99-071

Dane County
Department of Human Services

Director – Charity Eleson

KATHLEEN M. FALK
DANE COUNTY EXECUTIVE

FAX TRANSMISSION COVER SHEET

TO: PERSON David Austin w/ Sen. Robson's office
ORGANIZATION
FAX NUMBER 267-5171
DATE 8/6/01

FROM: PERSON David Carlsen NUMBER OF PAGES 2 (INCLUDING COVER SHEET)
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COMMENTS: David ... Here are our department's comments on HFS 58 which is before the Sen. Robson's cmte.
David

SPECIAL INSTRUCTIONS: ☐ *URGENT* ☐ *PLEASE REPLY* ☑ *FOR YOUR INFORMATION*

Dane County
Department of Human Services

Director – Charity Eleson
1202 Northport Drive, Madison, WI 53704-2092
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KATHLEEN M. FALK
DANE COUNTY EXECUTIVE

MEMORANDUM

DATE: August 6, 2001

TO: Senator Judith Robson, Chair-Senate Human Services and Aging Committee

FROM: Charity Eleson, Director

RE: CR 99-071, HFS 58-Kinship Care

Thank you for the opportunity to comment on the proposed revisions to Chapter HFS 58, relating to Kinship Care benefits.

Our chief concern with the proposed rule is section 58.06 (2) which would require us to make payments to a court ordered kinship care relative retroactive to the date of placement. Our concern is that there could be potentially lengthy delays between the date of court-ordered placement and when the application for benefits is actually made by the relative. This could potentially result in large retroactive payments that could cause difficulties for us in managing our Kinship Care budget.

We believe that a more reasonable approach would be to make payments retroactive to the date of application for court-ordered and non court-ordered cases. By making the payment retroactive to the date of application, the applicant is not penalized for any delays in processing the application and our agency is not faced with the prospect of large, unanticipated retroactive payments.

Thank you for the opportunity to share our concerns on this rule with you and your committee. We would ask that our suggested changes be considered in your deliberations on this rule.

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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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

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

Senate Committee on Human Services and Aging

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

Testimony by: Carol W. Medaris
Wisconsin Council on Children and Families
September 5, 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 attached pages from LAB Report 98-16.)

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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 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. By his testimony today Mark Mitchell, the Department representative, 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. The Department authored the decision referred to by Mr. Mitchell that declared waiting lists authorized by state statutes. That decision overturned an ALJ decision which 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. In addition, prior ALJ 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 Ehrle, Geen, and Clark, "Children Cared for by Relatives: Who Are They and How Are They Faring?" February, 2001, attached.) 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.

There are a few other issues that need to be better addressed in the rule. First, policies governing verification of residence and relationship leave too much discretion with local agencies. Verification has always been a problem -- both in the AFDC program and now in W-2 cases -- generally because it requires action by third parties (landlords, records and motor vehicle

departments, e.g.) over which the participant lacks control. Verification policy should be set by the Department and be the same for agencies (and therefor, participants) throughout the state. Sec. 58.11.

Second, verification of school enrollment requires a signature of a school official. (18-year-olds may be eligible if they are in school and likely to graduate.) Alternatives should be provided in the rule for cases arising during summer vacation, so that families are not denied benefits in the meantime. Sec. 58.04(4)(b).

Third, language needs to be added to clarify that caretaker relatives who have raised children for a long time may be deemed to meet the CHIPS jurisdictional requirement, in sec. 58.10(3)(b). (The Department has indicated its agreement with this principle in its response to earlier comments.)

AN EVALUATION

Kinship Care Program

Department of Health and Family Services

98-16

December 1998

1997-98 Joint Legislative Audit Committee Members

Senate Members:

Mary A. Lazich, Co-chairperson
Peggy Rosenzweig
Gary Drzewiecki
Robert Wirch
Kimberly Plache

Assembly Members:

Carol Kelso, Co-chairperson
Stephen Nass
John Gard
Gregory Huber
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:

New Federalism
National Survey of America's Families

An Urban Institute Program to Assess Changing Social Policies

THE URBAN INSTITUTE

Series B, No. B-28, February 2001

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 2

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

* Not in Wisconsin

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.

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-

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

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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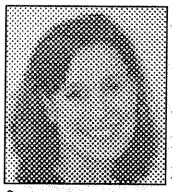

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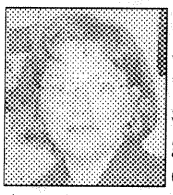

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Address Service Requested

This series presents findings from the 1997 and 1999 rounds of the National Survey of America's Families (NSAF). Information on more than 100,000 people was gathered in each round from more than 42,000 households with and without telephones that are representative of the nation as a whole and of 13 selected states (Alabama, California, Colorado, Florida, Massachusetts, Michigan, Minnesota, Mississippi, New Jersey, New York, Texas, Washington and Wisconsin). As in all surveys, the data are subject to sampling variability and other sources of error. Additional information on the NSAF can be obtained at **http://newfederalism.urban.org**.

The NSAF is part of ***Assessing the New Federalism,*** a multiyear project to monitor and assess the devolution of social programs from the federal to the state and local levels. Alan Weil is the project director. The project analyzes changes in income support, social services, and health programs. In collaboration with Child Trends, the project studies child and family well-being.

The project has received funding from The Annie E. Casey Foundation, the W.K. Kellogg Foundation, The Robert Wood Johnson Foundation, The Henry J. Kaiser Family Foundation, The Ford Foundation, The David and Lucile Packard Foundation, The John D. and Catherine T. MacArthur Foundation, the Charles Stewart Mott Foundation, The McKnight Foundation, The Commonwealth Fund, the Stuart Foundation, the Weingart Foundation, The Fund for New Jersey, The Lynde and Harry Bradley Foundation, the Joyce Foundation, and The Rockefeller Foundation.

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REVISION TO SECTION HFS 58.06(2), ADM. CODE

Proposed by the Department of Health and Family Services
September 5, 2001

Delete the currently proposed language at s. HFS 58.06(2).

Insert the following language at that same location:

(2) Each agency shall establish a written policy indicating when the kinship care or long-term kinship care payment will begin, but the written policy shall provide for the payment to begin no later than:

(a) If the placement is court-ordered, the date on which the child was placed by the court order with the relative or 90 days prior to the date on which the agency received the completed application, whichever is later.

(b) If the placement is not court-ordered, the date on which the completed application was received.

(c) A retroactive payment under pars. (a) and (b) shall be made once the application is approved.

(d) Pars. (b) and (c) do not apply if the applicant or kinship care relative is placed on a waiting list.

September 5, 2001

Senate Committee on Human Services and Aging

Motion on Clearinghouse Rule 99-071, relating to the eligibility of nonparent relatives of children to receive kinship care benefits

Moved by Senator Robson, seconded by Senator Roessler, that the Senate Human Services and Aging Committee:

1. Requests that the Department of Health and Family Services agree to consider modifying Clearinghouse Rule 99-071, as modified by the Department's September 5, 2001 revision to s. 58.06 (2), under s. 227.19 (4) (b) 2., Stats.; and

2. If the Department does not agree to consider modifying Clearinghouse Rule 99-071 in writing by 5:00 p.m. on Friday, September 14, 2001, objects under s. 227.19 (4) (d) 1. and 6., Stats., to the rule on the grounds that the Department does not have the statutory authority to promulgate this rule and on the grounds that this rule is arbitrary and capricious; and

3. If the Department agrees to consider modifying the rule, it shall submit a germane modification.

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TO: Senate Committee on Human Services and Aging

FROM: Bob Andersen

RE: Testimony on 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: September 6, 2001

Following is the testimony that I provided before your committee yesterday, September 5, 2001 on this administrative rule.

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.

Every entity that has been involved in the issue of allowing waiting lists to be established by DHFS for kinship care has decided against that authority, with the sole exception of DHFS itself. On March 14, 1997 the department requested the authority to establish waiting lists in a budget request and was denied that authority. See the attached memo. Subsequently, the legislature on two occasions denied creating that authority. At least two administrative law judges also found that DHFS does not have the authority to establish waiting lists. Yet despite this clear and unambiguous history, the department has defied the legislature and the independent hearing examiners to establish waiting lists and to propose administrative rules establishing waiting lists. According to its own testimony, there are approximately 190 children on waiting lists today.

How could this happen? The answer lies in a statutory administrative review process (s.227.46, et. seq.) which should be of grave concern for the legislature. Under this procedure, the decisions of the independent hearing examiners of the Division of Hearings and Appeals are only *proposed* decisions in the most significant cases. The administrative agency may completely reverse the decision of the hearing examiner in any particular case, as happened here. The administrative agency's's decision is the *final* decision. The only recourse that an aggrieved party has is to file an action in circuit court to review the decision of the agency. For low income people, this is an insurmountable obstacle, because of their lack of resources. Current law seriously undermines the interest that the legislature has frequently expressed in the recent past to

ensure that recipients of essential public assistance have the right to review of adverse agency determinations by independent hearing examiners. It allows for the protection offered by the independent judgement of hearing examiners to be eviscerated by the subjective priorities of a particular agency.

What happened here is that the decisions of at least two administrative law judges that found that the department has no authority to establish waiting lists were reversed by a *final* decision entered by the department that relied upon a contrived interpretation of case law to reach the result the department wanted. I will be discussing that case law and the erroneous interpretation below.

Independent of this case involving kinship care, the legislature should be very alarmed by this process for review of administrative decisions and should amend Chapter 227 of the statutes to provide that the decisions of the independent hearing examiners are the final decisions in all cases. Under this process, if an administrative agency disagrees with the conclusion of an independent hearing examiner, the statutes can authorize the agency to file an action in circuit court to have the decision overturned. Otherwise what can continue to happen, as is authorized under current law, is that an administrative agency can completely ignore the will of the legislature and the decisions of administrative hearing examiners and simply write its own *final* decision upholding its own action.

The history of what has happened with regard to the establishing of waiting lists in kinship care cases is as follows. As I indicated above, the department early on requested the authority to establish waiting lists in these cases, as evidenced by the copy of the March 14, 1997 budget request that I have attached to this testimony. That 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 submitted to the legislature. The memo also bears on its face the handwritten note, *"Deny - no waiting lists - counties must pay."*

In my testimony, I indicated that it was DOA that rejected this request, based on the fact that the copy of this request has a "Post-It Fax Note" from DOA. I assumed that it was DOA which wrote the handwritten denial on the face of the request. Interestingly enough, the very person with DOA whose name appears on that note approached me after the hearing to say that she did not write that handwritten note and that DOA did not reject this request. When I asked who could have rejected this request, she replied that it would have to have been the governor's office. The governor at the time was, of course, Governor Tommy Thompson.

Subsequently, DHFS went ahead with waiting lists none-the-less and LAW filed an appeal and commenced an action, challenging the establishment of waiting lists. The action was filed in Milwaukee Circuit Court, Dodd v. Wisconsin Department of Health and Family Services, Case No. 98-CV-007356. The circuit court judge remanded the case to the Division of Hearings and Appeals and the hearing examiner decided on June 29, 1999 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." The hearing examiner 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 referred back to the circuit court judge and the case was settled between the parties.

At the same time as this action was being considered by the courts, DHFS did get the governor to introduce language in the 1999 budget bill, providing that kinship care is not an entitlement, so as to authorize waiting lists. The legislature rejected that language from the bill. The department's response to this action of the legislature has been noted in its response to the comments that have been made 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 suggested make this explanation not very credible.

Subsequently, during the most recent budget deliberations on the 2001-03 budget bill, again the legislature was presented with the option of providing that kinship care is not an entitlement and authorizing waiting lists and once again the proposal was rejected. This time, the proposal was offered as one of the alternatives presented by the Legislative Fiscal Bureau to the Joint Committee on Finance. The Joint Committee on Finance rejected this alternative and the legislature approved that action with its approval of the budget bill.

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. The administrative law judge in that 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 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 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 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 expressly 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 state, 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 O'Donnell 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 Campbell	From G. A. Fossum	
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:

Dany - 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.

Dany - 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 DHFS in the case of Milwaukee County) is insufficient to meet the need for Kinship Care payments.

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

Judith B. Robson
Wisconsin State Senator

September 6, 2001

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

Re: Clearinghouse Rule 99-071 (kinship care eligibility)

Dear Secretary Dubé:

I am writing on behalf of the Senate Committee on Human Services and Aging in regards to Clearinghouse Rule, 99-071, relating to the eligibility of nonparent relatives of children to receive kinship care benefits.

The committee held a public hearing and executive session on the rule yesterday. Members of the committee expressed two concerns about the rule and approved a motion requesting modifications to the rule. A copy of the motion approved by the committee is attached.

One area of concern relates to section HFS 58.12. This section of the rule authorizes counties to establish waiting lists for kinship care. After hearing testimony during the public hearing and debating the question in executive session, the committee concluded that the department lacks statutory authority for this provision. Therefore, the committee respectfully requests that the department delete this section from the rule.

The other area of concern relates to section HFS 58.06(2). At the public hearing, the department's representative submitted a germane modification to the rule. This modification limits retroactive payments in situations where the child was placed through a court order to 90 days prior to the date on which the agency received the kinship care application.

Members of the committee expressed a desire to have a similar limit on retroactive payments in situations where placement is not ordered by a court. I respectfully request that you consult with Senator Moore and Senator Roessler, legislative leaders on the issue of kinship care, to help clarify the modification sought by the committee in this regard.

Thank you for your attention to these concerns. I look forward to hearing whether the department is willing to consider modifications to the rule.

Sincerely,

Judy Robson

Senator Judith B. Robson

JBR:da

State Capitol, Post Office Box 7882, Madison, WI 53707-7882 • Telephone (608) 266-2253
District Address: 2411 East Ridge Road, Beloit, WI 53511
Toll-free 1-800-334-1468 • E-Mail: sen.robson@legis.state.wi.us

State of Wisconsin
Department of Health and Family Services

Scott McCallum, Governor
Phyllis J. Dubé, Secretary

September 7, 2001

The Honorable Judith Robson, Chair
Senate Committee on Human Services and Aging
Wisconsin State Senate
P.O. Box 7882
Madison, WI 53707-7882

Dear Senator Robson:

This letter is in reference to action taken by your committee on Wednesday, September 5, 2001 regarding proposed Ch. HFS 58, Adm. Code, "Eligibility for the Kinship Care and Long-Term Kinship Care Program."

The Department is not willing to consider modifications to the proposed rule in the manner requested by your committee. The Department believes the Kinship Care and Long-Term Kinship Care Program can be made an entitlement only through specific enumeration of the full Legislature

The Department has submitted the germane modification, distributed to the committee Wednesday, to the Chief Clerk.

Please let me know if you have any questions. Thank you for your consideration of our proposed rule.

Sincerely,

Thomas E. Alt
Deputy Secretary

Statutory Language Change Requested To Executive Budget Request By DHFS

REVISED: March 14, 1997

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