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Joint Committee on Finance

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Child Protective Services Appeals (Children and Families -- Children and Families)

[LFB 2013-15 Budget Summary: Page 25, #15; Page 102, #9]

CURRENT LAW

A child and family usually enter the child welfare system through a report of child abuse or neglect, which initiates the child protective services (CPS) process. The CPS process consists of three stages: (a) CPS access; (b) CPS initial assessment; and (c) CPS ongoing services.

In the CPS access stage, a CPS agency receives information about suspected child abuse or neglect. Based on this information, caseworkers from county departments of human/social services, from the Department of Children and Families (DCF), and from licensed child welfare agencies under contract with DCF determine if the report constitutes an allegation of child abuse or neglect defined under state law. If the allegation meets the criteria for child abuse or neglect, then the report is screened-in for further assessment. In the CPS initial assessment stage, the screened-in reports are assessed to determine whether one or more types of abuse or neglect have occurred. The requirements of the assessment vary, depending on whether the alleged maltreatment or threat of harm to the child is by: (a) a parent, caregiver, household member, or an unknown maltreater (primary assessment); (b) an individual who has provided care to the child in or outside of the home or exercised temporary control of the child (secondary assessment); or (c) an individual outside of the family (non-caregiver investigation). If the assessment determines that there is a preponderance of evidence, based on credible information, that abuse or neglect has occurred, then the report is substantiated. The substantiation determination must be completed within 60 days. Once substantiated, the child and family are provided services in the CPS ongoing services stage.

During the initial assessment process, the CPS agency may also determine that a specific person has maltreated a child if: (a) the maltreatment has been substantiated; (b) the child, at

least one parent, and the alleged maltreater have all been interviewed; and (c) there is a preponderance of the evidence that the child was maltreated by the particular person identified. The CPS agency must notify the person who has been identified as the maltreater of his or her right to appeal that decision within 15 days of the substantiation determination. Under current law, the person may appeal the determination in accordance with the procedures established by DCF.

Also under current law, if a determination has been made that a person has abused or neglected a child, then: (a) DCF may not license, or continue or renew the license, of the person to operate an entity (defined below); (b) DCF, a county department, or contracted child care agency may not certify the person as a child care provider; (c) a county department or a child welfare agency may not license, or renew the license of, the person as a foster parent; (d) DCF or a county department may not provide subsidized guardianship payments to the person as an interim caretaker; and (e) a school board may not contract with the person for a child care program. In addition, an entity may not employ or contract with a caregiver or permit a nonclient resident to reside at the entity if the entity knows or should have known that the caregiver or nonclient resident has been determined to have abused or neglected a child. An entity is a child welfare agency, a foster home, an interim caretaker to whom subsidized guardianship payments are made, a group home, a shelter care facility, a licensed child care provider, a child care program that contracts with a school board, a certified child care provider, an organization that facilitates delegations of the care and custody of children, or a temporary employment agency that provides caregivers to another entity.

GOVERNOR

Provide \$99,100 GPR in 2014-15 to implement a uniform appeals process for CPS appeals, beginning January 1, 2015.

The bill would specify that the substantiation determination would be an initial determination and may include a determination that a specific person has abused or neglected a child. If the initial determination indicates that a specific person has abused or neglected a child, the county department, DCF, or licensed child welfare agency would have to provide the person with an opportunity for a review of that initial determination, in accordance with rules promulgated by DCF, before a final determination could be made that the person has abused or neglected a child.

The bill would then specify that within five days after the date of a final determination that a specific person has abused or neglected a child, the county department, DCF, or a licensed child welfare agency would have to notify the person in writing of the final determination, the person's right to a contested case hearing on the final determination, and the procedures by which the person may receive that hearing. Contested hearings would be conducted by the Division of Hearings and Appeals (DHA) in the Department of Administration (DOA).

The bill would specify that in order to receive a contested hearing, the person would have to send a written request for a hearing to DCF within 10 days after the date of the written notice

of the final determination. DCF would have to commence the hearing within 90 days after receipt of the request for the hearing, unless the hearing is rescheduled at the person's request or the hearing is held in abeyance pending the outcome of any criminal proceeding or proceeding related to children alleged to be in need of protection or services. DCF would have to issue the final decision within 60 days after the close of the hearing. Following the contested case hearing, any party to the proceeding could seek judicial review of the final administrative decision.

The bill would create one uniform contested case hearing process for all CPS appeals, as governed by Chapter 227 of the Wisconsin statutes. Funding under the bill would reimburse DOA for conducting the contested case hearings.

These provisions would first apply to written notices of the final determination issued on January 1, 2015.

In addition, provide \$99,100 PR and 2.0 permanent PR positions, beginning in 2014-15 to the DHA for an increase in workload related to the Governor's recommendation that the Division conduct administrative appeals hearings on determinations of child abuse and neglect for all counties in the state beginning January 1, 2015. Funding would be for: (a) salaries (\$55,800); (b) fringe benefits (\$20,500); and (c) supplies and services (\$22,800).

DISCUSSION POINTS

Depuy v. Samuels

1. In Illinois, a class action lawsuit was filed against the state by persons who had been named as perpetrators of child abuse or neglect. The plaintiffs also held or would hold occupational licenses, such as child care or other care giving occupations, that would be revoked or denied upon a determination that they abused or neglected a child. The plaintiffs alleged that the state unconstitutionally deprived them of their livelihoods.

2. In Illinois, after a report of suspected child abuse or neglect was made, the report was assigned to an investigator if the report met the minimum criteria for further investigation. The investigator determined within 60 days whether abuse or neglect was "indicated" or "unfounded" based on "credible evidence." The decision was reviewed and approved by the investigator's supervisor. The decision was then sent to the employers of child care professionals and the licensing entities without notifying the accused individual. Once notified, they could obtain the information that supported the "indicated" finding, undergo an internal review, and then undergo an administrative hearing.

3. The court found a property interest in occupational licenses that should be afforded full due process rights. An accused individual should be afforded an opportunity to be heard prior to a decision that affects their property right and with a more rigorous burden of proof.

Current CPS Appeal Procedures

4. Under current law, a CPS agency may find a specific individual has abused or neglected a child if there is a preponderance of the evidence that the child was maltreated by the particular person identified. The person may appeal that decision in accordance with procedures established by DCF. DCF has established three types of appellate procedures, based on the location of the person and whether there is an employment interest that would be jeopardized by the decision.

5. First, once a determination of maltreatment is made, the accused person cannot respond or provide additional information to influence a final determination. The original determination is the final determination. However, the person has 30 days from the notice of the determination to appeal the decision.

6. If the person resides in Milwaukee County, then the person receives a two-step review of the substantiation determination. First, an accused person may receive a review of the decision by the Bureau of Milwaukee Child Welfare (BMCW). If the appeal appears to be based on an issue with documentation, new information that would alter the substantiation decision, a finding of guilty of a criminal charge related to the case (automatically upheld), or other similar issue, then the case is offered an expedited management review. All other appeals in this first step receive a formal review from a three-person panel that consists of BMCW staff. This decision may then be appealed to a full administrative hearing conducted by DHA hearing examiners. BMCW contracts with DOA for these hearings. In calendar year (CY) 2011, 13 appeals of CPS determinations were conducted by these hearing examiners. In these contested cases, all parties are afforded an opportunity to present evidence and rebut countervailing evidence. Decisions may be appealed to the courts for judicial review.

7. If the person resides in a county other than Milwaukee County, then DCF procedures allow for two different types of appellate procedures, depending on whether an employment interest is affected by the outcome. A less formal appeals process may be used if no employment issue is affected. If the accused person provides notice of the wish to appeal within 30 days of the notice of the substantiation decision (unless the county agency extends the time period), then there is: (a) an optional first-step review process; (b) a formal review; and (c) written notice of the decision.

8. The first-step review process is a paper review done by someone other than the social worker or supervisor who made the original determination within 30 days. The formal review must be conducted by the director of the county agency or his or her designee(s), but not any person who has already made a determination in the case thus far. The accused person has a right to appear in person and to submit written information. The reviewer(s) may request others to give information at the review, other than the child, and must keep a record of the review. A written notice of the final determination and the reasons for that decision must be provided within 30 days of the review hearing. The accused may request to submit additional written evidence or information.

9. If the person resides in a county other than Milwaukee County and has, or will have,

an employment interest affected by the determination, then DCF's procedures require a municipal administrative hearing using the following process: (a) optional first-step review process; (b) administrative hearing; (c) written notice of the decision; and (d) judicial review.

10. The first-step review is a paper review done by someone other than the social worker or supervisor who made the determination within 15 days. The person then has 30 days to appeal the decision, and a hearing must be held within 15 days. Counties must provide impartial decision makers, witnesses must be sworn in, subpoenas may be issued, and the proceedings must be recorded. A written notice of the final determination and the reasons for that decision must be issued within 20 days. Finally, the person may appeal the decision to the courts for a judicial review.

11. In June, 2010, DCF issued a survey to counties to find out which methods of appeal were used by counties. BMCW and 44 counties responded. BMCW used the full administrative review described in paragraph #6 above. Some counties offered an adversarial, full due process hearing described under paragraph #10 above for all appeals. Other counties used the full due process hearing under paragraph #10 only if the determination affected an employment interest and used the briefer process described in paragraph #8 for all other CPS determination appeals. Some counties pay for private attorneys to represent the county, while others use district attorneys or corporation counsels. Others used county department staff.

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12. The bill would establish one procedure for all CPS appeals. The procedure to substantiate a report of child abuse or neglect would now have two parts if a specific person is identified as a maltreater: (a) an initial determination; and (b) a final determination. If a specific person has been identified as a maltreater in an initial determination, the accused person would be provided an opportunity for a review of that initial determination, in accordance with rules promulgated by DCF, before a final determination would be made.

13. Within five days of the final determination date, the accused person would be notified in writing of the final determination, the right to a contested case hearing on the final determination, and the procedures by which the person may receive that hearing. Contested hearings would be conducted by DHA hearing examiners.

14. In order to receive a contested hearing, the accused person would have to send a written request for a hearing to DCF within 10 days after the date of the written notice of the final determination. The contested hearing would have to be held within 90 days after the receipt of the request for the hearing, unless the hearing is rescheduled at the person's request or is held in abeyance pending the outcome of any criminal proceeding or proceeding related to children alleged to be in need of protection or services. The final decision would be issued within 60 days after the close of the hearing. Any party could seek judicial review of the final administrative decision. This would be the process for all CPS appeals, regardless of the county that made the substantiation determination and regardless of whether an employment interest was involved.

15. This process would begin on January 1, 2015. Funding of \$99,100 GPR in 2014-15

would support 1.5 FTE attorney positions and 0.5 FTE support positions in DOA to conduct the hearings for a six-month period. DCF would reimburse DOA for its costs in conducting the hearings. It should be noted that the administration provided funding for 12 months for supplies and services under the bill and has requested that the funding be reduced by \$11,400 GPR in 2014-15 to reflect that funding for only six months would be needed in the 2013-15 biennium.

16. Also, the administration requests additional technical statutory changes to conform the caregiver background check requirements with the new CPS appeals process.

Options for the CPS Appeals Process

17. The Committee could approve the Governor's proposal as modified (Alternative A1). The new procedures would provide consistency and uniformity throughout the state on the level of due process rights provided to persons accused of child abuse or neglect, as well as in the substantiation determinations, since the appeals decisions would all be made by DHA hearing examiners, rather than various county officials. This uniformity would address any liability concerns.

18. Alternatively, the Committee could require that all counties use the procedures under paragraph #10 to provide an adversarial hearing for all accused persons who wish to appeal the substantiation determination (Alternative A2). This alternative would provide counties with autonomy on handling the appeals of their own CPS substantiation determinations. Counties would still represent themselves at the hearings and provide their own impartial reviewers. In addition, this alternative would address any concerns regarding when full due process should be provided. However, costs would increase for the counties that do not currently conduct full adversarial hearings for all CPS appeals.

19. The Committee could deny the proposal (Alternative A3). DCF's current procedures provide added protections for persons accused of child abuse or neglect and who have an employment interest that would be affected by substantiation of the accusations. In Milwaukee County, these persons are provided contested hearings conducted by the DHA. In counties other than Milwaukee County, these persons are provided with full adversarial hearings, subject to judicial review. However, these persons may have an employment interest in the future. If a person attempts to pursue a career where his or her employment interest would be affected by a substantiation determination that already occurred under a formal review, rather than an administrative hearing, the case would have to be reopened for a full contested hearing because an employment interest would now be involved. Alternative A1 or A2 would prevent this issue from arising.

20. Under Alternative A2 or A3, accused persons would not be guaranteed a review of the substantiation determination before a final determination is made. Therefore, in addition to Alternative A2 or Alternative A3, the Committee could adopt the Governor's procedure to substantiate a report of child abuse or neglect in two parts if a specific person is identified as a maltreater: (a) an initial determination; and (b) a final determination (Alternative A4). Affording the opportunity for an accused person to have a review of the initial determination, in accordance with rules promulgated by DCF, before a final determination is made would ensure pre-

determination due process protections.

21. According to information provided by the administration, in CY 2011, there were a total of 86 appeals of CPS substantiation determinations in Milwaukee County and 261 in other counties. In Milwaukee County: (a) 31 received a management review; (b) 42 received a first-step formal review; and (c) 13 received an administrative hearing. In counties other than Milwaukee County: (a) 156 received a paper review; (b) 52 received a formal review; and (c) 53 received an administrative hearing. It is estimated, therefore, that DHA would be required to conduct an additional 105 administrative hearings from the hearings currently conducted by counties other than Milwaukee County (52 formal reviews and 53 administrative hearings).

22. DHA indicates an additional 1.5 attorney positions and a 0.5 support staff position would be needed to conduct the additional 105 administrative hearings. Funding would only be required for the last six months of the 2013-15 biennium because the Governor's proposed uniform CPS appeals process would take effect January 1, 2015. Funding would be for: (a) salaries (\$55,800); (b) fringe benefits (\$20,500); and (c) supplies and services (\$22,800). The administration requests a reduction in supplies and services of \$11,400 to reflect that the supplies and services funding should be for a six-month period, rather than for a full year.

23. The Committee could approve the Governor's proposal, as modified, to provide \$87,700 GPR in 2014-5 to DCF to implement the new CPS appeals process, beginning January 1, 2015, in order for DCF to reimburse DHA for the costs of conducting the hearings and provide DOA with 2.0 PR positions and expenditure authority of \$87,700 PR in 2014-15 to conduct the hearings (Alternative B1).

24. DHA indicates that DCF referred 978 cases during 2012. These cases include all cases under DCF, such as cases involving the Wisconsin Works (W-2) program, tax intercepts, cases involving children, and other cases. The Work/Family Services Unit in DHA has 11.15 FTE attorney positions and 1.0 FTE attorney supervisor position. This would average out to between 80 and 90 cases per attorney, depending on whether the supervisor is part of the calculation. Based on this information, the Committee could provide 1.0 attorney position (Alternative B2) or 1.0 attorney position and a 0.5 support staff position (Alternative B3) to absorb the additional administrative hearing caseload.

25. Under Alternative B2, the Committee would reduce funding in the bill by \$44,600 GPR in DCF and reduce funding and positions in DOA by \$44,600 PR and 1.0 PR position (0.5 attorney position and 0.5 support staff positions). Funding of \$54,500 would support: (a) salary (\$31,500); (b) fringe benefits (\$11,600); and (c) supplies and services (\$11,400).

26. Under Alternative B3, the Committee would reduce funding in the bill by \$32,900 GPR in DCF and reduce funding and positions in DOA by \$32,900 PR and 0.5 PR position (0.5 attorney position). Funding of \$66,200 would support: (a) salaries (\$40,000); (b) fringe benefits (\$14,800); and (c) supplies and services (\$11,400).

27. However, the administration indicates that the Work/Family Services Unit in DHA receives a variety of case types. Some of the cases may be quick reviews that can be completed in a

short amount of time, while other cases, like the CPS appeals cases are extensive deliberations that take far more time to complete. Therefore, position and caseload information may not be comparable and more staff may be needed for the CPS appeals compared to other types of cases.

ALTERNATIVES

A. CPS Appeals Process

1. Approve the Governor's proposal to require all CPS appeals in all counties to be conducted by DOA's DHA hearing examiners beginning January 1, 2015. In addition, modify the bill to conform the caregiver background check requirements with the new CPS appeals process as described in paragraph #16.

2. Delete the Governor's proposal. Instead, require all counties to conduct full administrative hearings under Chapter 68 of the Wisconsin statutes for all CPS appeals (described in paragraphs #10 and #18).

3. Delete the Governor's proposal.

4. In addition to Alternative A2 or A3, require the procedure to substantiate a report of child abuse to include the process described under the bill and the suggested modifications that afford the accused an opportunity to have a review of an initial substantiation determination before final substantiation determination is made.

B. Funding Level

1. Modify the Governor's proposed level of funding to reflect that only six-months of supplies and services funding is needed. Reduce funding for DCF by \$11,400 GPR in 2014-15. Reduce funding for DOA by \$11,400 PR in 2014-15.

ALT B1 DCF	Change to Bill Funding
GPR	- \$11,400

ALT B1 DOA	Change to Bill Funding
PR	- \$11,400

2. Modify the Governor's proposal to provide only 1.0 additional attorney and no additional clerical support in DHA for the increased CPS caseload. Compared to the bill, reduce funding in DCF by \$44,600 GPR in 2014-15. Reduce funding by \$44,600 PR in 2014-15 and 1.0

PR position (0.5 attorney position and 0.5 support staff position), beginning in 2014-15, in DOA.

ALT B2	Change to Bill
DCF	Funding
GPR	- \$44,600

ALT B2	Change to Bill	
DOA	Funding	Positions
PR	- \$44,600	- 1.00

3. Modify the Governor's proposal to provide 1.0 additional attorney and 0.5 support staff in DHA for the increased CPS caseload. Compared to the bill, reduce funding in DCF by \$32,900 GPR in 2014-15. Reduce funding by \$32,900 PR in 2014-15 and 0.5 PR position (0.5 attorney position), beginning in 2014-15, in DOA.

ALT B3	Change to Bill
DCF	Funding
GPR	- \$32,900

ALT B3	Change to Bill	
DOA	Funding	Positions
PR	- \$32,900	- 0.50

4. Delete the Governor's proposed funding.

ALT B4	Change to Bill
DCF	Funding
GPR	- \$99,100

ALT B4	Change to Bill	
DOA	Funding	Positions
PR	- \$99,100	- 2.00

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