



Federal Officials Seek to Derail Benefits For Children in Kinship Foster Care

by **Katina Ancar**

After California's Department of Social Services (DSS) lost a federal lawsuit against the US Department of Health and Human Services (DHHS) over foster care benefits for children in kinship care, a group of grandmothers and other relatives caring for foster children intervened as plaintiffs. Represented by legal services attorneys, these relatives appealed the court's decision and did what DSS could not do – they won.

Now, instead of accepting this defeat, US Health and Human Services Secretary Tommy Thompson has requested that Congress overturn this victory for foster children and relative caregivers.

Court Victory for Kinship Caregivers

Almost 25 percent of the 500,000 children in foster care reside in kinship foster care, meaning that relatives serve as their foster parents.¹ Last year's ruling in *Rosales v Thompson*² unlocked the door for a new group of children to receive federal Title IV-E foster care benefits.³ Previously, DHHS had asserted that only children eligible for benefits under the old Aid

for Families with Dependent Children (AFDC) guidelines while living with their parent(s) could receive Title IV-E funds (should they later enter foster care). The *Rosales* plaintiffs argued that the statute in fact permits children who live with any relative, and subsequently enter foster care, to receive federal foster care benefits. A panel of the U.S. Ninth Circuit Court of Appeals agreed with the plaintiffs' interpretation of the statute.

Rosales permits AFDC eligibility in a relative's home to serve as the AFDC "link" to Title IV-E foster care benefits.⁴ This expansion eases the financial burden on kinship foster parents in Ninth Circuit states, such as California, that do not allow state-funded payments to children in kinship foster care who did not qualify for AFDC payments in their parents' home. For those states that do provide state payments to kinship foster children, *Rosales* requires federal reimbursement of these costs – welcome assistance to the cash-strapped states.

Statutory Change Would Make Children Ineligible for Benefits
Rather than provide the benefits to which these children are now

entitled, DHHS seeks to attack the *Rosales* decision by erasing the legal requirement from the statute. Included in the 2005 federal budget is a proposal to change the eligibility criteria for Title IV-E benefits. The alteration would enact as law DHHS' interpretation of the statute.⁵

Although the proposed budget does not specify statutory language, DHHS seeks to amend § 672(a)(4) (B)(ii) to state effectively that:

A child's title IV-E foster care maintenance payment eligibility is inextricably linked to the . . . (parent's home) and is based on whether the child would have been eligible for AFDC in (the parent's home) ...⁶

Congress has not yet addressed the *Rosales* proviso in its ongoing budget negotiations, and no committee has drafted its statutory language. However, although inactive, the proposal is still pending.

This modification would permit DHHS to avoid providing Title IV-E funds to newly eligible "*Rosales* children" in the Ninth Circuit constituent states,⁷ and preclude litigation similar to *Rosales* that would benefit foster children in other

¹ See National Clearinghouse on Child Abuse and Neglect Information, *Foster Care National Statistics* (June 2003), <http://nccanch.acf.hhs.gov/pubs/factsheets/foster.cfm> (last updated Oct. 22, 2003) (citing Sept. 30, 2001 statistics).

² 321 F.3d 835 (9th Cir. 2003)

³ Title IV-E refers to Chapter 4, Subchapter E of the Social Security Act, which sets up the structure for federal funding of state foster care systems. See 42 U.S.C. §§ 670-679. DHHS reimburses state systems for a portion of the funds they expend for care to foster children. Eligibility for Title IV-E funds is linked to a child's eligibility for the old AFDC (Aid to Families with Dependent Children, now Temporary Assistance for Needy Families, or TANF). In the simplest terms, to receive federal IV-E payments, a

child must have been eligible for AFDC benefits prior to entering foster care. This is the federal "AFDC linkage requirement."

⁴ For a full discussion of the *Rosales* decision, see Katina Ancar, *Ninth Circuit Hands Long-Awaited Victory to Children Living with Relatives*, Youth Law News 17 (Oct.-Dec. 2003).

⁵ Budget of the United States Government, Fiscal Year 2005, Appendix, <http://www.whitehouse.gov/omb/budget/fy2005>. See also U.S. Dep't of Health & Human Servs, FY 2005 Budget in Brief at 93 (proposing to "amend the statute" to agree with DHHS' "longstanding" policy).

⁶ U.S. Dep't of Health & Human Servs, Administration for Children and Families, Justification of Estimates for Appropriations Committees, Payments to States for Foster Care and Adoption Assistance at C-15.

⁷ Those states are Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington. The Ninth Circuit also includes Guam and the Northern Mariana Islands.

states.⁸ According to DHHS' budget request, such a change will eliminate \$77 million in DHHS payments to children in the 2005 fiscal year. Over five years, the agency projects that it will save \$375 million.⁹ As states outside the Ninth Circuit attempt to negotiate modifications to their Title IV-E plans to allow equivalent eligibility, this amendment could save the agency hundreds of millions of dollars.¹⁰

The statutory change would also wrest from foster children the benefit of the *Rosales* ruling. While the proposal would not prevent current Title IV-E payments to eligible children, or retroactive benefits to California children,¹¹ it would close the door to Title IV-E eligibility for all future foster children. It would also sever benefits to current beneficiaries, again leaving relatives to rely on state-funded payments, or lower welfare benefits.

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⁸ See U.S. Dep't of Health & Human Servs., Administration for Children and Families, Justification of Estimates for Appropriations Committees, Payments to States for Foster Care and Adoption Assistance at C-13 (stating that the change seeks to prevent "ultimately legal and policy challenges from states outside of the 9th Circuit").

⁹ See *id.*

¹⁰ See *id.*

¹¹ The *Rosales* case originated as a state lawsuit by relative caregivers on behalf of California foster children. See *Land v. Anderson*, 55 Cal.App.4th 69, review denied (1997), cert. denied 522 U.S. 1048 (1998).