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Division of Children and Family Services
Memo Series 2001-15

Division of Juvenile Corrections
Administrator's Memo Series for Counties # 01-14

To: Area Administrators/Assistant Area Administrators
Bureau Directors
County Departments of Community Programs Directors
County Departments of Developmental Disabilities Services Directors
County Departments of Human Services Directors
County Departments of Social Services Directors
Licensing Chiefs/Section Chiefs
Tribal Chairpersons/Human Services Facilitators
Division of Juvenile Corrections Management Staff
Juvenile Court Intake Workers

From: Susan N. Dreyfus
Administrator, DHFS, DCFS

Eurial K. Jordan
Administrator, DOC, DJC

Date: December 28, 2001

RE: Adoption and Safe Families Act and the Federal Final Rule

As you are aware, the Adoption and Safe Families Act (ASFA) of 1997 (P.L. 105-89) established a variety of new standards relative to children and juveniles placed in out-of-home care and at risk of being placed in out-of-home care. In January 2000, the U.S. Department of Health and Human Services, Administration for Children and Families (ACF) issued an administrative rule that clarifies certain eligibility criteria that govern title IV-E eligibility and reimbursability. The Division of Children and Family Services has provided information previously in Memo Series CFS 98-12, Info Memo 98-15, Info Memo 99-01, Info Memo 99-09, Info Memo 2000-05 and Memo Series CFS 2000-15. The purpose of this memo is not to replace the previous numbered or information memos, but to provide greater details on certain aspects of the federal law and the final federal rule to implement provisions of ASFA.

A question that has arisen numerous times both in Wisconsin and other states is whether or not the requirements of ASFA apply to delinquent youth, juveniles in need of protection or services (JIPS) and to Indian children served by counties and tribes. The ASFA requirements **do** apply to those youth once they enter out-of-home care, either prior or subsequent to or in lieu of a placement in a secured correctional institution. More information on this is provided in the attached document.

In FFY 2003, ACF will conduct an outcome-focused review of child and family services in Wisconsin based on the requirements of ASFA and the final rule. In preparation for this review, ten county social service agencies conducted self-assessments of their child welfare systems on a pilot basis in 2000 and all county social service agencies were involved in the self-assessment process during the Summer of 2001 to assure that all agencies are aware of their own areas of strength and concern. A statewide assessment, that addresses many of the same areas analyzed by the counties during their self-assessment process, will be conducted as part of the ACF review.

Please review all of the attached material. We will be working with Office of Strategic Finance (OSF) Area Administration staff, DOC Regional Chiefs, DOC/DJC County Liaisons, and the Child Welfare Training Partnerships in following up on this information with you in the coming months to assure that all agencies are aware of and in compliance with all of the requirements of the federal law. It is critical that all agency managers, supervisors, intake workers, and case managers are aware of this information, work with key stakeholders in the local service system and incorporate the requirements into their daily practice. We recognize that state statutory language to clarify various provisions of ASFA is needed and is currently under development. However, the federal law is in effect and must be adhered to.

If you would like a copy of Titles IV-B and IV-E of the Social Security Act as amended by the Adoption and Safe Families Act, please contact the central office.

DHFS REGIONAL OFFICE CONTACT: Area Administrator

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MEMO WEB SITE: https://dcf.wisconsin.gov/cwportal/policy

THE ADOPTION AND SAFE FAMILIES ACT (P.L. 105-89)
Effective Date: November 19, 1997

FEDERAL FINAL RULE (45 CFR Parts 1355, 1356 and 1357)
Effective Date: March 27, 2000

DEFINITIONS

For the purposes of this document, the following definitions apply throughout.

Child/Juvenile: A person under the age of 18; or under 19 only if enrolled in a secondary school or the equivalent and expected to complete their studies by age 19. Child/juvenile includes those individuals under the jurisdiction of the circuit court under s. 48.13, 938.12, and 938.13, Stats. or under the jurisdiction of a tribal court.

Out-of-Home Care: 24-hour care for children or juveniles placed away from their parents or guardians and for whom the State/county child welfare or juvenile corrections agency has placement and care responsibility. This includes, but is not limited to, placements in foster family homes, foster homes of relatives, group homes, emergency shelters, non-secure residential care centers, and preadoptive homes.

KEY PRINCIPLES OF THE ADOPTION AND SAFE FAMILIES ACT (ASFA)

- The principles of safety, permanence, and well-being apply to all children and juveniles removed from their homes, whether they entered out-of-home care via the child welfare or juvenile justice system;
- The safety of children is the paramount concern that must guide all child welfare services;
- Out-of-home care is a temporary setting and not a place for children or juveniles to grow up;
- Permanency planning efforts for children and juveniles should begin as soon as a child/juvenile enters out-of-home care and should be expedited by the provision of services to families;
- The state and counties are required to operate the child welfare system and the juvenile justice system with a focus on results and accountability;
- Innovative approaches are needed to achieve the goals of safety, permanence and well-being. Safety must be a hallmark of family assessment, case planning, and reunification efforts.

BACKGROUND

The federal Adoption Assistance and Child Welfare Act of 1980 created the concepts of permanency planning and reasonable efforts. Most of the requirements of this Act were incorporated into Chs. 48 and 938, Stats., and various Department administrative rules both at that time and subsequent to 1980. Most of the changes resulting from the Act were incorporated into Titles IV-B and IV-E of the Social Security Act. While there have been minor modifications to those sections since 1980, there were no significant changes until those created by ASFA in 1997.

On January 25, 2000, the U.S. Department of Health and Human Services, Administration for Children and Families issued a final administrative rule with an effective date of March 27, 2000. The final rule amended existing regulations concerning child and family services by adding new requirements governing the review of a State's conformity with its IV-B and IV-E state plans and implemented provisions of the Multiethnic Placement Act (MEPA) and the Adoption and Safe Families Act. In addition, the final rule sets forth regulations that clarify certain eligibility criteria that direct the IV-E out-of-home care eligibility and reimbursability state reviews.

It is important to note that the federal government, via this legislation, will hold the state Department of Health and Family Services and, by extension, County Departments of Human/Social Services and Tribal Child Welfare agencies, responsible for achieving the requirements of ASFA and the final rule. Significant financial penalties will be assessed to the state for non-compliance with this legislation. It is critical that county and tribal child welfare agencies involve other actors, such as judges, District Attorneys, Corporation Counsels, and juvenile corrections, as policies and practice develop around ASFA given the fact these key stakeholders will have a significant impact on implementation of the requirements.

Many, but not all, of the changes in the federal law have now been incorporated into Wisconsin law. Applicable administrative rules are being amended to reflect those changes and we are developing legislative proposals to further update Chs. 48 and 938, as necessary. We acknowledge that it may be challenging at times to adhere to the federal regulations when some of those requirements are not yet reflected in state statute. However, all aspects of the ASFA legislation and final administrative rule are currently in effect and counties are expected to comply with the federal mandates.

LEGAL AND PROGRAMMATIC REQUIREMENTS

1. Permanence vs. Reunification

When the Adoption Assistance and Child Welfare Act (P.L. 96-272) was enacted in 1980, the primary emphasis was on reunification of children with their families once they had been placed in out-of-home care. That law also introduced the concepts of best interests of the child and reasonable efforts to prevent placements and to reunify families or find alternative permanency placements for children.

The ASFA legislation changes this thrust to a certain extent. Clearly, under ASFA, the primary goal is permanence for children and juveniles. Permanence with the child's/juvenile's family is the preferred goal, but the Act makes it clear that the time frames for accomplishing permanence are reduced and establishes clear time frames within which permanency goals must be accomplished. As a result, the emphasis has been slightly changed from reunification to overall permanence. The Act also identifies certain circumstances under which reasonable efforts are not required to prevent a child's/juvenile's removal from the home or to reunify the child/juvenile and the family. Under all circumstances, agencies must provide reasonable efforts to achieve the permanence goal.

2. Safety

The terms "safe," "safety," and "safely" are used throughout ASFA. The concept of safety applies to children/juveniles wherever they are residing and at all stages in the life of the case. It is important, then, that the safety of children/juveniles be considered whether they are at home, in out-of-home care, placed

with a relative, or in another planned permanent living arrangement. When the safety of the community is assessed in cases under the Juvenile Justice Code, an individualized assessment of the juvenile's needs must be included in the safety analysis.

Part of the issue of safety in out-of-home care relates to the need for criminal background checks of individuals seeking to become foster parents or to become employees of group homes or residential care centers (formerly child caring institutions). At the same time that ASFA required such background checks, the State of Wisconsin was creating the Caregiver Background Law at s. 48.685, Stats., and Ch. HFS 12, Adm. Code, as it relates to out-of-home care for children. As such, the impact of ASFA in Wisconsin was virtually unnoticed since it was incorporated into these state criminal background check requirements.

Under ASFA, a person cannot ever be licensed as a foster parent if that person has a felony conviction for child abuse or neglect, spousal abuse, a crime against children or for a crime involving violence, including rape, sexual assault or homicide, but **not** including other physical assault or battery. In terms of the latter, a person cannot be licensed as a foster parent for 5 years after any felony conviction for physical assault, battery or a drug-related offense. [Ref. Sec. 471(a)(20)(A); s. 48.685(5)(bm)]

ASFA requires each state to develop and implement standards to assure that children in out-of-home care are provided with quality services that protect the safety and health of children and juveniles removed from their homes. The Division of Children and Family Services is approaching the development of these standards in three ways: revision of Ch. HFS 56, the foster home licensing rules; the creation of Ch. HFS 44 relating to reasonable efforts and permanency planning, and the creation of ongoing services standards. Standards required under ASFA will be a part of all three of these avenues. [Ref. Sec. 471(a)(22)]

[Note: Section 48.685, Stats., and Ch. HFS 12, Adm. Code., include additional crimes, conditions and prohibitions that may affect various licensing actions.]

3. Applicability to Delinquents and Juveniles in Need of Protection or Services (JIPS)

To claim Title IV-E funds, including funds for independent living services, for any eligible child or juvenile in out-of-home care, the state must make assurances to the federal government that the requirements of Title IV-E are applied equally to all children or juveniles entering out-of-home care. Wisconsin and most other states do claim Title IV-E funds for all eligible children and juveniles placed in out-of-home care, including delinquents and JIPS. Therefore, all of the requirements of Title IV-E, including the amendments under ASFA, also apply to delinquents, JIPS, and CHIPS whether or not the individual child is IV-E eligible.

Although the applicability of most IV-E requirements begins once an eligible child or juvenile is placed in a Title IV-E reimbursable facility, the basis for certain IV-E reimbursement criteria must be met by specific deadlines prescribed in the final rule that may be required prior to the child/juvenile being placed in a reimbursable facility.

If, for example, a youth is placed at Lincoln Hills for two years and then is released to a group home, the 15-month clock for filing a termination of parental rights petition begins ticking at the time of the youth's placement in the group home. If, however, a youth is adjudged delinquent and is placed directly in a group home and is not placed in a juvenile correctional facility, then the 15-month clock begins ticking at the time of that placement in a group home. The clock would stop ticking if the child is placed or returned to a correctional institution but would re-start when the child was again placed in a reimbursable facility, so the 15 of 22 months standard must be considered. In either scenario, the contrary to the

welfare finding must be made in the first court order that authorizes the out-of-home placement and the reasonable efforts to prevent removal finding must be made within 60 days of the removal from the home regardless of the reimbursability of the placement. Additional information about the applicability of various requirements to juveniles is provided under specific section headings later in the document.

County agencies providing services to delinquents and JIPS must assure that the applicable standards and requirements of ASFA are applied to those youth in the same manner that they are applied to all children in the child welfare system. County agencies purchasing services for these youth from the Department of Corrections must assure in any agreement with that Department that the applicable standards and requirements of ASFA are being met.

4. Applicability to Native American Children

In general, no group of children or juveniles is excluded from the application of title IV-E requirements and the regulations must apply to tribal children and juveniles as they would any other child/juvenile in out-of-home care. The final rule states that while IV-E requirements must apply to all populations, the statute affords the State agency the flexibility to engage in appropriate individual case planning."
[65 FR 4029]

The final rule goes on to say that States must comply with the Indian Child Welfare Act (ICWA) and that nothing in ASFA or the final rule supercedes ICWA requirements. Therefore, both ASFA and ICWA must be adhered to when working with tribal children and juveniles.

5. Definition of Entry into Out-of-Home Care

The ASFA and final rule often refer to the terms "entry into [out-of-home] care" and "date a child is considered to have entered [out-of-home] care" as the basis for counting required timeframes for various cases events. Namely, this definition determines the date used in calculating all time period requirements for the following events:

- six-month permanency plan reviews conducted by the court or a court-appointed panel,
- 12-month permanency hearings,
- the 15 of 22 months termination of parental rights mandatory filing provision (or documentation of an exception), and
- time-limited reunification services.

The final rule defines entry into out-of-home care at 45 CFR § 1355.20 as the **earlier of the following dates:**

- The date of the first court finding that the child has been subjected to child abuse or neglect;

OR

- 60 days after the date that the child was removed from his or her home.

The federal language clearly references child abuse and neglect cases in the definition of "entry into out-of-home care," but interpretation of this term is unclear as it applies to delinquent youth and juvenile in need of protection or services (JIPS).

The Departments have further interpreted the definition of “entry into out-of-home care” to include the following:

- The date that the child or juvenile is removed from the home and placed in out-of-home care pursuant to a voluntary placement agreement under Wis. Stats. 48.63.
- The date that the juvenile is released or transferred from a Type 1 secured juvenile correctional facility and placed at a IV-E reimbursable placement.

Reimbursable Facility	Non-Reimbursable Facility
- shelter care	- detention facilities
- foster home	- medical facilities
- treatment foster home	- forestry camps
- group home	- secure correctional facilities (Type 1)
- residential care centers (including Type 2)	- unlicensed relative placements under the Kinship Care program

6. Contrary to Welfare Finding

The contrary to the welfare finding must be **made in the first court order that authorizes the removal** of the child/juvenile, even temporarily, from the home or maintains the child/juvenile outside of the home. This finding must be made in the first order authorizing the out-of-home placement regardless of the type of case or facility the child is placed in after removal. As such, this finding must be made prior to an action under s. 48.19(1)(a), (b) or (c) or s. 938.19(1)(a), (b), or (c) or at any hearing under s. 48.21 or 938.21, Stats., whichever occurs first. State statutory language to clarify when this judicial finding is needed and will be proposed, but the federal requirement is currently in effect. [Ref. Sec. 472(a)(1)]

This is a significant change in procedure. The language in the preamble to the final rule is the following:

> *Comment:* Several commenters requested that we [U.S. Department of Health and Human Services (HHS)] clarify that we [HHS] did not intend to consider an emergency order (sometimes referred to as a "pick-up order" or "ex-parte order") as the first court ruling for the purpose of meeting the contrary to the welfare requirements.
>
> *Response:* We [HHS] did not make any distinction about the type of order in which the contrary to welfare determination is required. We [HHS] mean the very first court order pertaining to the child's removal from home. If the emergency order is the first order pertaining to a child's removal from home, then the contrary to welfare determination must be made in that order to establish title IV-E eligibility. We [at HHS] understand that some States must change their practices and even State statutes to meet this requirement. The critical nature of this protection requires us [HHS] to maintain this policy.

When requesting that the court make a contrary to the welfare judicial finding in Ch. 48 proceedings, the safety analysis of the child protective services investigation standards should provide the appropriate factual basis for the child welfare agency case manager to present to the court. When requesting that the court make a contrary to the welfare judicial finding in Ch. 938 proceedings, the analysis that remaining in the home does not ensure the individual juvenile’s well-being is required. While the safety of the immediate surroundings or the community will be included in the contrary to the welfare analysis, the juvenile’s individual needs must also be assessed.

If the contrary to the welfare finding is not made in the first court ruling authorizing the removal from the home, the child/juvenile is not eligible for title IV-E foster care maintenance payments for the duration of that stay in out-of-home care.

7. Reasonable Efforts

The following reasonable efforts findings must be based on the premise that the health and safety of the child or juvenile are paramount concerns:

To Prevent Removal from the Home

When a child/juvenile is removed from the home, the court must make a finding no later that 60 days from the date of removal as to whether or not reasonable efforts were made to prevent the removal.

If the reasonable efforts to prevent removal judicial finding is not made within that 60-day time period, the child/juvenile is not eligible under the title IV-E foster care maintenance payments for the duration of that stay in out-of-home care.

To Finalize the Permanency Plan; Initial Finding

The court must make an initial finding within 12 months after the child's/juvenile's **entry into out-of-home care** that the agency has made or is making reasonable efforts to achieve the child's/juvenile's permanence goal, whether the plan is reunification, adoption, legal guardianship, placement with a fit and willing relative, or placement in another planned permanent living arrangement. This finding must be made at least once every twelve months while the child/juvenile is in out-of-home care. Entry into out-of-home care is defined as in #5 above**.**

The final administrative rule to implement provisions of ASFA removed the requirement for a specific judicial finding of reasonable efforts to reunify the child/juvenile with the family. While reunification remains the highest priority permanence goal, ASFA shifts emphasis from reunification to achieving overall permanence.

If this finding is not made, the child/juvenile becomes ineligible under title IV-E from the end of the twelfth month following the date the child is considered to have entered care or the end of the month in which the most recent judicial finding, or the end of the month in which the most recent reasonable efforts to finalize the permanency plan finding. The child/juvenile remains ineligible until such a judicial finding is made.

To Finalize the Permanency Plan; Annual Finding

The court must make a finding that reasonable efforts to carry out the provisions of the child's/juvenile's permanence goal have been made whenever the permanence goal for the child is changed or, at a minimum, no less frequently than once every 12 months thereafter. [Ref. Sec. 471(a)(15)(A), (B) and (C); s. 48.21(5)(b); s. 48.355(2c); 48.38(5)(f); s. 938.21(5)(b); s. 938.355(2c); s. 938.38(5)(f)]

If, at any point, it is determined that making reasonable efforts to reunify the child with his or her family is inconsistent with the permanency plan for the child, the court must find that the agency is making reasonable efforts to achieve permanence for the child in a timely manner in accordance with the permanency plan and reasonable efforts to complete whatever steps are necessary to finalize that permanence goal.

Reasonable Efforts Not Required

A significant change under ASFA is that the court may find, in certain circumstances, that reasonable efforts to prevent removal or reunify the child with his or her family are not required. Those circumstances are the following:

- The parent has subjected the child to aggravated circumstances. In Wisconsin, "aggravated circumstances" has been defined as:
  - Abandonment in violation of s. 948.20 (Abandonment of a child)
  - Torture. "Torture" is not a specified crime in Wisconsin. As such, the court has the ability to define the term in the context of particular cases. The dictionary defines torture as "the infliction of severe physical pain as a means of punishment or coercion; mental anguish; any method or thing that causes such pain or anguish." Given this definition, a court could describe such physical abuse as burning a child with cigarettes as torture. County agencies should maintain records on a finding that torture occurred and that reasonable efforts were not necessary.
  - Chronic abuse. The term "chronic" is not defined in ASFA. The dictionary definition ("of long duration; continuing; constant") is of limited value. As a result, courts again have some flexibility here in terms of defining how it will utilize this provision.
  - Sexual abuse. "Sexual abuse" for this purpose is defined in s. 48.355(2d)(2) as violations of s. 940.225 (Sexual assault), 944.30 (Prostitution), 948.02 (Sexual assault of a child), 948.025 (Engaging in repeated acts of sexual assault of the same child), 948.05 (Sexual exploitation of a child), 948.055 (Causing a child to view or listen to sexual activity), 948.06 (Incest with a child), 948.09 (Sexual intercourse with a child age 16 or older) or 948.10 (Exposing genitals or pubic area).

- The parent has committed murder or voluntary manslaughter of another child of the parent or has aided or abetted, attempted, conspired or solicited to commit such a murder or voluntary manslaughter. In Wisconsin, murder and voluntary manslaughter have been defined as s. 940.01 (First-degree intentional homicide), 940.02 (First-degree reckless homicide), 940.03 (Felony murder) or 940.05 (Second-degree intentional homicide).

- The parent committed a felony assault that resulted in serious bodily injury to the child or another child of the parent. In Wisconsin, this is defined as a violation of s. 940.19(2), (3), (4) or (5) (Battery; substantial battery; aggravated battery), 940.225(1) or (2) (Sexual assault), 948.02(1) or (2) (Sexual assault of a child), 948.025 (Engaging in repeated acts of sexual assault of the same child) or 948.03(2)(a) or (3)(a) (Physical abuse of a child).

- The parental rights of the parent to another child have been involuntarily terminated.

[Ref. Sec. 471(a)(15)(D); s. 48. 355(2d)(a) and (b); s. 938.355(2d)(a) and (b)]

[Note: The reasonable efforts not required provision also applies to any violation of any other state or federal law that would be a violation of these criminal laws if committed in this state.]

If the court makes a finding that one of the circumstances described above applies and that reasonable efforts to prevent removal or to reunify the child and family are therefore not required, then the court must hold a **permanency hearing within 30 days** after the date of the finding. The purpose of the hearing is to establish a permanency plan for the child or juvenile. If the court makes the finding and sets a date for the hearing, the agency responsible for developing the permanency plan must submit that plan to the court no later than 5 days prior to the hearing. Reasonable efforts must then be made to finalize and achieve the permanence goal described in the permanency plan. [Ref. Sec. 471(a)(15)(E); s. 48.355(2d)(c); s. 938.355(2d)(c)]

[Note: ASFA, Ch. 48, and Ch. 938 also still require that permanency plans be reviewed every six months by the court or a court-appointed administrative panel.]

8. Court-ordered Placement With a Specific Out-of-Home Care Provider

As a condition of eligibility, title IV-E requires that a child's placement and care responsibility be vested either with the State agency or another public agency with which the state has an agreement. Initially, the final rule stated that federal financial participation under title IV-E would not be available for children and juveniles when a court ordered a placement with a specific out-of-home care provider.

The U.S. Department of Health and Human Services (DHHS) has further clarified its interpretation of this provision in a written response posted on the DHHS website. This more recent interpretation states that if the court names a specific placement in agreement with the county agency's recommendation, then the child/juvenile remains eligible. If the court-ordered placement is contrary to the agency recommendation, the child/juvenile will remain eligible only if the court hears relevant testimony and gives bona fide consideration to the recommendation(s) of the agency and all parties.

9. Documentation of Judicial Findings

The judicial findings regarding (1) contrary to the welfare, (2) reasonable efforts to prevent removal, (3) reasonable efforts to finalize the permanency plan, and (4) findings that reasonable efforts are not required **must be explicitly documented on a case-by-case basis and be so stated in the court order.**

If the contrary to the welfare and reasonable efforts findings are not included in the court order, a transcript of the court proceeding is the only other documentation that will be accepted to verify that these findings have been made. Affidavits and nunc pro tunc (Latin for "now for then," this refers to retroactive re-dating of an order when there is a showing that the earlier date would have been legal and there was error, accidental omission or neglect which caused a problem that can be cured) orders will <u>not</u> be accepted as verification documentation.

Court orders that refer solely to state law to substantiate judicial determinations are not acceptable. The determination must provide additional, case-specific information.

10. Opportunity for Physical Custodians to be Heard at all Hearings

All foster parents, pre-adoptive parents and relatives caring for children under a voluntary placement agreement or court order, must be provided notification of all hearings and reviews regarding the child and an opportunity to be heard at any or all of those hearings and reviews. This required notification and opportunity to be heard does <u>not</u> make such a caregiver a party to the case.

In Wisconsin, the implementation of this requirement requires that such caregivers be given an opportunity to provide a written or verbal statement at each hearing and review or to provide a written statement prior to the hearing or review. All such statements must be relevant to the issues to be determined at the hearing, so **the notice to the caregiver must provide information on the specific issues to be considered**. It is important to note that if a caregiver is not provided with the notice or opportunity to make a statement, the caregiver may request a rehearing on the matter and, if the rehearing is requested, the court **must** hold a rehearing. [Ref. Sec. 475(4)(G); s. 48.357(2r); s. 48.363(1m); s. 48.365(2m)(ag);
s. 48.38(5)(b); s. 48.42(2g)(am) and (b); s. 48.427(1m); s. 938.357(2r); s. 938.363(1m); 938.365(2m)(ag); and 938.38(5)(b)]

11. Filing for Termination of Parental Rights

A significant aspect of ASFA is the requirement that, except under certain circumstances, the agency must request a petition for a termination of parental rights and the petition **must** be filed or joined if **any** of the following circumstances apply:

- The child has been placed outside of his or her home for 15 of the most recent 22 months.
- A court has found that a child was abandoned under s. 48.13(2) when the child was under one year of age or that the parent abandoned the child when the child was under one year of age under s. 948.20.
- A court has found that the parent committed, aided or abetted the commission, or has solicited, conspired or attempted to commit a violation of 940.01 (First-degree intentional homicide), 940.02 (First-degree reckless homicide), 940.03 (Felony murder) or 940.05 (Second-degree intentional homicide) and that the victim of the violation is a child of the parent.
- A court has found that the parent committed a violation of s. 940.19(2), (3), (4) or (5) (Battery; substantial battery; aggravated battery), 940.225(1) or (2) (Sexual assault), 948.02(1) or (2) (Sexual assault of a child), 948.025 (Engaging in repeated acts of sexual assault of the same child) or 948.03(2)(a) or (3)(a) (Physical abuse of a child) and that the violation resulted in great bodily harm or substantial bodily harm to the child or another child of the parent.

  [Note: Great bodily harm is defined at s. 939.22(14): Bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury. Substantial bodily harm is defined at s. 939.22(38): Bodily injury that causes a laceration that requires stitches; any fracture of a bone; a burn; a temporary loss of consciousness, sight or hearing; a concussion; or a loss or fracture of a tooth.]

If any of the above circumstances exist, the agency must request that a petition be filed. The above also applies to any violation of any other state or federal law that would be a violation of these criminal laws if committed in this state. The request to file a petition must be made in sufficient time to allow adequate time for a petition to be filed with the court by the end of the 15th month. As such, it is critical that the agency consult with the District Attorney or Corporation Counsel about appropriate time frames.

There are three exceptions to the 15 of 22 months requirement to file a petition for termination of parental rights:

1) The child is being cared for by a relative of the child by foster care placement, guardianship or court-ordered Kinship Care. This option should not be regarded as general as it might indicate. This should only be considered if it is determined that the relative will provide permanency for the child. It is important that the agency still consider the best interests of and permanence for the child. If the relative indicates no interest in caring for the child for an extended period of time (e.g., is not willing to adopt or become a long-term guardian), the agency should still consider requesting that a petition for TPR be filed.

2) The agency has documented in the case plan a compelling reason for determining that filing a TPR petition would not be in the best interests of the child. Again, this should be used only after careful consideration of the best interests of and permanence for the child. Under the ASFA requirements, the following criteria are established for the use of this exception:
   - The compelling reason must be considered on a case-by-case basis and must be based on the unique and individual circumstances of the child and family;
   - The use of checklists of compelling reasons is not allowed and agencies cannot specify categories of children for whom TPR will not be considered;
   - The compelling reason must be documented in the case plan and identified in the permanency plan for the child;
   - The child welfare agency is responsible for the compelling reason decision. Court approval of the agency's decision is not required for IV-E funding purposes, but the documentation must be available for review if requested by the court. Also, under s. 48.38(5) and 938.38(5), Stats., the court or administrative review panel must approve the permanency plan and can reconsider the agency's decision as part of the permanency plan hearing or review processes;
   - The decision must be made and documented in the case evaluation by the end of the 15th of the 22 months.

   Some examples of compelling reasons include:
   - The child, particularly an older child, is so opposed to adoption or that there are other specific factors which clearly create the likelihood that the adoption will not be successful;
   - The child is placed in a residential care center or other type of institution and the course of treatment has not been completed and reunification is still likely;
   - The child is Native American and his or her individual circumstances have been determined to not meet the standards for a termination of parental rights;
   - It is unlikely that the child will be adopted (as evidenced by the fact that the child has been listed in state and national adoption resources for at least six months and no viable resources have been located);
   - The child has severe difficulties that would make a change in placement very traumatic to the child and is ill-advised, even taking into consideration the foster parent's limited commitment to the child;
   - The child's parent maintains communication with the child and has a loving relationship with the child, but is unable to care for the child due to a mental illness, physical illness, developmental disability or incarceration.

- No grounds to file a petition to terminate parental rights exist.

General philosophical objections on the part of the child welfare agency, the District Attorney, the Corporation Counsel or the court to pursuing TPRs are not acceptable compelling reasons. The Department's adoption and consultation staff are available and should be utilized when determining if a compelling reason for not filing a TPR petition is being considered.

3) The agency has not made reasonable efforts, if required, to reunify the child with his or her family.

It is important to keep in mind that even though a petition for the termination of parent rights is required in the above circumstances, this does not necessarily mean that grounds for the involuntary termination of parental rights under s. 48.415 will always be met. Cases must be evaluated individually. This is particularly true in delinquency cases. If a petition for TPR is filed, the agency must notify the Department of Health and Family Services. [Ref. Sec. 475(4)(E); s. 48.417]

Any decision to not file a petition for TPR under the exceptions noted above and the supporting rationale must be documented in the child's case record. Such documentation must be consistent with subsequent case plans and evaluations of progress and the child's permanency plan.

On June 19, 2001, the U. S. District Court, Eastern District of Wisconsin issued a decision in the case of **Jeanine B. v. Scott McCallum** [Case No. 93-C-0547]. The court held that Congress created certain rights under the Adoption and Safe Families Act that children/juveniles in out-of-home care may seek to enforce in federal court.

Specifically, the enforceable rights as outlined in the opinion are: 1) the right to have a termination of parental rights proceeding initiated when a child has been in out-of-home care for 15 of the most recent 22 months; 2) the right to have the county agency/Bureau of Milwaukee Child Welfare, at the same time, begin to identify, recruit, process and approve a qualified family for adoption; and 3) the right to have any exceptions that apply to the 15 of 22 months termination of parental rights petition requirement documented in the case plan (e.g., the child is being cared for by a relative; a county agency/Bureau of Milwaukee Child Welfare has documented in the case plan a compelling reason for determining that filing such a petition would not be in the best interests of the child; or the county agency/Bureau of Milwaukee Child Welfare has not provided the family the services necessary for the safe return of the child to his or her home). For further discussion about the implications of the opinion, please contact your corporation counsel or district attorney.

12. Allowable Permanence Goals

ASFA changes the description of what allowable permanence goals for a child may be. The permanence goal is a part of the permanency plan but is limited to a description of what the goal is for the child. The permanency plan should describe the means to achieve that goal.

ASFA deleted the following italicized language: The purpose of the permanency hearing is to "determine the *future status of the child (including, but not limited to, whether the child should be returned to the parent, should be continued in foster care for a specified period, should be placed for adoption, or should (because of the child's special needs or circumstances) be continued in foster care on a permanent or long-term basis)*". That deleted language was replaced with the following underlined language:

> The purpose of the permanency hearing is to "determine the **permanency plan for the child that includes whether, and if applicable when, the child will be returned to the parent, placed for adoption and the State will file a petition for termination of parental rights, or referred for legal guardianship, or (in cases where the State agency has documented to the State court a compelling reason for determining that it would not be in the best interests of the child to return home, be referred for termination of parental rights, or be placed for adoption, with a fit and willing relative, or with a legal guardian) placed in another planned permanent living arrangement."** [Ref. s. 475(5)(C)]

This change in language clearly indicates the intent to not allow long-term foster care to be a permanence goal. If after first considering reunification, adoption, legal guardianship, or permanent placement with a fit and willing relative it is determined that the most appropriate permanency goal for a child is placement in another planned permanent living arrangement, the agency **must** document to the court the compelling reason for the alternate plan.

In addition, this language, coupled with subsequent language in the Chafee Foster Care Independence Act of 1999, also precludes independent living from being an acceptable permanence goal unless listed as another planned permanent living arrangement that meets a compelling reason standard. As such, all permanency plans must have one of the following as the permanence goal for the child:

- Reunification with the family (and the timeframe to achieve reunification);
- Adoption;
- Legal guardianship;
- Permanent placement with a fit and willing relative;
- Another planned permanent living arrangement (including independent living, long-term foster care, or sustaining care) after the court has accepted the agency's compelling reasons for not selecting one of the first four.

In addition, if the permanence goal is not reunification, there must be documentation of the steps the agency is taking to achieve a permanence goal of adoption, guardianship, placement with a relative, or another planned, permanent living arrangement. Such documentation must, at a minimum, include child specific recruitment efforts, such as using state and national adoption exchange resources or electronic exchange systems.

DHFS staff will review statutes and HSRS data elements to assure compliance with the acceptable permanence goals under ASFA.
[Ref. Sec. 475(1)(E) and (5)(C); s. 48.38(5)(c)5.; s. 938.38(5)(c)5.

13. Concurrent Permanency Planning

ASFA introduces the practice of concurrent permanency planning. The concept of concurrent planning is not new, but it has historically been subservient to the concept of linear permanency planning. Under linear case planning, agencies make reasonable efforts to reunify the child with the family and only when it becomes clear that reunification will not happen do agencies seriously consider other alternatives. Linear planning can result in long stays in out-of-home care if reunification efforts are not planful, focused and time-limited.

Concurrent planning, as authorized in ASFA, simply states that at the same time that efforts are underway to achieve a primary permanence goal, agencies may also make reasonable efforts to achieve a secondary goal. Such reasonable efforts may be initial contacts with relatives who may be interested in caring for the child. Discussions with relatives may also be concurrent in the sense that they may be taking place at the same time to support a relative's ability to serve as a temporary safety resource or to become a permanent placement for the child. If that is not possible, the role of the relative could be increased through serving as a placement for the child. [Ref. Sec. 471(15)(F); s. 48.355(2b); s. 938.355(2b)]

The following are the principles behind the concept of concurrent permanency planning:

- The goal is early permanence for the child based on a child's need for a stable, caring and permanent family
- Culturally respectful family and child assessments (strengths, needs, core problems)
- Tentative, reasoned hypothesis about the probability of the child's returning home, and the family's capacity to benefit from reunification services
- Respectful, candid discussion early on about the impact of foster care on children, clarity about birth parent's rights and responsibilities, supports the agency will provide, permanency options, and consequences of not following through with the case plan (e.g., time limits)
- Open, honest discussion with all parties: biological parents, relatives, foster families, attorneys and other service providers
- Involvement of families in case planning and review of permanency options
- Using time limits and the "crisis" of placement as a motivator to engage families in planning
- Encouraging regular and structured parent/child visitation to improve chances for reunification
- Involving foster parents in parent-child visits promotes more supportive relationships and opportunities for continuity in meaningful relationships
- Early involvement of immediate and extended family
- Foster parents as possible permanency resources if reunification doesn't work out
- Developing partnerships among biological families, agency workers and foster parents to clarify roles and to support achievement of short-term immediate goals and long-term permanency goals
- Regular and consistent documentation of behavioral progress, continuing needs and changes to child safety concerns and achievement of the permanence goal
- Consideration of due process and parental rights when the child is first placed in care
- Use of non-adversarial mediation strategies to resolve conflicts

Staff within the DHFS, Bureau of Programs and Policies Adoption and Consultation Section will be available to assist counties in early consideration of concurrent planning options and to assist counties in determining when TPR and adoption are appropriate.

14. Asset Limitation on Title IV-E Eligibility

Previously, a child in foster care was limited to assets of less than $1,000 in order to maintain Title IV-E reimbursability. This has long been a problem because it generally precluded the ability of agencies to assure that children had sufficient resources when they left out-of-home care for independent living. ASFA increased the asset limit to $5,000. The Chafee Foster Care Independence Act of 1999 further increased the asset limit to $10,000, which is now the current standard. [Ref. Sec. 477(a)(2)(A)]