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CLEARINGHOUSE RULE 99–071

Comments

[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated September 1998.]

1. Statutory Authority

a. Section HFS 58.03 (8) indicates that "kinship care" is a program under s. 48.57 (3m) (relating to kinship care) or (3n) (relating to long-term kinship care), Stats., that "provides assistance to children and families without need for full involvement of the child and family in the formal child welfare system." The subsection then specifies that in s. HFS 58.03 (8), "'formal child welfare system' means the system that assigns a case manager to a child or family and provides services pursuant to a voluntary agreement of the family or the order of a court."

There is nothing in s. 48.57 (3m) or (3n), Stats., which indicates that kinship care or long-term kinship care is a program under which there is no need for full involvement of the child or family in the formal child welfare system. Moreover, one criteria for eligibility for long-term kinship care is that the relative has been appointed as the guardian of the child under s. 48.977 (2), Stats. [see s. 48.57 (3n) (am) 1., Stats.], which presupposes that there has been extensive involvement in the formal child welfare system. Further, ch. HFS 58 clearly anticipates that some children for whom kinship care benefits are paid are under a court order [see s. HFS 58.05 (1) (c) 1. a.], that is, that the child welfare system is involved.

The issue of whether a kinship care or long-term kinship care case should have a case manager, whether services should be provided, whether permanency planning should be done, etc. (that is, the extent of the involvement in the child welfare system), is an important public policy issue for which the statutes do not provide a clear answer. Therefore, it is inappropriate

to include such a statement in ch. HFS 58, much less include such a statement in a definition which, according to s. 1.01 (7) (b), Manual, may not include substantive provisions.

b. Section HFS 58.03 (10) specifies that a kinship care payment means "a monthly payment of $215 to a relative on behalf of a child residing with that relative for the purpose of assisting in the living costs of the child." In contrast, s. 48.57 (3m) (am) (intro.) and (3n) (am) (intro.), Stats., specify that, if certain conditions are satisfied, kinship care or long-term kinship care payments are made to a relative "who is providing care and maintenance for that child." Because the statutes do not specify that the purpose is to assist in the living costs of the child, it would be preferable to define "kinship care payment" using only terms specified in the statutes.

c. Section HFS 58.03 (14) defines the term "relative" in terms of "a child's adult stepparent, brother . . . ." The definitions of the terms "kinship care relative" and "long-term kinship care relative" contained in s. 48.57 (3m) (a) and (3n) (a), Stats., do not make use of the word "adult." This raises two questions. First, does the word "adult" apply to all of the individuals listed in the rule definition of the term "relative"? Second, what statutory authority exists to require that a kinship care relative or a long-term kinship care relative be an adult?

d. Section HFS 58.07 (1) (a) and (b) in part provide that neither a kinship care payment nor a long-term kinship care payment may be made to a relative if the relative is receiving a foster care payment under s. 48.62 (4), Stats. However, s. 48.57 (3m) (cm) and (3n) (cm), Stats., provide that a kinship care relative and a long-term kinship care relative who receive payments under the kinship care program may not receive a payment under s. 48.62 (4), Stats. What statutory authority exists for, in effect, giving priority to a foster care payment under s. 48.62 (4), Stats.?

e. Section HFS 58.08 (1) (c) 2. provides that an approved applicant who is moved off a waiting list must receive payment for the period beginning not later than the first day of the following month. In addition, 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. Section 48.57, Stats., generally gives the department the authority to determine eligibility for kinship care payments. What statutory authority exists for delegating this responsibility to a kinship care agency?

f. If it is accepted that cooperation in the application process includes providing information about a parent for purposes of child support enforcement or providing good cause for not providing such information, then the review and fair hearing provisions in s. 48.57 (3m) (f) or (3n) (f), Stats., would apply because any denial of benefits for failure to cooperate would be based on the grounds that a condition in s. 48.57 (3m) (am) 5. or (3n) (am) 5., Stats., had not been met. In that case, s. 48.57 (3m) (f) and (3n) (f), Stats., provide that the appeal must be filed not more than ***45 days*** after the denial.

Section HFS 58.10 (3) (b) specifies that an appeal filed more than ***10 days*** after notification of a decision that there is no good cause must be denied. (Also see Appendix A (5) (f) and (11) (c) and (d).) Assuming that an appeal of the good cause denial is not pursued, Appendix A (5) (f) then provides that kinship care benefits must be denied. After a notice denying benefits is sent, a person has 45 days to appeal, as set forth in s. 48.57 (3m) (f) and (3n)

(f), Stats. However, s. HFS 58.10 (3) (a) provides that this 45-day period does not apply to an appeal "related to" a decision on a good cause claim. To be consistent with the statutes, it appears that at least 45 days must be allowed for such an appeal.

g. Section HFS 58.04 (7) provides that if an applicant is denied or a payment is terminated, the applicant or kinship care relative may not reapply for a benefit for a period of 90 days following the date of notification of the denial or termination. This means that, for example, if benefits were denied on the basis that a child does not meet or is not at risk of meeting one or more of the criteria in s. 48.13 or 938.13, Stats., and then 30 days after the denial the court exercised jurisdiction under s. 48.13 or 938.13, the relative could not apply for benefits for another 60 days. However, the person would be eligible for benefits under the statutes and there is no statutory basis for imposing this waiting period.

h. Section HFS 58.05 (1) sets forth eligibility criteria for kinship care payments, including the need of the child, best interests of the child and jurisdiction of the court. Furthermore, s. HFS 58.05 (2) specifies that an agency may not create eligibility criteria for the kinship care program in addition to the criteria set forth in s. HFS 58.04 or 58.05.

Due to the fact that the definition of kinship care in s. HFS 58.03 (8) includes the program under s. 48.57 (3n), Stats., that is, includes the long-term kinship care program, s. HFS 58.05 (1) technically applies to the long-term kinship care program. However, the eligibility criteria for long-term kinship care are set forth in s. 48.57 (3n) (am), Stats., and are different than the criteria set forth in s. HFS 58.05. Thus, s. HFS 58.05 sets forth eligibility criteria for the long-term kinship care program that are contrary to the eligibility criteria set forth in the statutes. Separate eligibility criteria must be specified for the long-term kinship care program. [Specifically, see s. HFS 58.05 (1) (a) and (c).]

Similarly, s. HFS 58.09 (1) (a) requires a reassessment every 12 months to determine if the requirements under ss. HFS 58.04 and 58.05 continue to be met. Because of the definitions of kinship care relative and kinship care program, s. HFS 58.09 (1) (a) technically applies to the long-term kinship care program. Thus, s. HFS 58.09 (1) (a) incorrectly sets forth reassessment criteria for the long-term kinship care program that are contrary to the reassessment criteria set forth in s. 48.57 (3n) (d), Stats. Likewise, s. HFS 58.09 (2) incorrectly requires that payments be discontinued for long-term kinship care based on reassessment criteria that apply to kinship care. Again, various features of the kinship care program and long-term kinship care program must be more clearly delineated in ch. HFS 58.

i. 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 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.

With respect to kinship care, s. 48.57 (3m) (am) (intro.), Stats., provides that:

> From the appropriations under s. 20.435 (3) (cz) and (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:

A comparable provision in s. 48.57 (3n) (am) (intro.), Stats., applies to long-term kinship care.

Legislative Fiscal Bureau Paper #462 (dated June 4, 1997) discussed the kinship care statute as it existed prior to July 1, 1997 and stated the following:

> DHFS [Department of Health and Family Services (DHFS)] staff contend that, because the current statutes make a reference to the appropriation used to support these payments, it is not clear whether counties are required to make these payments, or whether payments are subject to the amounts budgeted for these payments. By extending this argument, DHFS staff indicate that it may be permissible for counties to establish waiting lists for these payments if state funding is insufficient to meet the costs of making these payments.
>
> In order to address this issue, the [Joint Finance] Committee could clarify the current statutory provision by either: (a) deleting references to the statutory appropriation; or (b) explicitly stating that funding for kinship care payments to families is limited to the amount appropriated for this purpose.

On June 4, 1997, the Joint Finance Committee voted on both of these alternatives, and the vote was Ayes, 8; Noes, 8, on both. As neither alternative was adopted, the statute, which was ambiguous, was retained. (In an unrelated matter, the statute has since been modified with respect to Milwaukee County to provide for DHFS takeover of child welfare services there.) Thus, legislative history does not appear to provide a clear record as to what the Legislature intended with respect to using waiting periods for kinship care.

The long-term kinship care program was originally recommended by the Joint Legislative Council's Special Committee on Adoption Laws and enacted as 1997 Wisconsin Act 105. A review of discussions by that Committee does not indicate that the issue of waiting lists or entitlements was raised.

2. Form, Style and Placement in Administrative Code

a. In s. HFS 58.03 (5), "can be made" should be changed to "may be made." [See s. 1.01 (2), Manual.]

b. In s. HFS 58.04 (3) (b), the phrase "would negate" should be replaced by the word "negates."

c. Appendix A is written and numbered as if it were a text provision. It would appear to be more appropriate, and easier to cross-reference provisions in the appendix, if Appendix A were changed to a section in ch. HFS 58.

4. Adequacy of References to Related Statutes, Rules and Forms

a. The third sentence of the second paragraph of the analysis should specify that it was 1997 Wisconsin Act 27 which made DHFS responsible for administration of the kinship care program in Milwaukee County effective January 1, 1998. As currently worded, the sentence implies that it was 1997 Wisconsin Act 105 which did so.

b. Section HFS 58.03 (13), defines "medical assistance" by reference to "ss. 49.43 to 49.475 and 49.49 to 49.497, Stats." It appears that the reference should be to "ss. 49.43 to 49.499, Stats."

c. Section HFS 58.07 (2) provides that no kinship care or long-term kinship care payments may be made if a child is receiving supplemental security income under 42 U.S.C. ss. 1381 to 1383c. However, s. 48.57 (3m) (am) 6. and (3n) (am) 5r., Stats., additionally specify that no payments may be made if a child is receiving state supplemental payments under s. 49.77, Stats. A reference to this provision should be added to s. HFS 58.07 (2).

d. In s. HFS 58.08 (2), the phrase "placed with the kinship care relative by a court under s. 48.355, 48.357 or 48.365, Stats." should be changed to "placed with the kinship care relative by a court under s. 48.355 or 48.357, Stats." because s. 48.365, Stats., provides for an extension of a dispositional order, but not actual placement.

In addition, the phrase "pursuant to a petition under s. 938.13, 938.355, 938.357 or 938.365, Stats." should be changed to "pursuant to a petition under s. 938.13, Stats., or by a court under s. 938.355 or 938.357, Stats."

e. In Appendix A (12) (b) 2. b. and c., the cross-reference "subd. par. a." should be replaced by the cross-reference "this subd. 2. a."

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. In s. HFS 58.04 (2) (a), the references to "prospective resident" should be changed to "prospective adult resident" to utilize the term defined in s. HFS 58.03 (1).

b. In s. HFS 58.04 (5) (a), the phrase "such as . . . representative" should be set off by commas.

c. In s. HFS 58.05 (1) (a) 1. a., b., c. and d., the reference to "relative" should be changed to the defined term "kinship care relative." This comment also applies to Appendix A, (1) (b).

d. Section HFS 58.05 (1) (b) 1. b. provides that in cases in which a child is not placed by a court order, the best interests of the child are determined by making a reasonable effort to contact the child's parent or parents to determine that he or she or they are aware of and have consented to the living arrangement. Section HFS 58.05 (1) (b) 1. b. then provides that that consent must determine best interests. The following comments apply:

(1) It is not made clear how best interests are determined if it is not possible, after making a reasonable effort, to contact the child's parent or parents.

(2) It is not clear whether it is necessary to make a reasonable effort to contact all of a child's known parents, or only one parent. If the latter is the case, how is it determined which parent should be contacted?

(3) It is not clear what criteria is to be used in cases in which two parents are contacted and one agrees, but one disagrees, with that particular living arrangement.

(4) It appears that the statutory best interests of the child requirement for kinship care is based solely on whether the child's parent or parents have consented to the living arrangement. Section HFS 58.05 (2) prohibits any other criteria from being used. Was it the intention that no consideration other than parental consent be used to determine that placement with a particular relative is in the best interests of the child?

(5) As correctly noted in this provision, for the long-term kinship care program, s. 48.57 (3n) (am) 2., Stats., requires that the agency interview the applicant to determine if long-term placement is in the best interests of the child. Thus, parental consent is not at issue. The first two sentences of s. HFS 58.05 (1) (b) 1. b. do not make it clear that they do not apply to long-term kinship care.

(6) The second sentence should be rewritten to read: "If consent is received, the kinship living arrangement is determined to be in the best interests of the child."

e. In HFS 58.05 (1) (c) 1. (intro.), the phrase "shall make one" should be changed to "shall make at least one."

f. Section HFS 58.05 (3) (intro.) provides that if an agency approves a long-term kinship care payment, the agency and the relative, if the relative is willing, shall enter into a

written agreement. To what does the phrase "if the relative is willing" refer? Willing to provide long-term kinship care? Willing to enter into a contract? What happens if the relative is not willing to enter into a contract?

g. The last sentence of Appendix A (4) (intro.) provides that: "An exemption may be granted only for any of the following reasons:". If the intent is that an exemption will be granted if one of the conditions occurs, this should be rephrased to read: "An exemption shall be granted for any of the following:".

h. Appendix A (4) (a) 1. and 2. use the phrase "harm of a serious nature" in reference to a child, while the defined term "serious nature" in sub. (1) (b) refers to a relative. Should the term "serious nature" be defined with reference to a child? Similarly, sub. (4) (a) 4. refers to emotional harm of a serious nature to a kinship care relative while the term "emotional harm" is defined in Appendix A (1) (a) with reference to a child. Should the rule include a definition of the term "emotional harm" with reference to a kinship care relative? Also, in sub. (4), the word "a" should be inserted before the phrase "serious nature."

i. In Appendix A (5) (e) (intro.), it is unclear when the 10 days is counted from. This comment also applies to Appendix A (10) (d) (intro.), (11) (c) (intro.), (12) (b) 2. b. and (13) (c) (intro.).

j. Appendix A (5) (e) 1. to 3. and (13) (c) 1. to 3. provide three alternatives if the agency determines that good cause does not exist. It is unclear why the alternative of requesting a hearing under s. HFS 58.10 is not included. (See Appendix A (10) (d) 1. to 4. for a comparison.)

k. In Appendix A (9) (a) 3., "probably" should be changed to "probable." Also, "emotional impairment" should be changed to "emotional harm" to use the term defined in Appendix A (1) (a).

l. In Appendix A (10) (d) (intro.), "may first:" should be changed to "may do any of the following:".