuates monthly both statewide and by county. For example, in December, 2000, Lac du Flambeau had no relatives on a waiting list for kinship care payments. However, in June, 2001, the tribe reported 36 relatives on a waiting list. The kinship care program is not structured or administered as a statewide benefits program with a single budget. For this reason, individual counties and tribes may have surpluses and shortfalls in their kinship care budgets when their actual caseloads do not correspond with the initial allocations they receive. Therefore, under current practice with the available funding, waiting lists will continue to occur. Due to these monthly fluctuations in reported waiting list cases, the estimated amount of supplemental funding a county would need to address waiting lists could vary significantly, depending on the month that is selected for counting cases on a waiting list.

If you have any further questions, please do not hesitate to contact me.

YMA/bh

WISCONSIN LEGISLATIVE COUNCIL
STAFF MEMORANDUM

TO: SENATOR GWENDOLYNNE MOORE

FROM: Anne Sappenfield, Senior Staff Attorney

RE: Kinship Care Waiting Lists

DATE: August 31, 2001

This memorandum, prepared at your request, discusses whether the Department of Health and Family Services (DHFS) is permitted under current law to place, or authorize counties to place, individuals who are eligible to receive kinship care payments on a waiting list if adequate funding is not available. Under current law, it is not clear whether DHFS has this authority.

CURRENT LAW

Current s. 48.57 (3m) (a), Stats., provides in part:

> From the appropriation under s. 20.435 (3) (kc), the department ***shall*** reimburse counties having populations of less than 500,000 for payments made under this subsection and ***shall*** make payments under this subsection in a county having a population of 500,000 or more. A county department and, in a county having a population of 500,000 or more, the department ***shall*** make payments in the amount of $215 per month to a kinship care relative who is providing care and maintenance for a child if all of the following conditions are met:
>
> 1. The kinship care relative applies to the county department or department for payments under this subsection and the county department or department determines that there is a need for the child to be placed with the kinship care relative and that the placement with the kinship care relative is in the best interests of the child. [Emphasis added.]

The state reimbursement for kinship care payments is currently funded by a sum certain appropriation. Therefore, absent an additional allocation of funding by the Legislature, once state

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Attachment 3

kinship care funding is exhausted, DHFS is not permitted to use other funding to reimburse counties for kinship care payments.[1]

CLEARINGHOUSE RULE

Under current statutes and administrative rules, there are no provisions addressing the use of waiting lists for those who are eligible for kinship care payments. However, proposed Clearinghouse Rule 99-071 creates a procedure for establishing waiting lists for the kinship care program.

Proposed s. HFS 58.12 provides that an agency may place an applicant on a waiting list if the agency has expended its kinship care benefit allocation for the agency's fiscal year or has established a caseload which will result in the agency expending its kinship care benefit allocation by the end of the agency's fiscal year. The agency must notify DHFS of the need for a waiting list.

The rule permits an agency to prioritize applicants on the waiting list according to any of the following criteria, described in the agency's written policy:

1. The lack of stability of the living arrangement if a payment is not made.

2. The order in which the applications are received.

3. The level of urgency of the child's need to be placed with the kinship care relative.

4. If the child is under the guardianship of the kinship care applicant.

The proposed rule requires the agency to notify the applicant in writing when financial resources allow an applicant who is on a waiting list to receive a payment. The written notice must require the applicant to notify the agency of his or her continuing interest in and eligibility for the payment. An applicant who is moved off of a waiting list and approved must receive payment for the period beginning not later than the first day of the following month. An agency may provide a retroactive payment for all or part of the period during which the applicant was on the waiting list in accordance with the agency's written policies.

Finally, the proposed rule provides that if the child for whom the payment is requested was placed with the kinship care applicant by a court, the agency may not place that applicant on a waiting list.

In the Legislative Council comments regarding Clearinghouse Rule 99-071, the statutory authority for waiting lists is questioned. Specifically, the comments state:

> Section HFS 58.08 provides for waiting lists for the kinship care program, and s. HFS 58.05 (3) (intro.) indicates that the waiting list may also apply to the long-term kinship care program. The statutes are ambiguous as to whether kinship care or long-term kinship care are entitlements and waiting lists are not allowed or whether they are not

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[1] Article VII, s. 2 of the Wisconsin Constitution, provides that: "No money shall be paid out of the treasury except in pursuance of an appropriation by law."

entitlements and waiting lists are allowed. The issue of whether a county department must make a payment when the state appropriation to reimburse counties has been depleted has not been resolved.

In response to this comment, DHFS wrote:

. . . The Department has opinions from two Department attorneys that waiting lists are allowable.[2] The language included in the Governor's 1999-2001 budget clearly stating that this program is not an entitlement is merely to clarify the Department's existing interpretation, not to change it from an entitlement to a non-entitlement.

DISCUSSION

Under current law, any person whose application for kinship care payments is not acted on promptly or is denied on the grounds that required conditions to receive such payments are not met may petition DHFS for a review. [s. 48.57 (3m) (f), Stats.] Several individuals who have been placed on waiting lists to receive kinship care payments have challenged this action by the county in which they reside or by DHFS, for Milwaukee County residents. These individuals have had hearings before an administrative law judge (ALJ) assigned to act in the place of the Secretary of Health and Family Services. [See s. 227.43 (1) (bn), Stats.] In one case, the ALJ summarized the petitioner's arguments, and the argument that the current statute is ambiguous, as follows:

> The petitioner asserts that this statutory provision is internally inconsistent: it requires the county or Bureau [of Milwaukee Child Welfare] to pay the benefit to an eligible person, but it cross-references a "sum certain" appropriation amount that may not be adequate to pay all eligible persons their benefits. She argues that there are two reasonable constructions of this provision (i.e., all eligible persons must be paid, OR all eligible persons must be paid until the appropriation is exhausted) and that therefore it is "ambiguous" for purposes of statutory construction. Because the provision is ambiguous, the petitioner urges the examiner to look to extrinsic sources such as the provision's legislative history to ascertain the Legislature's "true" funding intent.

The ALJ summarized DHFS's response, that the statute is clear and permits waiting lists, as follows:

> The respondent Department argues that the statutory phrase is clear and unambiguous. Counsel asserts that the statute does four things: (a) identifies a specific appropriation; (b) identifies the entities responsible for making payments; (c) defines the amount of the payments to be made; and (d) defines in general terms who is eligible to receive such payments . . . . Therefore, she argues that resort to extrinsic evidence such as the legislative history is inappropriate because the four sub-parts can be read together as a "harmonious whole".

In that case, the ALJ concluded that the current kinship care statute requires counties, other than Milwaukee County, to continue to make kinship care payments using county money once the state

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[2] According to Daniel Stier, Chief Legal Counsel, DHFS, there are not two ***written*** opinions. The only written opinion is DHFS's revision of an ALJ's preliminary recital, discussed below.

appropriation is exhausted.[3] Her reasoning was that the provision that counties "shall" make kinship care payments to eligible recipients is clearly a mandate. She also cited a court of appeals case that held that a county that has been statutorily directed to provide a service must continue to do so at its own expense when the state appropriation has been exhausted. [*O'Donnell v. Reivitz*, 144 Wis. 2d 717, 725, 424 N.W.2d 733 (1988).][4] In addition, she suggested that in Milwaukee County, the Bureau of Milwaukee Child Welfare should make kinship care payments if there is a shortfall in state funding. [DHA Decision No. KIN-40/38572, Wis. Div. of Hearings and Appeals, August, 1999.]

In a later administrative review regarding placement on a waiting list for kinship care payments, the ALJ, citing the case discussed above, concluded in the preliminary decision for the case that the kinship care eligibility statute contains a mandatory direction that benefit payments be made to eligible persons and that the counties must continue to pay benefits from county funds once the state appropriation has been exhausted.

For the final decision in that case, however, DHFS replaced the ALJ's conclusions with a finding that the petitioner was properly placed on a waiting list by the county.[5] In the discussion portion of the final decision, the opinion provides a different interpretation of the case cited by the ALJ for requiring the county to pay for kinship care benefits after the state appropriation is exhausted. The opinion stated:

> [O'Donnell] involved court placement of delinquent children in residential treatment centers and secure correctional facilities. The statute at issue directed the state agency to bill the counties for those placements. If a county failed to pay, the agency was required by the statute to deduct the payment from the county's community aids allocation. The counties argued that, to the extent that the amounts billed exceeded the amounts appropriated to the counties as youth aids, the bills constituted an illegal tax on counties. Because the legislature possesses "supreme authority" over counties, the court rejected the argument.
>
> The kinship care statute contains no such directive to counties to bear the cost. While the statute directs that counties "shall make payments . . . to a kinship care relative," that language is coupled with the provision that the department "shall reimburse counties . . . for payments made under this subsection." Section 48.57 (3m) (am), Stats. Reimbursement is made from the sum certain appropriation under sec. 20.435 (3) (kc), Stats. In contrast with the legislative mandate at issue in O'Donnell, there is no statutory

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[3] The petitioner in the case was a resident of Milwaukee County and the Bureau of Milwaukee Child and Welfare was ordered to make payments on grounds other than discussed here. Specifically, the ALJ was not persuaded that kinship care funding was exhausted.

[4] In *O'Donnell*, the Milwaukee County Executive and a Milwaukee County taxpayer asserted that a statute requiring the county to pay the costs of incarcerating juvenile delinquents was the imposition of a tax on the county because the county's Youth Aids allocation was insufficient to cover the costs. The court disagreed and stated, ". . . in the absence of a constitutional limitation, the legislature may compel counties to provide a specified social service and to bear the cost." [*Id.*, at 736.]

[5] Under s. 227.46 (2), the ALJ is required to prepare a ***proposed*** decision. DHFS must serve copies of a proposed decision on all parties and those who are adversely affected by the decision may comment or object to the proposed decision. After permitting time for comments or objections, the Secretary of Health and Family Services renders the final decision.

language obligating the counties to make kinship care payments when the reimbursement appropriation has been exhausted.

Consistent with *O'Donnell*, there is no question that the legislature has the power to direct counties to make kinship care payments without reimbursement from the state. But that is not what the legislature has done. Rather, it directed that the counties shall pay and the state shall reimburse. To accept the administrative law judge's interpretation of the statute is to read the reimbursement language out of it.

As the legislature has structured the kinship care payment system, payment ceases when the reimbursement funds disappear. In the absence of further reimbursement funding, waiting lists are created. As it has done previously, the legislature decides whether to reduce or eliminate waiting lists by appropriating more reimbursement dollars. If the legislature had stated that prospective kinship care recipients were entitled to payment regardless of state funding or if it had directed the counties to pay regardless of reimbursement, waiting lists would be improper. But the legislature chose neither of those options. Waiting lists are entirely consistent with the county payment/state reimbursement system established by the legislature. [DHA Division No. KIN-20/46747, Wis. Div. of Hearings and Appeals, January 2001.]

It is not clear how a court would rule if presented with the question of whether waiting lists are permissible in the kinship care program. Although the administrative decisions discussed above indicate that waiting lists are improper, the final agency decisions regarding waiting lists are in conflict. Therefore, a court may find it appropriate to review such a case *de novo* without regard to prior agency decisions.

In conclusion, absent a court ruling or statutory change clarifying whether waiting lists are appropriate, it is not clear that DHFS is prohibited from establishing waiting lists.

If you have any questions or would like further information on this topic, please feel free to call me at the Legislative Council Staff offices.

AS:jal;ksm

New Federalism
National Survey of America's Families

An Urban Institute Program to Assess Changing Social Policies

THE URBAN INSTITUTE

Series B, No. B-25, February 2000

Children Cared for by Relatives: Who Are They and How Are They Faring?

Jennifer Ehrle, Rob Geen, and Rebecca Clark

Many children in kinship care live in poverty and are not receiving the services they need to overcome this hardship.

In 1997, 1.8 million children lived with relatives, with neither of their parents present in the home, according to analyses of the 1997 National Survey of America's Families (NSAF). The majority (1.3 million) of these children lived with kin privately without involvement of the child welfare system, while a half a million children were removed from their parents by a public agency because of abuse or neglect and placed with kin. Some of the children placed with kin by a public agency are in state custody (200,000) yet the majority (300,000) were placed with kin without being taken into custody.[1,2] Many of these children, regardless of the circumstances of their placement, are living in impoverished environments with caretakers who are older and have limited formal education. Moreover, despite being eligible for numerous public services, such as Aid to Families with Dependent Children (AFDC), food stamps, and Medicaid, many children in kinship arrangements do not receive them.[3]

These findings raise concerns about children living with kin and the environments in which they are being raised. A growing body of research by developmental psychologists suggests that separation from a parent or primary caretaker can be traumatic to a child (Bowlby, 1973, 1980). At the same time, the impact of a separation may be mediated by a host of factors innate to the child and by external factors such as the quality of the child's environment and the circumstances surrounding the separation (Fein and Maluccio, 1991). However, the findings in this brief suggest that many of these children live in poverty and are not receiving the services they need to overcome this hardship.

Despite this adversity, many experts believe that there are substantial benefits to placing children separated from their parents with kin rather than with unrelated foster parents. Specifically, research suggests kinship care placements may be preferable to nonkin foster care placements because they provide children with a sense of family support (Dubowitz et al. 1994). Research has also shown that children in kinship care have more frequent and consistent contact with birth parents and siblings than children in nonkin foster care (Chipungu et al. 1998). Yet it is still uncertain how the potentially damaging risks of poverty to children's development mitigate some of these benefits.

This brief documents the numbers of children living in different types of kinship environments, some characteristics of these environments, and the services these children receive. Findings are based on data from the 1997 National Survey of America's Families (NSAF), a nationally representative survey of households with persons under the age of 65. It includes measures of the economic, health, and social characteristics of more than 44,000 households. This analysis uses information from the sample of children under age 18. Information was obtained from the most knowledgeable adult in the household, the parent or caretaker most knowledgeable about the child's education and health

Attachment 4

care. This paper refers to these knowledgeable adults as "caregivers."

Three categories of kinship care are identified.

- ***Private kinship care (1.3 million children):*** Children are being cared for privately by relatives without involvement of a public child welfare agency.
- ***Kinship foster care (200,000 children):*** Children live with relatives because a child welfare agency removed them from their parents due to abuse or neglect, took them into state custody and placed them in the care of a relative.
- ***Voluntary kinship care (300,000 children):*** Children in these arrangements had come to the attention of child protective services and were placed with kin, but are not in state custody.

These categories are assessed and compared in terms of family environment and service receipt.[4]

One in five children in kinship care faces three or more simultaneous risks to their healthy development.

Environments of Children in Kinship Care

Substantial numbers of children in all types of kinship care face various socioeconomic risks to their healthy development. Two in five (41 percent) live in families with income less than 100 percent of the federal poverty level (FPL) (see table 1). One in three (36 percent) live with a caretaker without a high school degree. One in two (55 percent) live with a caretaker who does not a have a spouse. And nearly one in five (19 percent) live in households with four or more children. Of even greater concern, one in five (22 percent) face three or more risks simultaneously.[5] In comparison, only 8 percent of all children in the United States fall into this category (Moore, Vandivere, and Ehrle 2000).

Levels of risk do not vary significantly by kinship arrangements. The only difference was that a higher percentage (55 percent) of children in voluntary care live with providers without a high school degree, compared with children in private kinship care (33 percent) and children in kinship foster care (32 percent). This may be because many of these providers are grandparents, according to NSAF data, who may have had fewer opportunities for formal schooling. Otherwise, it is a notable finding that children experience the same level of risk regardless of the arrangement in which they live.[6]

Services for Children in Kinship Care

Service eligibility and receipt vary for the different kinship arrangements. Table 2 compares service eligibility for different types of kinship families. Some services are specific to the child welfare agency and some, such as income assistance, are provided by other agencies. Generally, only kin caring for a child who has been abused or neglected are eligible to receive child

TABLE 1. Environments of Children in Kinship Care

Socioeconomic Risk Factor	All Children in Kinship Care (sample size = 1095) (%)	Children in Private Kinship Care (sample size = 780) (%)	Children in Voluntary Kinship Care (sample size = 167) (%)	Children in Kinship Foster Care (sample size = 148) (%)
Caretaker has less than a high school degree[a,b]	36	33	55	32
Caretaker does not have a spouse	55	55	53	62
Four or more children live in the household	19	15	32	27
Family income less than 100% FPL	41	43	31	39
Three or more risks present	22	20	30	20

Source: Urban Institute calculations from the 1997 National Survey of America's Families.
Note: Based on t-tests, statistically significant differences at the 0.05 level are noted for the following comparisons of estimates: a = private kinship care to voluntary kinship care, b = voluntary kinship care to kinship foster care. These t-tests were only conducted when a chi-square test of distributions first indicated that a relationship existed between the type of kinship placement and the particular risk factor being analyzed.

welfare services, but all kin are eligible to receive income assistance, Medicaid, food stamps (if the family is income-eligible), and supplemental security income (if the child meets disability guidelines).

Families caring for children who have been abused or neglected can receive services from the child welfare agency. This agency visits families to monitor the child's safety and well-being in the placement, provides foster parent licensing and payments, and helps link families to services. A foster care payment, available to all kin who are caring for children in state custody and who become licensed, can provide a substantial source of economic support.[7] Payments and licensing requirements differ from state to state and depend on the age of the child. In 1996, payments averaged $356 per month for a 2-year-old, $373 per month for a 9-year-old, and $431 per month for a 16-year-old child (American Public Welfare Association 1998). Many state child welfare systems also offer subsidized guardianship as an option for children living in relative care. Guardianship enables kin to assume long-term parental care of the child without severing the legal parent/child relationship (Takas 1993). Subsidized guardianship provides a stipend that sometimes equals a foster care payment.

Yet compared with traditional nonkin foster parents, research has found that kinship caregivers are less likely to request or receive foster parent training, respite care services, educational or mental health assessments, individual or group counseling, or tutoring for the children in their care. These providers also receive less information and supervision from the child welfare agency (Chipungu et al. 1998). Thus, the extent to which kinship foster caregivers actually receive the services they need from child welfare is uncertain. Moreover, voluntary providers could be at a particular disadvantage. They may receive a lower level of service from child welfare because the child is not in state custody, depending on the particular state

Voluntary providers may receive a lower level of service from child welfare because the child is not in state custody.

TABLE 2. Services Available to Kinship Care Families

	Private Kinship	Kinship Voluntary	Kinship Foster
Child Welfare Services	—	SOME—depending on the state and the agency.	YES—but research shows they receive fewer than traditional nonkin foster parents.
Foster Care Payments	—	NO	YES—if relative becomes a licensed foster parent.
TANF (formerly AFDC) Child-Only Grants	YES*	YES	YES—if not receiving a foster care payment.
TANF (formerly AFDC) Income Assistance Grants	YES—for themselves and their own biological children if income-eligible.	YES—for themselves and their own biological children if income-eligible.	YES—for themselves and their own biological children if income-eligible.
Food Stamps	YES—must be income-eligible, but relative children would be counted when determining the grant amount.	YES—must be income-eligible, but relative children would be counted when determining the grant amount.	YES—must be income-eligible, but relative children would be counted when determining the grant amount.
Medicaid	YES—if the family is income eligible or a child-only grant is being made for that child.	YES—if the family is income eligible or a child-only grant is being made for that child.	YES—all foster children are categorically eligible.
Supplemental Security Income	YES—if relative child meets disability guidelines.	YES—if relative child meets disability guidelines.	YES—if relative child meets disability guidelines and a foster care payment is not being made for that child.

*Wisconsin's TANF program converted child-only payments to kinship care payments and families are only eligible if the child is determined to be at risk of harm if living with his or her biological parents. Child welfare agencies do an assessment of all families applying for the payment.

and agency. Voluntary kin providers do not have the option of becoming licensed foster parents.

Kin families are eligible for many services outside child welfare, yet they receive relatively few. With regard to income assistance, kin families not receiving foster care payments can receive child-only AFDC, now Temporary Assistance to Needy Families (TANF), payments each month. Payment amounts differ from state to state[8]—in 1996 they ranged from $60 to $452 for one child per month, with an average of $207 per month.[9] These amounts are prorated at a declining rate for each additional child and do not vary depending on the age of the child. This average is notably lower than the average foster care payment, which, as previously stated, ranges from $356 to $431 per month depending on the age of the child. Finally, families that are income-eligible, which many kinship families are, can receive the standard AFDC payment for the household unit.

In 1997, only 53% of all children in kinship care received Medicaid, despite all being eligible.

In 1996, despite their eligibility, only 28 percent of children living with relatives were receiving AFDC payments (table 3). Significantly more children in voluntary care families (52 percent) were receiving payments, however, compared with children in private kinship families (24 percent) and children in kinship foster families (19 percent). The higher percentage of voluntary families receiving payments may be due to their links to child welfare system. Social workers may refer these families to AFDC for financial assistance. Private kinship providers, however, do not appear to have this contact and may not be aware that they are eligible for assistance. The lower receipt of income assistance among kinship foster families may be a function of their already receiving foster care payments, which makes them ineligible for a child-only AFDC payment.

Income-eligible kinship families can also receive food stamps, with the relative child figured into the assistance amount. Given the poverty many kinship families experience, it seems likely that many would be income-eligible and receive this type of assistance, particularly if they took on the care of an additional child. In 1996, 60 percent of children in kinship care families with incomes below 100 percent of FPL lived with a family member who had received food stamps (64 percent of all children in families with incomes below 100 percent of FPL lived with a member who had received food stamps). This portion did not differ depending on the type of kinship care arrangement the child lived in.

Generally all children living in kinship care are eligible to receive Medicaid. For children in private and voluntary kinship care, if the family is receiving a child-only payment for that child (for which all are eligible), the child is also eligible for Medicaid. Children in kinship foster care are categorically eligible to receive Medicaid assistance.

Given their eligibility for Medicaid and the difficulty in placing a nonbiological child on an employer-covered insurance plan, it would be expected that receipt of Medicaid would be very high among families caring for relative children. However, in 1997, only 53 percent of all children in kinship care received Medicaid. Moreover, only 58 percent of children in kinship foster care families were receiving it, especially surprising given foster children's categorical eligibility. Yet only 29 percent of all children in kinship care were uninsured at some time in 1997, suggesting that some kinship care children may be included on the caretaker's private plan. Adding a nonbiological child to a private plan may be difficult, however, particularly if the caretaker does not have legal custody of the child.

Finally, if the relative child in their care meets disability guidelines, relative families are eligible to receive supplemental security payments, unless they are already receiving foster care payments in 1996. Three percent of children in kinship families were receiving these payments, and percentages did not differ depending on the type of kinship care in which the child was placed.

Overall, given the hardship many kinship families experience and their eligibility for services, the relatively low percentages of families actually receiving some

TABLE 3. Service Receipt of Children in Kinship Care

Service	All Children in Kinship Care (sample size = 1095) (%)	Children in Private Kinship Care (sample size = 780) (%)	Children in Voluntary Kinship Care (sample size = 167) (%)	Children in Kinship Foster Care (sample size = 148) (%)
AFDC[a,b]	28	24	52	19
Food Stamps (percents based on children in families with incomes below 100 percent of the federal poverty line)	60	58	60	77
Supplemental Security Income	3	3	2	4
Medicaid	53	49	71	58

Source: Urban Institute calculations from the 1997 National Survey of America's Families.
Note: Based on t-tests, statistically significant differences at the 0.05 level are noted for the following comparisons of estimates: a = private kinship care to voluntary kinship care, b = voluntary kinship care to kinship foster care. These t-tests were only conducted when a chi-square test of distributions first indicated that a relationship existed between the type of kinship placement and the particular service being analyzed.

Children living in voluntary kinship care are now in precarious environments with potentially lower levels of monitoring from the child welfare agency.

services raises questions about access. Previous research has suggested that relatives caring for children privately sometimes face significant obstacles to obtaining assistance because they do not have legal custody of the children in their care. Eligibility workers also may not be aware of the services kinship families can receive (Chalfie 1994; Hornby, Zeller, and Karraker 1995). Further, these families may not seek out these services because they are unaware that they are eligible or because they want to avoid involvement with welfare agencies. More research on frontline practices and the kinship families themselves is needed to better understand why services are not being accessed.

However, an increasing number of states are creating and modifying policies to alleviate access issues. For example, in Washington, D.C., relative caregivers can obtain a medical consent form that gives them permission to seek routine and emergency medical assistance for the child. In addition, in some communities, comprehensive resource and service centers are now available to offer support groups, individual counseling, parenting classes, respite care, information and referral services, health screenings, and job training and education to grandparents and other relatives caring for kin children (Generations United 1998).

Discussion

The NSAF is the first national survey to identify and enumerate different types of kinship care families. It also provides the first available detailed data on the environments and service receipt of children in kinship care. These findings are important because they can inform policymakers and those developing and implementing programs to serve kinship care families. A few findings are of particular note.

- **The population of children living in *voluntary kinship care* (300,000), those placed with kin due to abuse or neglect but not taken into state custody, is substantial.** This population had never been identified using national data and it is notable that it is so large. Moreover, findings show that these children experience similar levels of socioeconomic risk as children in other kinship arrangements. This is problematic because these children have already experienced abuse or neglect and are now in precarious environments with potentially lower levels of monitoring from the child welfare agency.

- **Children in all kinship care environments face substantial socioeconomic risk.** One fifth (22 percent) of children in kinship care simultaneously face three or more risks, while only 8 percent of the overall population of children in the United States have this experience. Given that only children in kinship foster and voluntary kinship care receive services from the child welfare agency, child welfare decision-

makers have become increasingly concerned that more private kinship caregivers, who are equally needy, will seek assistance from the child welfare system.

- **Despite being eligible to receive services, relatively few children in kinship care live in families that do.** More information is needed to address the access issues these families may face.

Children living with kin are already in a vulnerable situation given that they are separated from their parents. The environments in which they are placed may make a significant difference in how they adjust to this separation. However, many children in kinship care arrangements face considerable socioeconomic risks to their healthy development and their families may not be receiving the services they need to overcome these risks. Ideally, a service system to support these families would capitalize on the benefits children gain from being placed with kin while at the same time providing the resources relatives need to create environments that promote children's well-being.

Endnotes

1. When a child welfare agency believes a child's home environment puts the child at serious risk of abuse or neglect, the agency will petition the court to remove the child from parental custody. The state takes temporary custody of the child when a court determines that removal is necessary.

2. Given the relatively small size of the kinship care population there is more room for error when estimating the sizes of the different subpopulations. The population estimates in this report represent our best attempt at enumerating the subpopulations of children in kinship care. Yet it is important to note that the true population numbers may lie somewhere within a range of estimates. Specifically, these data suggest there is a 90 percent likelihood that the number of children in private kinship care is between 1,120,000 and 1,383,000; that the number of children in kinship foster care is between 130,000 and 232,000; and that the number of children in voluntary kinship care is between 191,000 and 341,000.

3. In 1997 when this data was collected, the income assistance program for needy families was called Aid to Families with Dependent Children (AFDC). The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) signed into law in August 1996, replaced AFDC with Temporary Assistance for Needy Families (TANF).

4. Differences among all three groups were assessed using chi-square tests. Where these tests demonstrated a statistically significant relationship at the 0.05 level, differences between each possible pair of kinship arrangements were determined using t-tests. Findings discussed in this text are statistically significant at the 0.05 level, unless otherwise stated.

5. Research suggests that children may be resilient to growing up with one risk, but the presence of multiple risk factors may be harder to overcome (Garmezy 1993), and has been associated with worse outcomes for children (Moore, Vandivere, and Ehrle 2000).

6. Although the percentages may appear different in some cases the differences are not significant, due to small sample sizes and higher standard errors.

7. In three states the relative child also has to be IV-E eligible. A child's eligibility for IV-E is linked to his or her family's eligibility for the Aid to Families with Dependent Children (AFDC) program as in effect in their state on July 16, 1996.

8. In Wisconsin, the child must be shown to be at risk of harm if living with biological parents in order for the relative caregiver to be eligible for a TANF child-only payment.

9. This data is based on an annual benefit survey conducted by the Congressional Research Service and from Urban Institute tabulations of AFDC state plan information.

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TO: Joint Committee for Review of Administrative Rules

FROM: Bob Andersen Bob Andersen

RE: Senate Clearinghouse Rule 99-071, Relating to the Eligibility of Nonparent Relatives of Children to Receive Kinship Care Benefits to Help Them Provide Care and Maintenance for Children

DATE: November 14, 2001

Legal Action of Wisconsin (LAW) is an organization funded by the federal Legal Services Corporation to represent low income people in civil actions in the populous 11 counties in Southeastern Wisconsin. As a result we represent a great number of people in actions involving W-2 and kinship care. LAW was involved in litigation challenging the department's attempt to establish waiting lists, which is discussed below.

1. **Need for Revision of Chapter 227, which Enables an Administrative Agency to Adopt Its Own *Final Decision* in any Administrative Challenge of its Authority.**

What has happened in this area reveals a very serious flaw in the statutes that undermines the integrity of an important aspect of the administrative review process. While this involves DHFS, it could just as easily be any other agency that is involved. The flaw is the ability of an administrative agency under s. 227.46, et. seq., to write its own self serving ***final decision*** reversing the decision of an independent hearing examiner in a case challenging the agency's authority. The only redress that a petitioner has is to file an action in circuit court to review the decision of the agency. This is a costly burden for a petitioner, especially a low income petitioner, as would be the case here. However, even where a petitioner is able to afford the expenses of an action in circuit court, this process undermines the purpose of an administrative process that is supposed to benefit an ordinary lay person, who is not supposed to need to rely on the assistance of legal counsel.

The solution to this problem lies in changing the statutes so that, at least, in an administrative challenge to the authority of an agency, the decision of the independent hearing examiner is the *final decision* in the case, which cannot be overturned by the agency whose authority is in question.

2. **Every Entity that has Been Involved in the Issue of Allowing DHFS to Establish Waiting Lists, Has, At Least Once, Denied the Agency that Authority.**

The executive branch first rejected this effort to allow waiting lists in 1997, the legislature rejected this twice in 1999 and 2001, and two independent hearing examiners have ruled that the department does not have the authority under the statutes to establish waiting lists.

In 1995, Kinship Care was created by the bill that created W-2. The enactment provided that the counties ***shall*** make kinship care payments to relatives, just as the statute provides to this day.

On March 14, 1997, for the following session's budget bill, **the department requested the authority to establish waiting lists** in a budget request and was denied that authority. See the attached memo. The memo indicates that the department wanted the statutory requirement that counties ***shall*** provide benefits to be qualified by the condition, ***"to the extent resources are available,*** **so that the department could** ***develop waiting lists or other strategies to address the situation where the Kinship Care funding for the county (or DHFS in the case of Milwaukee County) is insufficient to meet the need for Kinship Care payments."*** This request was denied, as evidenced by the language that was ultimately submitted to the legislature, which did not include these provisions. The memo also bears on its face the handwritten note, ***"Deny - no waiting lists - counties must pay."***

This memo was cited by the administrative hearing examiner, Louis Dunlap, who first found that the department had no authority to establish waiting lists [see below]. It was submitted to Dunlap by staff of the Legislative Fiscal Bureau, whose records had been subpoenaed. Presumably, since it is an executive budget request, this request was denied by the executive branch.

The case before Dunlap was filed in **May, 1998.** It was ultimately decided on June 29, 1999. In the meantime, before the **beginning of 1999**, the department once again requested the governor to introduce language in the budget bill to authorize the department to establish waiting lists and to provide that kinship care is ***not an entitlement.*** This language was inserted in the budget bill this time around by the governor. However, the Joint Committee on Finance did not adopt this language and it did not subsequently succeed in getting into the budget bill.

The department's response to this action of the legislature has been noted in its response to the comments that were offered to this proposed rule:

> ***The language included in the Governor's 1999-2001 budget clearly stating that this program is not an entitlement is merely to clarify the Department's existing interpretation, not to change it from an entitlement to a non-entitlement.***

The adverse action taken on the department's earlier budget request in March 1997 and the fact that litigation was underway against the department when this amendment was offered make this explanation not very credible. **Instead, the more reasonable interpretation of these events is that the department knew that it did not have the authority to establish waiting lists because its request was rejected in March 1997, was worried about the outcome of the litigation, and included this language in the budget bill to give the department the authority to establish waiting lists. The legislature refused to adopt those provisions to give them that authority.**

On June 29, 1999, hearing examiner Dunlap ruled that the department does not have the authority to establish waiting lists, but instead the law ***"presents a strong showing of the obligation upon the department or the counties to pay all eligible persons."*** [emphasis added] Dunlap cited the March 14, 1997 request memo of DHFS in making the decision, as well as the mandatory language of the statute. The case was in circuit court by that time (Milwaukee Circuit Court, Dodd v. Wisconsin Department of Health and Family Services, Case No. 98-CV-007356) and the case was settled by the department.

The department did not attempt to have this language inserted in the budget bill in 2001. Instead, provisions for the establishment of waiting lists and that kinship care is not an entitlement were considered by the Joint Committee on Finance. Once again, the committee refused to adopt these provisions.

It is clear from this legislative history, that waiting lists were not authorized from the inception of this legislation, that the department attempted to rectify this by subsequent efforts to introduce legislation, but that the department was never able to get a majority of the Joint Committee on Finance to approve this change in the law or to get this legislation subsequently approved by both houses.

Subsequently, another appeal was filed challenging the department's authority to establish waiting lists -- this time in Fond du Lac County -- and on January 5, 2001, another administrative law judge in a case in Fond du Lac County ruled that the department does not have the authority to establish waiting lists and that the counties are obligated to pay benefits under the statutes to all eligible persons, without regard to whether appropriations were exhausted.

3. **The Department Reversed the Conclusions of Both Hearing Examiners, by Issuing Its Own *Final Decision*, Which Relies on a Contrived Interpretation of Case Law.**

The administrative law judge in the Fond du Lac case cited the court of appeals decision, O'Donnell v. Reivitz, 144 Wis. 2d 717, 725, 424 N.W.2d 733 (1988), as did the administrative law judge in the earlier decision referred to above, for the proposition that the state can require counties to make payments, even where appropriations are exhausted, because the legislature possesses ***supreme authority*** over the counties.

On March 7, 2001, the department reversed this ***proposed*** decision, by finding that there

was a critical difference between the statute involved in O'Donnell and the statute on kinship care. **In the words of the department,**

> ***In contrast with the legislative mandate at issue in O'Donnell, there is [under the kinship care statute] no statutory language obligating the counties to make kinship care payments when the reimbursement appropriation is exhausted.***

This statement is false. The truth is that the kinship care statute ***is not "in contrast,"*** because the statute in **O'Donnell did not contain language about what to do *when the reimbursement appropriation is exhausted* either.** The statute in that case, which required counties to pay for the costs of placements of delinquent children in residential treatment centers and secure correctional facilities, provided as follows:

> **The department [of Health and Social Services] shall bill counties or deduct allocations from the allocations under s. 20.435(4)(cd) for the costs of care, services, and supplies purchased or provided by the department for each person receiving services under 48.34 and 51.35(3). Payment shall be due within 60 days of the billing date. If any payment has not been received within 60 days, the department shall withhold aid payments in the amount due from the appropriations under s. 20.435(4)(b) or (c)(d).**

The kinship care statute [s. 48.57 (3n)(am] provides as follows:

> **From the appropriation under s. 20.435 (3) (kc), the department shall reimburse counties having populations of less than 500,000 for payments made under this subsection and shall make payments under this subsection in a county having a population of 500,000 or more. A county department, and in a county having a population of 500,000 or more, the department shall make monthly payments for each child in the amount specified in sub. (3m)(am)(intro) to a long term kinship care relative who is providing care and maintenance for that child if all of the following conditions are met:**

The only difference between the O'Donnell statute and the kinship care statute is the ***method of payment.*** Under the kinship care statute, the county is required to pay and the department is required to reimburse. Under the statute in O'Donnell, the department itself provides the services and then either bills the counties or deducts the costs from a specific allocation. If the county is billed and fails to pay within 60 days, the department withholds payments from certain appropriations. The statute in O'Donnell addresses the ***method of payment*** if the county ***fails*** to make payment, ***not the circumstance where the appropriation runs out.***

Neither statute limits the counties' obligation, where the appropriations run out. Consequently, the O'Donnell decision squarely addresses the question of the counties' liability under the kinship care statute, even where the appropriations are exhausted. As the court in O'Donnell said,

> Subject to limitations prescribed in the Wisconsin Constitution, the legislature possesses supreme authority over municipalities. . . . As an arm of the state in governmental matters, generally a county cannot refuse to obey a state's direction. . . . There are many instances where the legislature imposes new duties involving financial obligations upon counties without providing any appropriation therefor. This is done on the theory the county is a political subdivision or agency of the state. . . . Accordingly, in the absence of a constitutional limitation, the legislature may compel counties to provide a specified social service and to bear the cost.

In summary, the distinction that the department attempts to draw with the <u>O'Donnell</u> case is not a valid one and does not support its reversal of the hearing examiners' decisions in either of the cases referred to in this memo.

On the contrary, the decisions of the hearing examiners are squarely consistent with what has been the unmistakable intent of the legislature on this question. The department has no authority for the establishment of waiting lists for kinship care and therefor its attempt to establish waiting lists by this administrative rule is invalid.

Statutory Language Change Requested To Executive Budget Request By DHFS

REVISED: March 14, 1997

Post-it® Fax Note 7671	Date 3/24/97	# of pages ▶ 2
To Rachel Carabell	From G. A. Fasciano	
Co./Dept. LFB	Co. DOA	
Phone # 6-3847	Phone # 6-2288	
Fax # 7-6873	Fax #	

Topic: Kinship Care

Section(s) in Budget Bill:

Section 1606 amending 48.57(3m)(am)(intro.)

Language in Budget Bill and Preferred Language:

This provision provides that the department shall reimburse counties for Kinship Care payments. The provision also requires counties to make a $215 Kinship Care payment to individuals provided certain criteria are met.
DHFS requests two changes in the statutory language:

Deny - my unanswered questions re use of TANF for this purpose.

(a) Rather than have the department reimburse counties for Kinship Care payments, specify that the Department will provide funding from appropriation 20.435 (3)(kc) to counties to use for Kinship Care payments or for services to children at risk of abuse or neglect to prevent the need for protective services intervention services or to keep children safely in their homes.

Deny - no waiting lists - counties must pay

(b) Insert the clause, "to the extent resources are available," prior to the requirement that a county department or the department shall make the $215 Kinship Care payments

Explanation:

The first change is intended to allow the Department to provide counties a funding allocation which counties would use for Kinship Care payments or for services to children at risk of abuse or neglect to prevent the need for protective services intervention services or to keep children safely in their homes. To the extent that the entire funding allocation was not needed for Kinship Care payments, the county (or DHFS in the case of Milwaukee County) could use the balance of the money to fund services to children at risk of abuse or neglect to prevent the need for protective services intervention services or to keep children safely in their homes. This change is intended to provide an incentive to counties to seek more cost-effective strategies to Kinship Care, where appropriate (e.g., providing services to keep the child in his own home rather than having the child placed with a relative) because the county (or DHFS) will be able to retain funds that are not spent on Kinship Care payments.

EY7

The second change is intended to clarify that a county is obligated to fund Kinship Care payments up to the level of funding provided. This clarification will allow counties to develop waiting lists or other strategies to address situations where the Kinship Care funding for the county (or DHPS in the case of Milwaukee County) is insufficient to meet the need for Kinship Care payments.

Contact: Robin Lesiic, 266-9363 or Fredi Bove, 266-2907

SUE JESKEWITZ

State Representative • 24th Assembly District

Joint Committee for Review of Administrative Rules

Hearing on Clearinghouse Rule 99-071
Relating to the Kinship Care Program
November 14, 2001

I would like to express my support for the objections that the Senate Committee on Human Services and Aging raised to Clearinghouse Rule 99-071. I encourage this committee to agree and vote to suspend the rule.

From a strictly administrative perspective, we cannot allow departments to overstep their authority and single handedly overrule the legislature. These departments are here to work in conjunction with the legislature, not to make dictatorial decisions. The legislature has shown in earlier decisions that it does not want waiting lists for kinship care. Twice, the Joint Finance Committee has voted unanimously to fully fund the kinship care program to eliminate waiting lists.

In addition, two independent hearing examiners issued decisions ruling that the department does not have the authority to establish waiting lists. Legislative Council has also concluded that it is unclear whether or not the department has clear authority to establish waiting lists.

The legislature has voted that they do not want waiting lists. Independent hearing examiners do not believe the department has the authority to set up waiting lists. Legislative council cannot conclude that the department has this authority. Even so, instead of waiting for this rule to work its way through the legislative process, the department issued its own final decision determining that they were allowed to set up waiting lists for kinship care. To allow the department to make this decision for itself, independent of the input of others, is like the fox guarding the hen house.

Based on those reasons alone, I do not believe that the Department of Health and Family Services should be allowed to set up waiting lists for kinship care. However, there are also social reasons for why kinship care waiting lists should not be allowed.

Kinship care allows youth to stay with family members when their parents are unable to care for them. We cannot punish children for the mistakes of their parents. To not fully fund the kinship care program, to allow waiting lists, could put these children in jeopardy, possibly pulling them away from their family support and into the foster care system.

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The kinship care program encourages families to take responsibility for their young relatives. Allowing waiting lists for the program may discourages families from providing this familial support because they do not know if they are going to get payments. There are families who may not be able to take on another child without the guarantee of the small payment that they get through the kinship program.

If these children are not taken in by their extended families there are only three other choices: return them to their parent (who has already been shown to be unable to care for the child), have them enter the foster care system (which is nearly double the cost) or, in the case of older children, many of them live a life on the streets. Two of the reasons are obviously unsafe for the child and the third is an added burden on an already overburdened foster care system (at a much greater cost to the state).

We need to look out for the vulnerable population, the children. Allowing waiting lists for the kinship care program will put the future safety of these children in jeopardy.

Please join me, as well as the Senate Committee on Human Services and Aging, in rejecting Clearinghouse Rule 99-071.

Thank you.

CWAG

Thomas L. Frazier, *Executive Director*

Coalition of Wisconsin Aging Groups

Date: September 27, 2001

To: The Honorable Judy Robson, Co-Chair
Joint Committee for Review of Administrative Rules

The Honorable Glenn Grothman, Co-Chair
Joint Committee for Review of Administrative Rules

From: Tom Frazier, Executive Director

Subject: Clearinghouse Rule 99-071, Secs. 58.06(2) and 58.12 – relating to the Kinship Care Program

As you may know, the Coalition of Wisconsin Aging Groups (CWAG) has a rich history of viewing public policy through an intergenerational lens, taking note of the effects of policies and programs on the entire lifespan. Our members, many of whom are grandparents themselves, are particularly committed to assisting grandparents and other relatives who are raising children. As intergenerational advocates, CWAG urges you to oppose any changes in Administrative Rules that would create waiting lists for the Kinship Care Program recently requested by the Department of Health and Family Services.

These relative caregivers are providing a great service to their families and their communities by providing children some sense of stability during times of family crisis. Many are grandparents and older relatives who are living on fixed incomes, who are likely to get pushed further into poverty without this necessary financial support. Also, the children in these homes are likely to have additional needs as a result of experiencing family disruption. The children's needs become even more difficult to meet as their poverty increases.

As you may also be aware, CWAG has historically been an opponent of waiting lists. Our members, their friends and families have recounted countless stories of tremendous stress and substantial sacrifice while waiting for COP and other long-term care services. We do not want these non-traditional families to share the "waiting list" experience. It is not good public policy to ask relative caregivers who are simply responding to the complex needs of their extended families to wait for the necessary economic support that is due them.

If you have any questions or require additional information, do not hesitate to contact us. It has been said that a true measure of society is how well it treats its youngest and oldest citizens. By opposing waiting lists for the Kinship Care Program, you will demonstrate your commitment to protecting some of our state's most vulnerable families.

cc. Members, Joint Committee for Review of Administrative Rules

2850 Dairy Drive • Suite 100 • Madison, WI 53718-6751 • 608/224-0606 • Fax 608/224-0607

SENATOR JUDITH B. ROBSON
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JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES

November 15, 2001

Secretary Phyllis Dubé
Department of Health and Family Services
1 West Wilson Street
Madison, Wisconsin

Re: Emergency Rule HFS 94.20(3)
Emergency Rule HFS 119
Clearinghouse Rule 99-071

Dear Secretary Dubé:

We are writing to inform you that the Joint Committee for the Review of Administrative Rules (JCRAR) held a public hearing and executive session on November 14, 2001. At that meeting, the JCRAR received public testimony regarding two emergency rules, Emergency Rule HFS 94.20(3), relating to patients' rights, and Emergency Rule HFS 119, relating to premium rates for HIRSP.

Based on the public testimony, the committee adopted a motion extending the effective period of Emergency Rule HFS 94.20(3) for 60 days. The committee approved the motion on a 10-0 vote.

The committee also adopted a motion extending the effective period of Emergency Rule HFS 119 for 60 days. The committee approved this motion on a 10-0 vote.

Finally, the committee received public testimony and took executive action on Clearinghouse Rule 99-071, relating to the Kinship Care program. This rule was previously objected to by the Senate Committee on Human Services and Aging. A motion in JCRAR to sustain the objection failed on a 5-5 vote. The department is therefore free to promulgate Clearinghouse Rule 99-071.

Pursuant to § 227.24(2)(c), *Stats.*, we are notifying the Secretary of State and the Revisor of Statutes of the Committee's action through copies of this letter.

Sincerely,

Senator Judith B. Robson
15th Senate District

Representative Glenn Grothman
59th Assembly District

JBR:GG:da

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JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES

To: Members of the Joint Committee for Review of Administrative Rules
From: David Austin, committee clerk for Senator Robson
Date: November 13, 2001
Re: Materials for November 14 hearing

Enclosed please find the following material for tomorrow's JCRAR hearing:

1. ***Emergency Rule HFS 94.20***, text and letter from the Department of Health and Family Services requesting an extension of the effective period of the rule.

2. ***Emergency Rule HFS 119***, text and letter from the Department of Health and Family Services requesting an extension of the effective period of the rule.

3. ***Emergency Rule NR 20.20(73)(j) and 25.06(2)(b)***, text and letter from Department of Natural Resources requesting an extension of the effective period of the rule.

4. ***Clearinghouse Rule 99-071***, relating to kinship care; text of the rule, report to the Legislature and fiscal estimate.

The committee will also take up objections to ***Clearinghouse Rule 00-164***, relating to wetland mitigation. This rule was objected to in part by both the Assembly Committee on Environment and the Senate Committee on Environmental Resources. The two committees objected to different portions of the rule, so JCRAR will have to consider two different objections. The following material relating to this rule is enclosed:

1. Text of the rule as originally submitted to the Legislature and showing modifications made by the department during review by standing committees.

2. Report to the Legislature.

3. Fiscal estimate.

4. Letter from Assembly Committee on Environment to Department of Natural Resources, requesting modifications.

5. Assembly Record of Committee Proceedings.

6. Letter from Senate Committee on Environmental Resources to DNR, requesting modifications.

7. Senate Record of Committee Proceedings.

8. Letter from DNR to Senate and Assembly committees submitting modifications.

9. Letter from Assembly Committee on Environment to DNR, objecting in part to the rule.

10. Letter from Senate Committee on Environmental Resources to DNR, objecting in part to the rule.