WISCONSIN LEGISLATIVE COUNCIL STAFF

RULES CLEARINGHOUSE

Ronald Sklansky
Director
(608) 266–1946

Richard Sweet
Assistant Director
(608) 266–2982

Jane R. Henkel,
Acting Director
Legislative Council Staff
(608) 266–1304

One E. Main St., Ste. 401
P.O. Box 2536
Madison, WI 53701–2536
FAX: (608) 266–3830

CLEARINGHOUSE RULE 99–161

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.]

2. Form, Style and Placement in Administrative Code

a. Section HFS 50.03 (2) (b) refers to "s. HFS 50.03 (1) (b)." This reference should be changed to "sub. (1) (b)." Also, s. HFS 50.03 (2) (b) refers to "s. HFS 50.03 (2) or (3)." This reference should be changed to "this subsection or sub. (3)." [See s. 1.07 (2), Manual.]

b. Section HFS 50.044 (3) (c) refers to the uniform foster care rate "currently" in effect, the "current" basic rate and the "current" uniform foster care rate; s. HFS 50.045 (3) (c) refers to the "current" uniform foster care rate. Use of the words "current" and "currently" should be eliminated to avoid any ambiguity--for example, it could be argued that what is intended is the rate in effect on the effective date of this rule, the rate in effect at the time of a decision on a request for amendment, the rate in effect at the time a request for an amendment is made or the rate in effect at some other point in time. [See s. 1.01 (9) (b), Manual.] The rule should be specific regarding which rates apply. Also, in s. HFS 50.045 (3) (c), the word "current" should be deleted from the phrase "current level of points."

c. In s. HFS 50.045 (1), the reference to "HFS 50.044" should be to "s. HFS 50.044." [See s. 1.07 (2), Manual.] In sub. (3) (c), the phrase ", as amended," should be deleted.

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

a. In s. HFS 50.01 (4) (c), it would be preferable to have more specific references to the statutes as follows:

(1) Rather than referring to a "county ***agency*** authorized to place children for adoption under s. 48.57, Stats.," (emphasis added), it would be preferable to refer to a "county department authorized under s. 48.57 (1) (e) or (hm), Stats., to place children for adoption."

(2) Rather than referring to "an agency authorized under ss. 48.60 and 48.61, Stats., to accept guardianship and place children under its guardianship for adoption," it would be preferable to refer to a "licensed child welfare agency authorized under ss. 48.60 and 48.61 (5), Stats., to accept guardianship and to place children under its guardianship for adoption."

b. In s. HFS 50.01 (4) (u), the reference to "s. HSS 56.09" should be changed to "s. HFS 56.09." There are also several other references to "HSS" which should be changed to "HFS," for example, see ss. HFS 50.03 (1) (b) 3., 50.044 (3) (c) and 50.045 (3) (c).

c. Section HFS 50.03 (2) (a) refers to the reasonable placement efforts to assure adoption placement. It does not refer to the requirement in s. 48.833, Stats., that an adoption agency must consider the availability of an adoption placement with a relative of the child. It may be useful to cross-reference this statutory requirement.

d. In s. HFS 50.044 (3) (a), the phrase "under sub. (2)" should be inserted after the first occurrence of the word "family."

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

a. Sections HFS 50.01 (4) (d), 50.04 (4) and 50.044 (1) refer to "legal adoption." The word "adoption" is defined in s. HFS 50.01 (4) (b), thus making it unnecessary and confusing to refer to an adoption as being "legal."

b. According to the definition of "adoption agency" in s. HFS 50.01 (4) (c), it appears that all "adoption agencies" referred to in ch. HFS 50 could be deemed to be Wisconsin adoption agencies. Therefore, it is not clear why s. HFS 50.01 (4) (j) (intro.) refers to a "Wisconsin adoption agency." Unless a distinction is intended between Wisconsin agencies and out-of-state agencies, s. HFS 50.01 (4) (j) (intro.) should simply refer to an adoption agency.

c. Section HFS 50.01 (4) (j) defines a "child at high risk" but does not refer to what the child is at high risk of. Other provisions refer to this, for example, s. HFS 50.01 (4) (r) refers to a child at high risk "of developing a moderate or intensive level of special needs," and s. HFS 50.03 (1) (b) 5. refers to a "child at high risk of developing a moderate or intensive level of special needs under subd. 3." It would be useful if the definition in s. HFS 50.01 (4) (j) included a reference to what the risk is of, thus providing more initial information and avoiding repeating

language in the rule. For example, s. HFS 50.01 (4) (j) (intro.) could be changed to the following: "'Child at high risk' means a child in the guardianship of an adoption agency who does not have a known special need under s. HFS 50.03 (1) (b) 1., 2., 3., or 4., but who is at high risk of developing a moderate or intensive level of special needs under s. HFS 50.03 (1) (b) 3. based on one or more of the following:".

d. Section HFS 50.01 (4) (j) 1. refers to the "guardianship agency." This term is not defined. It appears that this phrase should be changed to use the defined term "adoption agency" or "agency" in s. HFS 50.01 (4) (c). If not, the term "guardianship agency" should be defined or explained.

e. Section HFS 50.01 (4) (j) 3. defines a "child at high risk" as a child who "has experienced 4 or more placements with extended family or foster homes that might affect the normal attachment process." It is unclear whether this means: (1) that having experienced four or more placements is sufficient to establish this criteria; or (2) that the child must have experienced four or more placements ***and*** it must be established that those placements "might" affect the normal attachment process. This should be clarified.

f. Section HFS 50.01 (4) (j) 4. defines a "child at high risk" as a child who "experienced neglect in the first 3 years of life or sustained physical injury that might have a long term effect on physical, emotional or intellectual development." The following comments apply:

(1) "Neglect" is not defined in ch. HFS 50. It may be useful if it were defined, for example, by reference to the definition of "neglect" in s. 48.981 (1) (d), Stats. Must neglect be substantiated under s. 48.981, Stats., or by a finding by a court under s. 48.13 (10) or 948.21, Stats., or can "neglect" be established by other means for the purpose of s. HFS 50.01 (4) (j) 4.?

(2) Is "physical injury" intended to refer to any type of physical injury, for example, injury in an automobile accident, or is it intended to be physical abuse? If the former is intended, should this also refer to a physical disease instead of just a "physical injury"?

g. Section HFS 50.01 (4) (j) 2. refers to a medical diagnosis or medical history that "could" result in the child's later having certain kinds of conditions; s. HFS 50.01 (4) (j) 3. refers to placements that "might" affect the normal attachment process; s. HFS 50.01 (4) (j) 4. refers to neglect or injury that "might" have a long-term effect. It is unclear what distinction between "could" and "might" is intended. Also, it is not clear if the intention is to require a high probability, a remote possibility, a reasonable likelihood or some other standard. This should be clarified.

h. Section 48.975 (5) (a), Stats., requires the rule to define the extenuating circumstances under which an initial agreement to provide adoption assistance may be made after adoption. Section HFS 50.01 (4) (n) defines "extenuating circumstances," but it appears that the term is never used. A term should not be defined unless it is used.

It appears that the intent is to consider the circumstances in current s. HFS 50.065 (2) (a) 2. a. as those extenuating circumstances and apply the appeal procedure in s. HFS 50.065 (2). If so, s. HFS 50.065 should be amended to explicitly refer to extenuating circumstances and a separate definition may not be necessary. In addition, the internal inconsistency in s. HFS 50.065 (2) should be remedied. Section HFS 50.065 (2) (a) (intro.) provides, in pertinent part, that an adoptive parent may appeal "[a] decision of the department before the adoption became final not to approve an application for adoption assistance" under certain circumstances. The circumstances listed in s. HFS 50.065 (2) (a) 2. a. and d. involve circumstances in which there would have been no decision before the adoption became final because the parents were not given sufficient information before the adoption became final to initiate an application for adoption assistance. Because there was no application, there was no decision not to approve an application before the adoption became final and, literally, no appeal right under s. HFS 50.065 (2) (a). As this is not the intended result, this should be corrected.

It is not clear why the proposed definition of extenuating circumstances in s. HFS 50.01 (4) (m) did not include all of the circumstances in s. HFS 50.065 (2) (a) 2., rather than those in s. HFS 50.065 (2) (a) 2. a.

Also, the rule does not explain what happens if the circumstances in s. HFS 50.065 (2) (a) 2. a. and d. are discovered after the adoptive placement but before the adoption is final inasmuch as s. HFS 50.065 (2) applies only after the adoption is final and s. HFS 50.065 (1) does not explicitly cover such situations as currently drafted.

Because extenuating circumstances are an exception to the requirement in s. HFS 50.04 (1) that an adoption assistance agreement be approved at the time of adoptive placement, it may be useful if s. HFS 50.04 (1) provided a cross-reference to this exception.

i. Section HFS 50.01 (4) (m) refers to the "meaning established in" another provision; whereas s. HFS 50.01 (4) (n) refers to the "meaning found in" another provision. In both cases, it would be preferable to indicate that the term "has the meaning given in [the other provision]."

j. In s. HFS 50.01 (4) (o) and (p), "proceedings" should be singular. Also, both s. HFS 50.01 (4) (o) and (p) refer to "termination of parental rights proceedings under the laws of the state or the federal government." Is the reference to "the state" intended to refer only to Wisconsin? If not, the phrase should be changed to "a state." Also, do the laws of the federal government provide for termination of parents rights proceedings? If not, the reference to the laws of the federal government should be deleted. Should a reference to a termination of parental rights proceeding by a tribal court be included? In s. HFS 50.01 (4) (p), the phrase "or both" should be deleted as its inclusion does not change the meaning of the provision. Finally, the use of the terms "condition" and "status" should be made consistent.

k. In s. HFS 50.01 (4) (r), it may be useful to replace the phrase "or to the adoptive parents of a child at high risk of developing a moderate or intensive level of special needs" to read as follows: "and also means the $0 payment to the adoptive parents or prospective adoptive parents of a child at high risk." These changes would be useful to clarify that: (1) the maintenance payment in such cases is $0; (2) the payment also applies to prospective adoptive

parents; and (3) "child at high risk" is a defined term and should explain what the child is at risk of as discussed in comment c., above.

l. In s. HFS 50.01 (4) (u), is the requirement that a substantial change in circumstances be "progressive" intended to eliminate circumstances in which a child suddenly develops intensified needs? Also, should the phrase "a change" be changed to "an increase" to avoid suggesting that the payment rate decreases based on a substantial change in circumstances?

m. Section HFS 50.03 (1) (b) 5. refers to a "child at high risk of developing a moderate or intensive level of special needs under subd. 3." It is unclear if the child must meet the criteria under the definition of a "child at high risk" under s. HFS 50.01 (4) (j) plus meet some additional criteria under s. HFS 50.03 (1) (b) 5. Any ambiguity about this could be eliminated by amending the definition in s. HFS 50.01 (4) (j) as discussed in comment c., above.

n. Section HFS 50.04 (1) should indicate that only prospective adoptive parents file an application under ss. HFS 50.03 (3) (b) or 50.04 (4)--while making it clear that only adoptive parents may file the request under ss. HFS 50.044 and 50.045.

o. Section HFS 50.04 (4) indicates that, prior to adoption, the "family" may file an application for an agreement to replace a prior agreement if the "family" believes there has been a change in circumstances. It then indicates that the agency must assess the current special needs of the child and, as appropriate, offer to "modify" the agreement to "replace" the prior agreement. The following comments apply:

(1) It appears that the term "change in circumstances" should be changed to the defined term "substantial change in circumstances."

(2) The term "family" is unclear. It appears that the term "family" should be changed to "prospective adoptive parent or parents."

(3) It is not clear why the "agency" must conduct the assessment. Under s. 48.975 (4) (b) 1., Stats., Department of Health and Family Services (DHFS) is required to conduct a review of any request for an amendment to increase benefits, not an "agency" as defined in s. HFS 50.01 (4) (c).

(4) It is not clear what is intended by "modifying" the agreement to "replace" the prior agreement. Section 48.975 (4) (b) (intro.), Stats., provides for amendment of an agreement, even an agreement entered into by proposed adoptive parents, rather than replacing an agreement. It is not clear why the agreement is being considered a replacement agreement, rather than an amended agreement.

(5) It appears that the appeal process in s. HFS 50.065 (1), which relates to appeals before an adoption is final, would apply to an adverse decision of a request for a replacement agreement. However, s. HFS 50.065 (1) does not clearly provide for such and should be amended to do so.

p. The following comments apply to s. HFS 50.044 (1):

(1) Section HFS 50.044 (1) should be changed to add the requirement from s. 48.975 (4), Stats., that the parents must believe there has been a substantial change in circumstances before they may submit a request.

(2) Section HFS 50.044 (1) indicates that adoptive parents who signed an adoption assistance agreement for a child at high risk may request a review to determine whether a substantial change in circumstances has occurred. However, s. 48.975 (4) (b), Stats., refers to allowing adoptive parents to request that the agreement be amended, rather than allowing them to request a review. Section HFS 50.044 (1) should more accurately reflect the statutory language. This change would have the added advantage of making the language in s. HFS 50.044 consistent with the language in s. HFS 50.065 (2) (c).

(3) The last sentence of s. HFS 50.044 (1) provides that if the request does not result in an amended agreement, the adoptive parents "may request a review no earlier than 12 months after the date of the last request for a review." As noted in comment (2), above, the reference to requesting a review is problematic--especially in the last sentence of s. HFS 50.044 (1) when the word "review" may be confused with appeal rights. Again, the references to requesting a review should be changed to requesting that an agreement be amended.

q. Section HFS 50.044 (2) (intro.) indicates that "The family shall do all of the following:". It appears that the defined term "adoptive family" should be used, rather than the term "family." Also, this introductory language would be clearer if it specified: "To request that an agreement be amended, the adoptive family shall do all of the following:". These comments also apply to s. HFS 50.045 (2).

r. Section HFS 50.044 (3) (intro.) would be clearer if it specified: "If a request to amend an adoption assistance agreement is received, the department shall do all of the following:". Using this approach, the introductory phrase in s. HFS 50.044 (3) (b), "Upon receiving an application to amend the agreement," could be eliminated. These comments also apply to s. HFS 50.045 (3) (intro.) and (3) (b).

s. Sections HFS 50.044 (3) (b) and 50.045 (3) (b) refer to contacting the "appropriate human service agency or agencies" to request information about substantiated reports of abuse or neglect. It appears that this should more specifically refer to the appropriate county department of human services, county department of social services, or in Milwaukee County, DHFS.

t. It is not clear why ss. HFS 50.044 (3) (c) and 50.045 (3) (c) provide that if there has been a substantial change in circumstances and no substantiated report of abuse or neglect by the adoptive parents, DHFS must offer to adjust the adoption assistance maintenance payment for ***up to one year***. This presumably means that after the year has expired, the amount of the adoption

assistance maintenance payment will revert to the amount that was in effect immediately prior to the amendment. However, this is not specifically stated.

Section 48.975 (4) (bm), Stats., requires that if there has been an amended agreement, DHFS must annually review the amended agreement to determine whether the substantial change in circumstances continues to exist. Section 48.975 (5) (dm), Stats., provides that if the substantial change in circumstances no longer exists, DHFS must offer to decrease maintenance payments, but the offer may not result in an amount that is less than the initial amount of adoption assistance for maintenance.

The rule does not make clear the procedure used to determine whether to continue an amended agreement beyond the one year and what will happen at the end of one year. (Section HFS 50.06 (3) (a), which predates s. 48.975 (4) (bm), Stats., requires that DHFS annually review each adoption assistance case to determine the need for continuing, temporarily suspending or adjusting adoption assistance. However, it is not clear that this is the review contemplated by s. 48.975 (4) (bm), Stats., and s. HFS 50.06 (3) (a) does not specifically refer to an annual review to determine if a substantial change in circumstances continues to exist.)

If the intent is that the adoptive parents must initiate a request for an extension of the current payment amount beyond the one year, the procedure for them to do so must be specified. Several provisions in the rule come close to addressing the issue but do not do so. For example, s. HFS 50.045 (1) indicates that if a person has an amended agreement in place, the person may, within 90 days prior to the expiration of the amended agreement, file a request with DHFS to "review the current circumstances of the child for the purpose of amending the amount of the monthly adoption assistance maintenance payment." Presumably, in most cases, the adoptive parents will simply want to amend the agreement to have it continue beyond the one year at the same rate, rather than amending the rate. As another example, s. HFS 50.045 (3) (a) refers to having DHFS "determine whether a substantial change in circumstances exists" but does not refer to having DHFS determine whether a substantial change in circumstances continues to exist. As a third example, s. HFS 50.045 (3) (c) refers to having DHFS offer to amend the adoption assistance agreement, but does not refer to having DHFS offer to continue the agreement.

Again, the rule should either eliminate the reference to a one-year amendment or clarify the procedure for reviewing the case--especially if some affirmative action on the part of the adoptive parents will be required. Presumably, any such affirmative actions would be initiated by DHFS, for example, by sending a form to the adoptive parents by a certain time.

u. Section HFS 50.045 (1) indicates that an adoptive parent with an agreement which provides for a $0 maintenance payment may file a request under s. HFS 50.045. However, it appears that a request by such a person must be filed under s. HFS 50.044. This should be clarified. Also, s. HFS 50.045 (1) indicates that the adoptive parents may file a request with DHFS to "review the current circumstances of the child for the purpose of amending the amount of the monthly adoption assistance maintenance payment. However, s. 48.975 (4) (b), Stats., refers to allowing adoptive parents to request that an agreement be amended, rather than allowing them to request a review of circumstances. Section HFS 50.045 (1) should more accurately reflect the statutory language.

v. Section HFS 50.044 (1) permits an adoptive parent to make a new request no earlier than 12 months "after the date of the last request for a review." In contrast, s. HFS 50.045 (1) permits a request if there has been at least 12 months "since the denial of a previous request under this section." Is the difference in the two sections as to when the count begins, that is, date of request versus date of decision, intentional?

w. In s. HFS 50.045 (2) (b), it is not clear what "fully concurs" means as opposed to "concurs."

x. According to s. 48.975 (4) (b) 2., Stats., in s. HFS 50.045 (3) (c), the phrase "no substantiated abuse or neglect of the child" should be changed to "no substantiated abuse or neglect of the child by the adoptive parents."

y. Section HFS 50.06 (1) (d) refers to circumstances in which adoption assistance is "decreased" or "reduced." It is not clear why both terms are used and what difference is intended. Unless this is explained, the term "reduced" should be deleted.

z. In s. HFS 50.065 (2) (d), the phrase "determine whether a substantial change in circumstances has occurred" should be changed to "amend an adoption assistance agreement."

aa. On the Request for Adoption Assistance Amendment form (CFS-2092), it may be useful to have "Yes" and "No" check boxes under the three "Not Applicable" categories. Also, it is not clear what the reference to "(8 points)" is intended to mean under the behavioral care needs--moderate category.