

**J.C.R.A.R. HEARING SLIP**

(Please Print Plainly)

DATE: March 24, 1999 (2)

CHR-NO. WD 05, HFS 12 + 13

OR  
SUBJECT Emergency Rule of Order on

(NAME) David B. Spatterbank

(Street Address or Route Number) 2009 Arborvitae Drive

Madison WI 53713-1009

(City and Zip Code) Madison WI 53713-1009  
(Representing) DRSP of Delawareans

Speaking in Favor of the Rule:   
(i.e. against objection or the rule suspension)

Speaking Against the Rule:   
(i.e. in favor of objection or suspension)

Registering in Favor:

but not speaking:

Registering Against:

but not speaking:

Speaking for information only; Neither for nor against:

Please return this slip to a messenger PROMPTLY.

Senate Sergeant-At-Arms  
Room 109-LL One East Main  
P.O.Box 7882  
Madison, WI 53707-7882

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(Please Print Plainly)

DATE: 3/24/99

CHR-NO. \_\_\_\_\_

OR  
SUBJECT HFS 12 & 13

(NAME) Thurley Wm, Todd

(Street Address or Route Number) 3400 N. 58th

Madison WI 53716

(City and Zip Code) Appleton WI 54911  
(Representing) Appleton Property Inc

Speaking in Favor of the Rule:   
(i.e. against objection or the rule suspension)

Speaking Against the Rule:   
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DATE: 3-24-99

CHR-NO. \_\_\_\_\_

OR  
SUBJECT DHS Emergency Rule  
1A113

(NAME) Jess Keys  
1195w

(Street Address or Route Number) 2001 W. Beltline Hwy #201

Madison WI 53714

(City and Zip Code) District 195w, 5220  
(Representing) \_\_\_\_\_

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DATE: 3/24/99

CHR-NO. HFS 12\*13  
OR

SUBJECT \_\_\_\_\_

Rep. Gregg Underheim  
(NAME)

(Street Address or Route Number) \_\_\_\_\_

(City and Zip Code) \_\_\_\_\_

(Representing) \_\_\_\_\_

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DATE: 24 Mar 99

CHR-NO. HFS 12/13  
OR

SUBJECT \_\_\_\_\_

William Donaldson  
(NAME)

(Street Address or Route Number) \_\_\_\_\_

(City and Zip Code) Madison WI 53705

(Representing) Wisconsin Bd on Aging & LTZ

Speaking in Favor of the Rule:   
(i.e. against objection or the rule suspension)

Speaking Against the Rule:   
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Registering in Favor:   
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DATE: 3/24/99

CHR-NO. \_\_\_\_\_  
OR

SUBJECT \_\_\_\_\_

A. Storm Porter  
(NAME)

(Street Address or Route Number) 2 N. Packer St., Suite 300

(City and Zip Code) Madison, WI 53703

(Representing) Individuals with Disabilities  
State Bar of Wis

Speaking in Favor of the Rule:   
(i.e. against objection or the rule suspension)

Speaking Against the Rule:   
(i.e. in favor of objection or suspension)

Registering in Favor:   
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Registering Against:   
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(Please Print Plainly)

DATE: 3-23-99

CHR-NO. 12 & 13

OR

SUBJECT \_\_\_\_\_

Jenele Elder-Green

(NAME) 4333 N. 29th St,

(Street Address or Route Number)

MIL, WI 53216

(City and Zip Code)

Alpha Kappa Alpha Sorority  
(Representing)

Speaking in Favor of the Rule:   
(i.e. against objection or the rule suspension)

Speaking Against the Rule:   
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Registering in Favor:

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DATE: 3-23-99

CHR-NO. 12 & 13

OR

SUBJECT \_\_\_\_\_

J. Foster

(NAME) 2222 Niagara St

(Street Address or Route Number)

Rock, IL 63224

(City and Zip Code)

Speaking in Favor of the Rule:   
(i.e. against objection or the rule suspension)

Speaking Against the Rule:   
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(Please Print Plainly)

DATE: 3/24/99

CHR-NO. \_\_\_\_\_

OR

SUBJECT HS 10+13

David Stue

(NAME) 217 N. Main St

(Street Address or Route Number)

Madison, WI 53703

(City and Zip Code)

Speaking in Favor of the Rule:   
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Speaking Against the Rule:   
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DATE: 3-24-99

CHR-NO. \_\_\_\_\_

OR

SUBJECT HFS 12 & 13

(NAME) John Hessel, Linda Darsen

(Street Address or Route Number) \_\_\_\_\_

MADISON

(City and Zip Code) \_\_\_\_\_

DHFS

(Representing) \_\_\_\_\_

Speaking in Favor of the Rule:

Speaking in Favor of the Rule:

Speaking Against the Rule:

Speaking Against the Rule:

Registering in Favor:

but not speaking:

Registering in Favor:

Registering Against:

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Registering Against:

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DATE: 3-24-99

CHR-NO. HFS 12 & 13

OR

SUBJECT \_\_\_\_\_

(NAME) Rep. Peggy Krusick

(Street Address or Route Number) \_\_\_\_\_

(City and Zip Code) \_\_\_\_\_

(Representing) \_\_\_\_\_

Speaking in Favor of the Rule:

Speaking Against the Rule:

Registering in Favor:

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Registering Against:

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DATE: 3-24-99

CHR-NO. \_\_\_\_\_

OR

SUBJECT HFS 12 & 13

(NAME) Rep. Len Young

(Street Address or Route Number) \_\_\_\_\_

(City and Zip Code) \_\_\_\_\_

(Representing) \_\_\_\_\_

Speaking in Favor of the Rule:

Speaking Against the Rule:

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**I.C.R.A.R. HEARING SLIP**

(Please Print Plainly)

DATE: 3/24/99

CHR-NO. \_\_\_\_\_

OR

SUBJECT Criminal Background

(NAME) Linda L. Martin

W4794 River Road  
(Street Address or Route Number)

Fredonia, WI 53021  
(City and Zip Code)

Sheboygan County  
(Representing)

Speaking in Favor of the Rule:  
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Speaking Against the Rule:  
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Registering in Favor:

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DATE: 3-24-99

CHR-NO. \_\_\_\_\_

OR

SUBJECT Prisoners Back

(NAME) Andrew Darter

4516 N. Wilshire  
(Street Address or Route Number)

Wilmunke 53211  
(City and Zip Code)

WV-Phil Wacker  
(Representing)

Speaking in Favor of the Rule:  
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CHR-NO. \_\_\_\_\_

OR

SUBJECT HFS 12+13

(NAME) Brian Puteff

121 S. Puchney St  
(Street Address or Route Number)

Madison WI 53703  
(City and Zip Code)

Wisconsin Health Care Association  
(Representing)

Speaking in Favor of the Rule:  
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Speaking Against the Rule:  
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CHR-NO. HES 12 + 13

OR

SUBJECT \_\_\_\_\_

(NAME) TIM HARTIN

(Street Address or Route Number)

5721 DOAKS ROAD

(City and Zip Code)

MADISON WI 53719  
WI Health & Hospital Assn.  
(Representing)

Speaking in Favor of the Rule:

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DATE: 3/24/99

CHR-NO. \_\_\_\_\_

OR

SUBJECT CRIMINAL BACKGROUND

REVIEWS

(NAME) BARBARA JACOBS

(Street Address or Route Number) 1930 N. H. MOUNT BLVD

(City and Zip Code) MILWAUKEE 53208

UW-MILWAUKEE  
(Representing)

Speaking in Favor of the Rule:

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DATE: 3-24-99

CHR-NO. \_\_\_\_\_

OR

SUBJECT Ch. 12 + 13

updates

(NAME) Sean Trimble

(Street Address or Route Number) 2544 S. Shore Dr

(City and Zip Code) LTC Ombudsman

(Representing)

Speaking in Favor of the Rule:

(i.e. against objection or the rule suspension)

Speaking Against the Rule:

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Tommy G. Thompson  
Governor

Joe Lekan  
Secretary

**State of Wisconsin**  
Department of Health and Family Services

OFFICE OF LEGAL COUNSEL

1 WEST WILSON STREET  
P.O. BOX 7850  
MADISON WI 53707-7850

PHONE: (608) 266-8428

March 10, 1999

The Honorable Fred Risser, President  
Wisconsin State Senate  
1 East Main, Suite 402  
Madison, WI 53702

The Honorable Scott Jensen, Speaker  
Wisconsin State Assembly  
1 East Main, Suite 402  
Madison, WI 53702

Re: Clearinghouse Rule 98-188  
HFS 13 & HSS 129, relating to reporting and investigation of caregiver misconduct and operation of the caregiver misconduct registry.

Gentlemen:

In accordance with the provisions of s. 227.19(2), Stats., you are hereby notified that the above-mentioned rule is in final draft form. This notice and the report required by s. 227.19(3), Stats., are submitted herewith in triplicate.

The rule was submitted to the Legislative Council for review under s. 227.15, Stats. A copy of the Council's report is also enclosed.

If you have any questions about the rule, please contact Linda Dawson at 266-0355.

Sincerely,

Paul E. Menge  
Administrative Rules Manager

cc Gary Poulson, Deputy Revisor of Statutes  
Senator Judy Robson, JCRAR  
Representative Glenn Grothman, JCRAR  
Linda Dawson, Office of Legal Counsel  
Larry Hartzke, Division of Supportive Living  
Kevin Lewis, Secretary's Office

MAR 10 1999

MAR 10 1999

MAR 10 1999

PROPOSED ADMINISTRATIVE RULES - HFS 13  
ANALYSIS FOR LEGISLATIVE STANDING COMMITTEES  
PURSUANT TO S. 227.19 (3), STATS.

Need for Rules

Since July 1, 1991, the Department has had rules, s. HSS 129.10, which establish and provide for the maintenance of a registry of persons eligible by training and testing to be employed in Wisconsin as nurse assistants working in hospitals, nurse assistants working in nursing homes, home health agency aides and, since October 1, 1991, hospice program aides. The rules implemented s. 146.40 (4g), Stats. The rules were amended by emergency order effective April 1, 1992, to add to the registry, as directed by s. 146.40 (4g) and (4r), Stats., all substantiated findings of allegations that persons working in any of these caregiver capacities had abused or neglected a resident or patient or misappropriated a resident's or patient's property, and making that information available to prospective employers and other interested persons on request.

This rulemaking order amends ch. HSS 129 to take out of it the misconduct part of the current registry, that is, the part consisting of substantiated findings of misconduct toward clients by caregivers working as nurse aides in hospitals or nursing homes or for home health agencies or hospice programs, and to replace that part with a reference to a new ch. HFS 13 created by this order.

A recent session law, 1997 Wisconsin Act 27, amended s. 146.40 (4g) and (4r), Stats., to provide for expansion of the misconduct part of the registry so that, beginning October 1, 1998, the Department would add to the registry substantiated findings of allegations that any other person employed by or under contract with a hospital, nursing home, home health agency or hospice program or any person employed by or under contract with any of several other types of facilities, agencies and programs or services licensed, certified or registered by the Department abused or neglected a client served by the facility, agency or program or service or misappropriated a client's property. The other types of "entities" covered by the expanded misconduct part of the registry and the reporting, review and investigation, entering findings and appeal procedures under s. 146.40 (4r), Stats., are the following: community-based residential facilities, residential care apartment complexes (formerly called assisted living facilities), certified adult family homes (only if certified by the Department), licensed adult family homes (only if licensed by the Department), certified community mental health and substance abuse programs or services, rural medical centers and ambulance service providers.

The new ch. HFS 13 covers the structure of the misconduct part of the caregiver registry, the information included in it and release of registry information; a requirement that an entity upon learning of an incident of alleged caregiver misconduct take whatever measures are necessary to protect clients pending a finding; mandatory reporting by entities of allegations of caregiver misconduct, with penalties for failure to



report incidents; reporting by other persons; review by the Department of reports received from entities and concerned individuals alleging abuse or neglect of a client or misappropriation of a client's property, and follow-up investigation by the Department as necessary; determination by the Department either that an allegation is or is not substantiated, and notice to the subject of the report, if an allegation is substantiated, that the finding will be entered on the misconduct part of the caregiver misconduct registry, and the consequences of that action (which for some persons employed by or under contract with an entity may mean being barred indefinitely from similar employment and for others being barred from similar employment unless rehabilitation is demonstrated), unless he or she contests that determination by requesting a hearing; notice to the subject of a report that if the finding is included in the registry, he or she may add a rebuttal statement which will be included with the finding; and how to request a hearing, how the hearing will be conducted and the hearing decision.

These are replacement permanent rules for similar emergency rules that were published October 1, 1998, and amended on February 27, 1999.

#### Responses to Clearinghouse Recommendations

All comments of the Legislative Council's Rules Clearinghouse on the proposed rules were accepted, except the following:

2.a. Comment: Section and paragraph titles should be modified to be written in proper format. See s. 1.05 (2), Manual.

Response: No change. For rules in process the Clearinghouse Director has advised this agency that there is no need to change form of titles to meet the new requirements. These rules have been in process for a long time. Also, the same form for titles should be kept as was used in the original emergency rules published October 1, 1998. All new proposed rules of the Department use the new forms for those titles.

4.b. Comment: In HFS 13.05 (3) (b), it appears that the reference to par. (c) should be to par. (a).

Response: No. The requirement under sub. (3) is to report either to DHFS or DRL, depending on whether the person is credentialed by DRL.

5.e. Comment: In HFS 13.03 (5), "2 lists" could be deleted.

Response: No change. Reference to "2 lists" helps in the understanding of what is being done here. Two lists are also referenced in HFS 129.10 (1) Note.

## Public Hearings

The Department held 3 public hearings in January 1999 on the proposed permanent rules and on the emergency rules that went into effect on October 1, 1998. The hearings were in Wausau, Milwaukee and Madison. A total of 237 persons attended, and 13 of them testified on the rules. Twenty-five persons, including 2 who submitted petitions, one with 1248 signatures and another with 25 signatures, submitted written comments to the Department on the proposed and emergency rules during the public review period that ended in early February 1999.

In response to comments received during public review of proposed ch. HFS 13 and the emergency rules, the Department did all of the following:

- Added definitions for "access" and "course of conduct."

- Significantly revised the definition for "abuse," and incorporated "neglect" in it rather than defining "neglect" separately. The definition of "abuse" originally in ch. HFS 129 was not precise enough for enforcement purposes. That definition was revised to be more precise and moved to the ch. HFS 13 emergency rules which were effective on October 1, 1998 by emergency order. The same revised definition was included in the ch. HFS 13 proposed permanent rules brought to public hearing in January 1999. That definition is now qualified by addition of phrases referring to acts "when contrary to the entity's policies and procedures or when not part of the client's treatment program" and a course of conduct "which serves no legitimate purpose," and by specification of acts that are not included in the definition of "abuse," such as an act which is inadvertent or undertaken in self-defense.

- Significantly revised the definitions for "caretaker" and "under the entity's control." These revised definitions and the added definition for "access" serve to better delineate the persons covered by requirements for reporting caregiver misconduct and operating the caregiver misconduct registry.

- Added that the subject of a reported allegation of caregiver misconduct may have a representative of that person's choice present when Department investigators have any contact with the subject.

## Final Regulatory Flexibility Analysis

These rules apply to the following licensed, certified, registered or approved "entities:"

- certified community mental health programs;
- certified community alcohol and other drug abuse (AODA) prevention and treatment programs;

- ambulance service providers;
- adult family homes certified or licensed by the Department;
- residential care apartment complexes (formerly called assisted living facilities);
- community-based residential facilities (CBRFs);
- nursing homes and facilities for the developmentally disabled;
- hospice programs;
- home health agencies;
- rural medical centers; and
- hospitals.

Many of the entities are small businesses as "small business" is defined in s. 227.114 (1) (a), Stats. This includes about 1/3 of the community mental health and AODA programs; 25 of 450 ambulance service providers; 7 of 45 residential care apartment complexes; 600 of 1120 CBRFs; 96 of 472 nursing homes; most of the hospice programs; and 115 of 191 home health agencies.

The rules require an entity to report to the Department allegations of caregiver misconduct toward residents or patients. Misconduct is abuse or neglect of a client or misappropriation of the client's property. The Department has current rules in ch. HFS 129 that require this reporting by nursing homes and facilities for the developmentally disabled, hospitals, home health agencies and hospice programs. Section 146.40 (4g) and (4r), Stats., was amended by 1997 Wisconsin Act 27 to expand the reporting responsibility to the other types of care and treatment providers listed above. This order consolidates under ch. HFS 13 the required reporting of misconduct, follow-up investigation by the Department and maintenance by the Department of a registry of caregivers for whom allegations of misconduct have been substantiated.

Chapter HFS 13 will not itself have a significant economic impact on a substantial number of small businesses. Expansion of the scope of the caregiver misconduct reporting requirement from 5 service provider types to 11 service provider types is a statutory requirement.

SUMMARY OF PUBLIC HEARINGS ON PROPOSED CHAPTER HFS 13  
REPORTING AND INVESTIGATION OF CAREGIVER MISCONDUCT

PERSONS WHO ATTENDED A HEARING OR SUBMITTED WRITTEN COMMENTS

Public Hearing in Wausau on January 12, 1999

1. Jean Burgener, Administrator, Colonial Manor Medical and Rehab Center, Wausau (commented on HFS 13)
2. Phil Salamone, AFSME – Council 40, AFL-CIO, Schofield submitted (commented on HFS 13)
3. David Sier, Appleton Memorial Hospital and Wisconsin Hospital Association
4. Mike Kunes, Prof. Firefighters Union
5. Lorna Soulier, Bad River Chippewa Health Dept.
6. Anna Pegs – Green Bay Fire Dept.
7. Lowell Stan Latender, Oneida Chippewa Tribe
8. Rand Weborg, WAODA (commented on HFS 13)
9. Steve Solomon, Representing Community Health Care
10. Kathleen Hasenohrl, Assoc. Dean, Health Concerns, Midstate Technical College, (MSTC) Marshfield
11. George Kamps, Oneida Tribal Social Services – Mental Health Services
12. Jerome LaBarge, Lac Du Flambeau Tribe
13. Carol Ahles – Taylor County Hospital
14. Curt Oberholzer, St. Joseph Hospital, Marshfield
15. Mark Stroschl, WI Association of AODA (commented on HFS 13)
16. Christopher Lien, St. Joseph Hospital, Marshfield
17. Robert Bouley, Bad River T.R.A.I.S.
18. Peggy Jones, R.N., Wausau Manor Nursing Home (commented on HFS 13)
19. Susan Gillig, St. Joseph Hospital, Chippewa Falls
20. Thomas Finley, Corp. Counsel, Marathon County
21. Caralie Fox, Marathon County DSS (commented on HFS 13)
22. Andrea Maulson, Self
23. Leah Malecha, Wood County Unified Services
24. Thomas Lehmkuhl, Self
25. Liz Zehms, Unified Cerebral Palsy
26. William McCulley, Portage County H&HSD
27. Thomas J. McCarrier, MSTC, WI Rapids
28. Earlene Ronk, Administrator, Brown County Human Services
29. Marianne Missfeldt, Rhinelander
30. Wanda Hose, Eastview Med & Rehab., Antigo
31. Sherry Bastle, Eastview Med & Rehab, Antigo
32. Gail Chapman, BQA, Rhinelander
33. Glen Grady, Administrator, Memorial Medical Center, Neillsville
34. Tom Leslie, Wausau Fire Dept.
35. Joe Strohl, Prof. Firefighters of Wisconsin
36. Michael Drury, Prof. Firefighters of Wisconsin, Local #847
37. Lucille Carley, Lac Courte Oreilles Tribe
38. Renee Boswell, Lac Courte Oreilles Kinship Care Program
39. Kris Glodowski, Kennedy Park Med. & Rehab. Center, Schofield
40. Chris Hartlep, Howard Young Medical Center, Woodruff

41. Tim Hartin, Wisconsin Health & Hospital Association
42. Donna Simek, Lincoln County DSS, Merrill
43. Joann Benedict, Lincoln County DSS, Merrill
44. Andrea Hoffman-Vosburgh, Lincoln County DSS, Merrill
45. Cheryl Smith, Sokaogon Chippewa Community, Mole Lake

Public Hearing in Milwaukee on January 20, 1999

46. Bill Bazan, Wisconsin Health & Hospital Association, Milwaukee
47. Lisa M. Turba, Hartford Memorial Hospital
48. Christine D. Carlson, MWC & IFPI, Milwaukee
49. Mary Jo Ochalla, Valley Health Services, Menasha
50. Margo Neimon, Wisconsin Correctional Service, Milwaukee
51. Sandra Trimberger, All Saints Healthcare System, Racine
52. Jeanette M. Krimmer, All Saint's Healthcare System, Racine
53. Fannie LeFlore, UMOS, Inc., Milwaukee
54. Lee M. Fifer, S.A.F.E. Groups Services, Inc. Milwaukee
55. Yvonne Makowski, Milw County Mental Health Div, Human Resource
56. Michelle Krebsbach, Douglas Memorial Center, Inc., Elkhorn
57. Kathy Tews, Lakeland Medical Center, Elkhorn
58. Kim Castillo, Curative Rehab Services, Milwaukee
59. John Zubican, West Allis Memorial Hospital
60. Amy Rislov, Sinal Samaritan Medical Center, Milwaukee
61. Frances Wahmhoff, Milwaukee Health Service Systems
62. Joyce R. Kazmierczak, Lindengrove, Inc., New Berlin
63. Anna Dixon Reid, Milwaukee Health Service System
64. Michael Cummings, Aurora Health Care, Milwaukee
65. Julie Bischoff, St. Aemilian, Lake Side, Inc., Milwaukee
66. Eileen Eversen, St. Aemilian-Lake Side Inc., Milwaukee
67. Joe Spolowicz, Wisconsin Correctional Service, Milwaukee
68. Sally Cezenza, Memorial Hospital of Burlington
69. Susan Childs, Self, South Milwaukee
70. Gene D. Jurczyk, Self, Oshkosh
71. Linda Mansfield & Shirley Fox, St. Vincent Hospital, Green Bay
72. Robin Stachula, Hales Corners Care Center
73. Jennifer Healy, Open Gate, Inc., Milwaukee
74. Lynne Munle, Allis Care Center, West Allis
75. Debra Carter, Self, Milwaukee
76. Dave Rohlfing, Self, Milwaukee (commented on HFS 13)
77. David Wenzel, Member of Professional Firefighters of WI, Muskego
78. Gregory M. Gollner, Greenfield Professional Firefighters IAFF
79. Karla Renee Bronaugh, St. Luke's Medical Center, Milwaukee
80. Sam Marjanov, Matt Tricot Recovery LTC, Shorewood
81. Roy G. Mercer, SPHR, Northwest General Hospital, Milwaukee
82. Elaine Lukas, Self, Brookfield
83. Al Castro, United Community Center, Milwaukee
84. Peggy Krusick, Self, Madison

85. Tina Resch, Professional Services Group, Kenosha
86. Jamie A. Watkins, Professional Service Group, Kenosha
87. Nancy A. Heiser, Froedtert Memorial Lutheran Hospital, Milwaukee
88. Prentiss J. Davis, Wisconsin Correctional Service, Oak Creek
89. Kristen M. Christopherson, Krukowski & Costello, SC, Milwaukee
90. Bob Weiss, Covenant Healthcare System, Inc., Brookfield
91. Paula Fisher, Self, Milwaukee
92. John Wells, DOC/DCC Region, West Bend
93. Pam Loveless, St. Camillus Campus, Wauwatosa
94. Stephen B. Swigart, Wisconsin Correctional Services, Milwaukee (commented on HFS 13)
95. Michael St. John, Community Memorial Hospital, Menomonee Falls (commented on HFS 13)
96. John Turk, Cove, Inc., Cudahy
97. Ann M. Moore, PhD., Milwaukee County Mental Health Division
98. Jesse Cranz, Vision Linda, Inc. & State Diversity Committee, Milwaukee
99. Catherine M. Hackney, NRH, Beverly Health Care, Erin, WI
100. James Fields, Kilbourn Care Center, Milwaukee
101. Gary Trulson, Oshkosh Fire Department
102. Gary L. Vokovitch, Wauwatosa Professional Firefighters L-1923
103. Paul Peshek, NHA, Lincoln Lutheran Care Center, Racine
104. Virginia R. Finn, Michael, Best & Friedrich, Milwaukee
105. Brenda Mendolla-Buckley, Oneida Tribe of Wisconsin, Oneida
106. Kristinn Armann, Lincoln Lutheran of Racine
107. Lynda A. Crucius, Self, Pewaukee
108. Tim Harkin, Wisconsin Health & Hospital Association, Madison
109. Jacqueline S. Stock, Dennis Hill Haven Red. Center, Milwaukee
110. Mary E. Smith, Transitional Living Services, Milwaukee
111. Anthony L. Garfield, Self, Milwaukee
112. Alice Wilde, Community Care Org., Inc., Milwaukee
113. Cynthia S. Christenson, Children's Health System, Waukesha
114. Lori Plotkin, Human Services Triangle, Milwaukee
115. M. J. Jenkins, Ph.D., Bureau of Substance Abuse Services, Milwaukee
116. Linda Cooper, Islamic Family & Social Services, Milwaukee
117. Dr. Larry D. Lee, Islamic Family & Social Services, Milwaukee
118. William Baker, Racine Firefighters L-32
119. David H. Bosanko, Professional Firefighters of Wisconsin, Racine
120. Amy D. Katarincic, Michael Best & Friedrich, Milwaukee
121. Jean Trimble, BOALTC, Milwaukee
122. John B. Kiel, Self, Kenosha
123. Curtis Brzezinski, Milwaukee County
124. Stormy M. Walker, Milwaukee Womens Center
125. Donna Kahl, W2 Program, Milwaukee
126. Michael Kunes, Professional Firefighters of Wisconsin, Manitowoc
127. Ralph Kramer, Genesis Behavioral Services, Inc., Greendale
128. Carey Tradwell, Self, Milwaukee Women's Center
129. Sandra Reynolds, Self, Kenosha
130. Ann Robinson, Lincoln Lutheran of Racine
131. Amy Walker, Genesis Behavioral Services, Inc. West Allis

132. Larry Noszowski, Ph.D., Self, Wauwatosa

**Public Hearing in Madison on January 26, 1999**

133. Jeff Pearcy, Wisconsin Certification Board, Wauwatosa (commented on HFS 13)
134. Mark Howard, AFSCME L-1942, Madison
135. JoAnna Dela Pena, Ho Chunk Nation, Wisconsin Dells
136. Karen Rude-Pierce, Local 1901 AFSCME, Oneida
137. Audrie Bernard, Neneimial Community Development Corp., Madison
138. Shirley Christian, SEIU Local 150, Madison
139. Leroy Mayberry, SEIU Local 150, Madison
140. Don Willett, SEIU, Local 150, Milwaukee
141. Allen Highman, Wis. State Employees Union, Madison
142. Linda DeLeon, AFSCME 1258 Rock County Healthcare Center, Janesville
143. David Carrig, University Hospital, Madison
144. Diane Holcomb, AFL-CIO Council 40, Monticello
145. Julie Hintzman, American Family Institute, Monona
146. Bob Anderson, Legal Action of Wisconsin, Madison
147. Brian Purtell, Wis. Health Care Assoc., Madison
148. David Steele, Lutheran Social Services, Appleton
149. Rodney Muenster, Villa Hope, Inc., Appleton
150. Kathy Million, Brookside Care Center, Pleasant Prairie
151. Yvonne Klermm, Brookside Care Center, Kenosha
152. Laurel Miller, Local 1901, Green Bay
153. Ralph Williams, Self, Janesville
154. Cathy L. Hinds, Local 1258 AFSCME, Janesville
155. Charles L. Suggs, Sr, Self, Madison
156. Rodney J. Muenster, Villa Hope, Inc., Appleton
157. Greg Spring, Wisconsin AFL-CIO Council 40, Madison (commented on HFS 13)
158. Jennifer Lea Bronsdon, Family Works, Inc. Madison
159. Amy Stear, Federation of Nurses & Health Professionals, Milwaukee
160. Melanie G. Ramey, Hospice Organization of Wisconsin, Madison
161. Christy Brown LeFlore, Lutheran Social Services, Milwaukee
162. Tequila Nash, Nehemiah CDC & Tellurian, Madison
163. Steven Tope, Gundersen Lutheran, LaCrosse
164. Ric Schwichtenberg, Self, Madison
165. Mary Evans, Meriter Health Services, Madison (commented on HFS 13)
166. Lucy Dupree Wagner, Sauk Prairie Memorial Hospital and Clinics (commented on HFS 13)
167. Carla J. Gorski, Rural Wisconsin Health Cooperative, Sauk City
168. Michael J. Grassy, Self, Madison
169. Donna J. Baranowski, Madison Health Services
170. Philip McCants, Self, Madison
171. Richard Shold, Madison Area Technical College
172. Melissa McRae, DVR Consumers, Fond du Lac
173. Peggy Morse, Self, Poynette
174. Mary A. Fischbeck, Self, Portage
175. Kay Ann Rotaczak, Self, Pardeeville

176. Tanya E. Westmoreland, AODA & DD Caregivers, Madison
177. William E. Hayes, Self, Madison
178. Shana M. Wuebben, Meriter Health Services, Madison
179. Kitty Hause, St. Clair Hospital & Health Services, Baraboo
180. Steven K. Ruff, Wis. Social Services Assoc. Prairie du Sac
181. Tracey Simpson, Franciscan Skemp Healthcare, LaCrosse
182. Kathleen Anderson, Franciscan Skemp Healthcare, LaCrosse
183. Robert Ivory, Self, Madison
184. Nancy Moberg, Self, Madison
185. Lawrence Lautenschlager, WSEU Local 48, WMHI, Oshkosh
186. Peggy O'Brien, Local 48, WSEU, WMHI, Oshkosh
187. Kathleen Eastman, WSEU Local 48, WMHI, Oshkosh
188. David A. Beyer, Self, Berlin
189. M. Colleen Wilson, State Medical Society of Wisconsin, Madison
190. Michael Kirby, State Medical Society of Wisconsin, Madison
191. James Kilgore, Self, Madison
192. Bonnie Trudgeon, Beloit Memorial Hospital
193. Al Trepania, Great Lakes Inter-Tribal Council, Inc., Lac du Flambeau
194. Ann Jablonski, St. Croix-Chippewa Tribe, Madison
195. Cathryn Laszinski, Agency Recovery Counseling Service, Stevens Point
196. James F. Gentry, Local 316, Professional Firefighters IAFF, Oshkosh
197. Mike G. Johnson, Local 316, Professional Firefighters, Oshkosh
198. Jack S. Clark, Local 316, Professional Firefighters, IAFF, Oshkosh
199. Michael J. Czlapinski, Local 316 Professional Firefighters, Oshkosh
200. Frank Jarapko, Local 316 Professional Firefighters, IAFF, Oshkosh
201. Michael D. Augsburg, Local 316 Professional Firefighters, Oshkosh
202. David W. Gee, Local 316 Professional Firefighters, IAFF, Oshkosh
203. Gary E. Ross, Local 316 Professional Firefighters, Oshkosh
204. Jesus G. Q. Garza, Wisconsin Technical College Board, Madison
205. Brenda Mendolla-Buckley, Oneida Tribe of Wisconsin, Oneida
206. Gary Jordan, Oneida Tribe, Oneida
207. Michael Waupoose, Self, Madison
208. Mary Weidner, Wild Rose Manor, Redgranite
209. Michael Kunesch, Professional Firefighters of Wisconsin, Manitowoc
210. John Gee, Local 316 Professional Firefighters, Oshkosh
211. Douglas J. Waech, Local 316 Oshkosh Firefighters, Oshkosh
212. Ann Peggs, Professional Firefighters L-141, Green Bay
213. Charles J. Buss, Professional Firefighters, Fond du Lac
214. Michael Florek, WAAODA, Madison
215. LeAnne K. Klug-Casewoy, Self, Columbus
216. Jennifer Wertkin, Forest County Potawatomi Community, Madison
217. Claudia Stine, Board on Aging & Long Term Care, Madison
218. Theo Rodger, Self, Madison
219. John Flynn, Self, Janesville
220. Rick Gale, Professional Firefighters of Wis., West Allis
221. Theodore J. Frank, Local 316, Professional Firefighters, Oshkosh
222. Michelle Schneider, Menomonee Indian Tribe, Keshena



223. Brandi Moen, Self, Monroe
224. Laurie L. Berg, Monroe Manor Nursing & Rehab Center, Janesville
225. Joyce Evers, Alcohol/Drug Treatment Providers Assoc., Madison (commented on HFS 13)
226. Barbara W. Trefz, Self, Madison
227. Roberta A. Larson, Dept. of Regulation & Licensing, Madison
228. Dian M. Polly, MATC, Practical Nursing Director, Madison
229. Tim Hartin, Wisconsin Health & Hospital Association, Madison
230. Carolyn Skenandore, Oneida Nation, Oneida
231. Ellie McLaughlin, Oneida Nation, Greenberg
232. Sue John, Oneida Nation, Oneida
233. Mark Herstand, National Assoc. of Social Workers, Madison
234. Sheri L. Fischer, Grant Regional Health Center, Inc., Boscobel
235. Charles Zeisser, St. Mary's Hospital, Madison
236. Thomas J. Huiting, United Behavioral Health Services of Appleton
237. Terri Gabriel, Asst. Political Dir., Wisc. State Council, Service Employees Intl. Union

**Submitted Written Comments on Chapter HFS 13**

238. Michael Basch, Executive Director; Susan McCabe, Director of Nursing Services; and Jeff Madson, Personnel Director, Sheboygan Retirement Home and Beach Health Care Center
239. Phillip Neuenfeldt, Secretary-Treasurer, Wisconsin State AFL-CIO
240. Tim Hartin, General Counsel, Wisconsin Health & Hospital Association
241. Andrea Maulson, Tomahawk, WI
242. Wisconsin Board on Aging and Long-Term Care
243. Phyllis T. Williams, Administrator, Lakeland Nursing Home, Walworth County
244. Barbara Fox, President, Creative Community Living Services, Inc.
245. Matthew Herman, Executive Director, Menomonee Falls Health Care Center
246. Michael O. Kittleson, Administrator, Grand View Care Center, Blair, WI
247. Trudy Achterhof, Director of Human Resources, Baldwin Hospital
248. Anita M. Poetzel for Betty Ulmer, Von Briesen, Purtell & Roper, s.c., Milwaukee
249. Terri Gabriel, Assistant Political Director, Service Employees International Union Wisconsin State Council, Milwaukee
250. Joe Witt, Ladysmith Nursing Home and Lake Manor
251. Earlene Ronk, Administrator, Brown County Human Services Mental Health Center, Green Bay
252. Karen Vincent, Administrator, Sheridan Medical Complex, Kenosha
253. Thomas P. Moore, Executive Director, Wisconsin Health Care Association, Madison
254. David M. Rademacher, Administrator, Dr. Kate Newcomb Convalescent Center, Woodruff
255. James E. Ertz, Administrator, Hillview Health Care Center, La Crosse
256. Wisconsin Association of Homes and Services for the Aging, Madison
257. Patricia A. Schulz, Administrator, Heritage Manor, Elroy
258. Cheryl Kruschke, Administrator, North Ridge Medical and Rehab. Center, Manitowoc
259. Petition signed by David Carrig, Madison, and 24 other persons – concerned about confidentiality of records.
260. Petition circulated by Wisconsin Council 40, AFSCME, AFL-CIO, and signed by 1248 persons – concerned about broadened definitions of “abuse” and “neglect” and absence of notification to an employee under investigation that he or she has a right to have a representative present during Department’s investigation.

PROPOSED ORDER OF THE  
DEPARTMENT OF HEALTH AND FAMILY SERVICES  
REPEALING, RENUMBERING, AMENDING, REPEALING  
AND RECREATING AND CREATING RULES

To repeal HSS 129.03(1), 129.10(2)(b) and 129.11; to renumber HSS 129.10(2)(a); to amend HSS 129.06, 129.03(10) and (11m), 129.07(2)(f)2.g. and 129.12(2) and Note; to repeal and recreate HSS 129.03(8) and 129.10(5) and Note; and to create chapter HFS 13 and HSS 129.10(1) Note, relating to reporting and investigation of caregiver misconduct and operation of the caregiver misconduct registry.

Analysis Prepared by the Department of Health and Family Services

Since July 1, 1991, the Department has had rules, s. HSS 129.10, which establish and provide for the maintenance of a registry of persons eligible by training and testing to be employed in Wisconsin as nurse assistants working in hospitals, nurse assistants working in nursing homes, home health agency aides and, since October 1, 1991, hospice program aides. The rules implemented s. 146.40 (4g), Stats. The rules were amended by emergency order effective April 1, 1992, to add to the registry, as directed by s. 146.40 (4g) and (4r), Stats., all substantiated findings of allegations that persons working in any of these caregiver capacities had abused or neglected a resident or patient or misappropriated a resident's or patient's property, and making that information available to prospective employers and other interested persons on request.

This rulemaking order amends ch. HFS 129 to take out of it the misconduct part of the current registry, that is, the part consisting of substantiated findings of misconduct toward clients by caregivers working as nurse aides in hospitals or nursing homes or for home health agencies or hospice programs, and to replace that part with a reference to a new ch. HFS 13 created by this order.

A recent session law, 1997 Wisconsin Act 27, amended s. 146.40 (4g) and (4r), Stats., to provide for expansion of the misconduct part of the registry so that, beginning October 1, 1998, the Department would add to the registry substantiated findings of allegations that any other person employed by or under contract with a hospital, nursing home, home health agency or hospice program or any person employed by or under contract with any of several other types of facilities, agencies and programs or services licensed, certified or registered by the Department abused or neglected a client served by the facility, agency or program or service or misappropriated a client's property. The other types of "entities" covered by the expanded misconduct part of the registry and the reporting, review and investigation, entering findings and appeal procedures under s. 146.40 (4r), Stats., are the following: community-based residential facilities, residential care apartment complexes (formerly called assisted living facilities), certified adult family homes (only if certified by the Department), licensed adult family homes (only if licensed by the Department), certified community mental health and substance abuse programs or services, rural medical centers and ambulance service providers.

The new ch. HFS 13 covers the structure of the misconduct part of the caregiver registry, the information included in it and release of registry information; a requirement that an entity upon learning of an incident of alleged caregiver misconduct take whatever measures are necessary to protect clients pending a finding; mandatory reporting by entities of allegations of caregiver misconduct, with penalties for failure to report incidents; reporting by other persons; review by the Department of reports received from entities and concerned individuals alleging abuse or neglect of a client or misappropriation of a client's property, and follow-up investigation by the Department as necessary; determination by the Department either that an allegation is or is not substantiated, and notice to the subject of the report, if an allegation is substantiated, that the finding will be entered on the misconduct part of the caregiver misconduct registry, and the consequences of that action (which for some persons employed by or under contract with an entity may mean being barred indefinitely from similar employment and for others being barred from similar employment unless rehabilitation is demonstrated), unless he or she contests that determination by requesting a hearing; notice to the subject of a report that if the finding is included in the registry, he or she may add a rebuttal statement which will be included with the finding; and how to request a hearing, how the hearing will be conducted and the hearing decision.

The Department's authority to repeal, renumber, amend, repeal and recreate and create these rules is found in s. 146.40(4g) and (4r), Stats., as affected by 1997 Wisconsin Acts 27 and 237, and s. 227.11(2), Stats. The rules interpret s. 146.40(4g) and (4r), Stats., as affected by 1997 Wisconsin Acts 27 and 237.

SECTION 1. Chapter HFS 13 is created to read:

## CHAPTER HFS 13

### REPORTING AND INVESTIGATION OF CAREGIVER MISCONDUCT

- HFS 13.01 Authority and purpose.
- HFS 13.02 Applicability.
- HFS 13.03 Definitions.
- HFS 13.04 Caregiver misconduct registry.
- HFS 13.05 Allegations of caregiver misconduct.

**HFS 13.01 AUTHORITY AND PURPOSE.** This chapter is promulgated under the authority of ss. 146.40(4g) and (4r) and 227.11(2), Stats., to protect clients served in specified department-regulated programs by establishing a process for reporting allegations of abuse or neglect of a client or misappropriation of a client's property to the department, establishing a process for the investigation of those allegations and establishing the due process rights of persons who are subjects of the investigations.

**HFS 13.02 APPLICABILITY.** This chapter applies to the department, to all specified department-licensed, certified, approved or registered entities and to all persons employed

by or under contract with an entity and who have access to the entity's clients and who are under the entity's control.

**HFS 13.03 DEFINITIONS.** In this chapter:

(1) (a) "Abuse" includes neglect and mistreatment and means any of the following when contrary to the entity's policies and procedures or when not a part of the client's treatment plan:

1. An act, or repeated acts, an omission or a course of conduct by a caregiver or nonclient resident, including but not limited to restraint, isolation or confinement, that, when done intentionally, does any of the following:

a. Causes or could reasonably be expected to cause pain or injury to a client or the death of a client, and the act does not constitute self-defense as defined in s. 939.48, Stats.

b. Substantially disregards a client's rights under ch. 50 or 51, Stats., or a caregiver's duties and obligations to a client.

c. Causes or could reasonably be expected to cause mental or emotional damage to a client, including harm to the client's psychological or intellectual functioning that is exhibited by anxiety, depression, withdrawal, regression, outward aggressive behavior, agitation, fear of harm or death, or a combination of these behaviors. This subdivision paragraph does not apply to permissible restraint, isolation, or confinement implemented by order of a court or as permitted by statute.

d. Causes or could reasonably be expected to cause harm to the physical or mental health of a client through substantial carelessness or negligence.

2. An act or acts of sexual intercourse or sexual contact under s. 940.225, Stats, by a caregiver and involving a client.

3. The forcible administration of medication to or the performance of psychosurgery, electroconvulsive therapy or experimental research on a client with the knowledge that no lawful authority exists for the administration or performance.

4. A course of conduct or repeated acts by a caregiver which serve no legitimate purpose and which, when done with intent to harass, intimidate, humiliate, threaten or frighten a client, causes or could reasonably be expected to cause the client to be harassed, intimidated, humiliated, threatened or frightened.

(b) "Abuse" does not include acts of mere inefficiency, unsatisfactory conduct or failure in good performance as the result of inability, incapacity, inadvertency, or ordinary negligence in isolated instances, or good faith errors in judgment or discretion.

(2) "Access," when used in reference to a person's access clients, means that in the course of performing the person's expected duties for or functions with the entity, or as a nonclient resident of the entity, the person has or may have direct, regular contact with clients served by the entity.

(3) (a) "Caregiver" means a person who is all of the following:

1. A person who has received regulatory approval from an agency or is employed by or under contract with an entity.

2. A person who has access to the entity's clients.

3. A person who is under the entity's control.

(b) "Caregiver" does not include any of the following:

1. A person who performs solely clerical, administrative, maintenance or other support functions for the entity and is not expected to have regular, direct contact with clients or the personal property of clients.

2. A person who is employed by or under contract with an entity to provide infrequent or occasional services, such as delivering items to the facility, equipment maintenance, groundskeeping, construction or other similar services that are not directly related to the care of a client.

(4) "Caregiver misconduct registry" means information collected and preserved in a database by the department on all caregivers who have been found to have abused or neglected a client or misappropriated a client's property, except for persons licensed, permitted, certified or registered under ch. 441, 448, 449, 450, 451, 455 or 459, Stats.

(5) "Caregiver registry" means the registry required under s. 146.40(4g), Stats., which consists of 2 lists, the list under s. HSS 129.10 of nurse aides qualified by training and testing to work in a hospital or nursing home or for a home health agency or hospice program, and the caregiver misconduct registry, which includes nurse aides, under this chapter.

(6) "Client" means a person who receives care or treatment from an entity.

(7) "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose.

(8) "Credential" means a license, permit or certificate of certification or registration issued under chs. 440 to 480, Stats.

(9) "Department" means the Wisconsin department of health and family services.

(10) "Employed by" means working for another for compensation on a full-time, part-time, temporary or per diem basis.

(11) "Entity" has the meaning given in s. 50.065(1)(c), Stats.

Note: Entities include those facilities, organizations or services that are licensed or certified by, approved by or registered with the Department under the following chapters of the Department's administrative rules:

HFS 34	Emergency mental health service programs
HFS 40	Mental health day treatment services for children
HFS 61	Community mental health, alcoholism and other drug abuse (AODA) programs
HFS 63	Community support programs for chronically mentally ill persons
HSS 82	Certified adult family homes
HFS 83	Community-based residential facilities
HSS 88	Licensed adult family homes
HFS 89	Residential care apartment complexes (formerly, assisted living facilities)
HSS 110	Ambulance service providers
HFS 124	Hospitals
HFS 127	Rural medical centers
HSS 131	Hospices
HFS 132	Nursing homes
HSS 133	Home health agencies
HFS 134	Facilities for the developmentally disabled

(12) "Misappropriation of property" means any of the following:

(a) The intentional taking, carrying away, using, transferring, concealing or retaining possession of a client's movable property without the client's consent and with the intent to deprive the client of possession of the property.

(b) Obtaining property of a client by intentionally deceiving the client with a false representation which is known to be false, made with the intent to defraud, and which does defraud the person to whom it is made. In this paragraph, "false representation" includes a promise made with the intent not to perform it if it is a part of a false and fraudulent scheme.

(c) By virtue of his or her office, business or employment, or as trustee or bailee, having possession or custody of money or of a negotiable security, instrument, paper or other negotiable writing of another, intentionally using, transferring, concealing, or retaining possession of the money, security, instrument, paper or writing without the owner's consent, contrary to his or her authority, and with the intent to convert it to his or her own use or to the use of any other person except the owner.

(d) Intentionally using or attempting to use personal identifying information as defined in s. 943.201(1)(b), Stats., or an individual's birth certificate or financial transaction card as defined in s. 943.41(1)(em), Stats., to obtain credit, money, goods, services or anything else of value without the authorization or consent of the individual and by representing that he or she is the individual or is acting with the authorization or consent of the individual.

(e) Violating s. 943.38, Stats., involving the property of a client, or s. 943.41, Stats., involving fraudulent use of a client's financial transaction card.

(13) "Misconduct" means abuse or neglect of a client or misappropriation of a client's property.

(14) "Nonclient resident" means a person 12 years of age or older who is not a client of an entity but who resides at the entity and is expected to have access to entity clients.

(15) "Nurse aide" means a nurse's assistant as defined in s. HSS 129.03(14), a home health aide, as defined in s. HSS 129.03(11) or a hospice aide, as defined in s. HSS 129.03(11r).

(16) "Reasonable cause" means that the greater weight of evidence provides a reasonable ground for belief that the individual committed the act as alleged.

(17) "Under the entity's control" means a person employed by or under contract with the entity for whom the entity does 2 or more of the following:

(a) Determines whether the person may provide care, treatment, support or similar services to clients served by the entity.

(b) Directs the policies or procedures the person must follow in performing his or her duties as a caregiver.

(c) Directs the conditions under which the person performs his or her duties as a caregiver.

(d) Directs the work assignments of or tasks performed by the caregiver.

(e) Determines the person's work schedule.

(f) Supervises or evaluates the person's work or job performance, including imposing discipline or awarding performance awards.

(g) Determines the compensation the person received for performing his or her duties as a caregiver.

(18) "Without consent" has the meaning given in s. 939.22(48), Stats.

**HFS 13.04 CAREGIVER MISCONDUCT REGISTRY.** (1) ESTABLISHMENT AND MAINTENANCE. The department shall establish and maintain a database of caregivers as an official record of persons found to have abused or neglected a client or misappropriated a client's property under the requirements of this chapter. The database shall contain the following lists:

(a) Nurse aides. A list of all nurse aides who have been found under s. HFS 13.05(6) or (7) to have abused or neglected a client or misappropriated a client's property and to whom any of the following applies:

1. The nurse aide waives a hearing to contest the listing of the finding in the registry or fails to file a timely request for a hearing under s. HFS 13.05(7)(b) after receipt of the department's notice of the department's intent to enter its findings about the nurse aide in the registry.

2. The hearing officer under s. HFS 13.05(7)(d)6. finds reasonable cause to believe that the nurse aide abused or neglected a client or misappropriated a client's property.

(b) All other caregivers. A list of all persons other than nurse aides who have been found under s. HFS 13.05(6) or (7) to have abused or neglected a client or misappropriated a client's property and to whom any of the following applies:

1. The person waives a hearing to contest the listing of the finding in the registry or fails to file a timely request for a hearing under s. HFS 13.05(7)(b) after receipt of the department's notice of the department's intent to enter its findings about the person in the registry.

2. The hearing officer under s. HFS 13.05(7)(d)6. finds reasonable cause to believe that the person abused or neglected a client or misappropriated a client's property.

(2) **CONTENT**. Information about a person in the caregiver misconduct registry shall include all of the following:

(a) The person's social security number, if available.

(b) The person's full name, including middle initial.

(c) The person's mailing address.

(d) The person's date of birth.

(e) Any finding made by the department under s. HFS 13.05(6), or, if appealed, by a hearing officer under s. HFS 13.05(7), that the person abused or neglected a client or misappropriated the property of a client, and whether the person filed a rebuttal statement with the department under s. HFS 13.05(6)(c)2.e. disputing that finding.

(3) **RELEASE OF CAREGIVER MISCONDUCT REGISTRY INFORMATION**. With the exception of the person's social security number and to the extent permitted by state and federal law, the information included in the registry about individuals is public information. The department shall respond promptly to inquiries concerning registry information. A request for registry information shall be in writing and accompanied by a self-addressed stamped envelope.



**Note:** Send a request for registry information to: Bureau of Quality Assurance, P.O. Box 309, Madison, Wisconsin 53701-0309. If the information is part of a child abuse or neglect record subject to s. 48.981, Stats., it may be released only as allowed by s. 48.981(7), Stats.

**HFS 13.05 ALLEGATIONS OF CAREGIVER MISCONDUCT.** (1) DEFINITIONS. In this section:

(a) "Community-based residential facility" has the meaning given in s. 50.01(1g), Stats.

(b) "Home health agency" has the meaning given in s. 50.49(1)(a), Stats.

(c) "Nursing home" has the meaning given in s. 50.01(3), Stats.

(d) "Report" means any allegation of misconduct that has been filed, either orally or in writing, and includes any similar additional allegations that are discovered during the course of an investigation.

(e) "Reporter" means the person or entity who files a report.

(f) "Subject of the report" means the person against whom an allegation of misconduct is made or, when an attorney files a written notice of appearance in the matter, the attorney representing the person.

(2) ENTITY'S RESPONSIBILITY TO PROTECT CLIENTS. Upon learning of an incident of alleged misconduct, an entity shall take whatever steps are necessary to ensure that clients are protected from subsequent episodes of misconduct while a determination on the matter is pending.

(3) ENTITY'S RESPONSIBILITY TO REPORT ALLEGATIONS. (a) Entity's duty to report to the department. Except as provided under pars. (b) and (c), an entity shall report to the department any allegation of an act, omission or course of conduct described in this chapter as client abuse or neglect or misappropriation of client property committed by any person employed by or under contract with the entity if the person is under the control of the entity. The entity shall submit its report on a form provided by the department within 7 calendar days from the date the entity knew or should have known about the misconduct. The report shall contain whatever information the department requires.

**Note:** For copies of the report form, write or phone the Bureau of Quality Assurance, P.O. Box 309, Madison, Wisconsin 53701-0309; 608-267-3565. Return completed reports to the same address.

(b) Entity's duty to report to the department of regulation and licensing. In addition to the reporting requirement under par. (c), an entity shall report to the department of regulation and licensing any allegation of misconduct committed by any person employed by or under

contract with the entity, if the person holds a credential from the department of regulation and licensing that is related to the person's employment at, or contract with, the entity. The entity's report shall be made within 7 calendar days from the date the entity knew or should have known about the misconduct.

**Note:** Send this report to the Department of Regulation and Licensing, Division of Enforcement, P.O. Box 8935, Madison, Wisconsin 53708-8935.

(c) Entity's duty to report child abuse or neglect to county authorities. In accordance with s. 48.981, Stats., an entity shall immediately report, by telephone or personally, to the county department of social services or human services or the sheriff or city, village or town police department the facts and circumstances contributing to a suspicion that child abuse or neglect has occurred or to a belief that it will occur. In addition, the entity shall notify the department in writing or by phone within 7 calendar days that the report has been made.

**Note:** Send notifications to the Bureau of Quality Assurance, P.O. Box 309, Madison, Wisconsin 53701-0309; or phone 608-267-3565.

(d) Entity's duty to notify subject of the report. An entity shall notify the subject of a report under par. (a), (b) or (c) that an allegation of abuse or neglect of a client or misappropriation of a client's property has been made and that the report is being forwarded to the appropriate authority. Notice to the subject of the report shall be given as soon as practicable, but within 7 calendar days of the entity's reporting to the appropriate authority.

(e) Penalty for failure to report incidents of caregiver misconduct. An entity that intentionally fails to report an allegation of misconduct under this subsection by any person employed by or under contract with the entity may be required to forfeit not more than \$1,000 and may be subject to any of the following sanctions:

1. Submission by the entity of a plan of correction for approval by the department, and implementation of the plan of correction.
2. Implementation by the entity of a department-imposed plan of correction.
3. Any regulatory limitations or conditions, as appropriate, imposed by the department on the entity.
4. Suspension or revocation of licensure, certification or other approval for a period of not more than 5 years.
5. Notification in a local newspaper of the act and, if applicable, any forfeiture imposed.

**Note:** When allegations that are the subject of a report involve the possible commission of a crime, reporters should also separately notify law enforcement authorities having jurisdiction in the case.

(4) REPORTS SUBMITTED TO THE DEPARTMENT BY OTHER PERSONS. (a) If any individual believes that a person employed by or under contract with an entity has abused or neglected a client or misappropriated a client's property, the individual may report this to the department. The report may be made by phone or in writing on a form provided by the department.

**Note:** To make an oral report, phone 608-267-3565. For a copy of the report form, write or phone the Bureau of Quality Assurance, P.O. Box 309, Madison, Wisconsin 53701-0309; 608-267-3565. Return a completed report to the same address.

(b) Upon receiving a report under par. (a), the department shall do all of the following, as appropriate:

1. In accordance with s. 48.981, Stats., immediately notify county authorities with reasonable particularity if the action that forms the basis for the allegation of abuse or neglect involves a victim who is a minor.

2. Immediately notify the department of regulation and licensing if the subject of the report holds a credential from the department of regulation and licensing.

3. In accordance with s. 46.90, Stats., notify the lead elder abuse agency designated under s. 46.90(2), Stats.

(c) If an individual believes that a person employed by or under contract with an entity has abused or neglected or misappropriated the property of a client who is aged 60 or older or subject to the infirmities of aging and who either does not reside in a nursing home or community-based residential facility licensed under ch. 50, Stats., or receive services from a home health agency licensed under ch. 50, Stats., the individual or entity may file a report with the agency designated by the county board to serve as the lead agency for elder abuse in accordance with s. 46.90, Stats. The lead elder abuse agency designated under s. 46.90(2), Stats., shall notify the department that it has received the report.

**Note:** When allegations that are the subject of a report involve the possible commission of a crime, reporters should also separately notify law enforcement authorities having jurisdiction in the case.

(5) FORWARDING FINDINGS FROM OTHER INVESTIGATIONS TO THE DEPARTMENT. Upon conclusion of an investigation conducted pursuant to a report made under sub. (3)(b) or (c) or (4) to county authorities in accordance with s. 48.981, Stats., or s. 46.90, Stats., or to the department of regulation and licensing, the county authorities or the department of regulation and licensing shall forward the findings to the department.

(6) REVIEW BY THE DEPARTMENT. (a) Responsibility. The department shall review and, if necessary, conduct further investigation in regard to each report it receives under sub. (3) or (4). The department shall coordinate its investigatory efforts with other investigatory authorities or agencies where appropriate and, if necessary, conduct further investigation when notified of allegations under subs. (3)(c) and (4)(c).

(b) Investigation procedures. 1. After receiving a report of alleged misconduct, the department shall review the report and shall make a determination as to whether further investigation is necessary. In reviewing reports it receives, the department shall consider at least all of the following:

a. Whether the allegation of misconduct is a violation of any statute, rule or standard of practice.

b. Whether the allegation of misconduct, if taken as a whole, has merit.

2. If the department determines that an allegation lacks merit, the department shall notify in writing the reporter, the subject of the report and the involved entity or staffing agency, if known, of the department's determination.

3. If the department determines further investigation of a report is necessary, the department shall provide the subject of the report, the reporter and the involved entity or the staffing agency, if known, with written notice of the department's decision to conduct further investigation. The notice shall contain all of the following:

a. A brief statement regarding the nature and purpose of the investigation.

b. The sanctions that will result if the allegation of misconduct is substantiated.

c. A statement that if additional allegations are discovered during the course of the investigation, the additional allegations will be investigated as part of the report that is the subject of the notice.

d. A statement that the subject of the report may have a representative of his or her choice present when there is any contact with the department's investigators during the course of the investigation.

(c) Decision. After completing its investigation, the department shall prepare a written decision and provide it to the subject of the report. If the decision is mailed, it shall be mailed via certified mail to the subject's last known address, return receipt requested. Distribution and content of the written decision shall be as follows:

1. 'No reasonable cause to substantiate the allegation.' If the department determines that there is no reasonable cause to substantiate the allegation, the department's written decision shall be provided to the subject of the report, the involved entity or staffing agency, if known, the reporter and to other agencies as appropriate. The decision shall contain a brief description of the allegation and the investigation conducted by the department, with enumeration of the findings and conclusions. If an additional allegation was discovered during the investigation, the department's decision may include information about the additional allegation and of the department's decision regarding the additional allegation, or the department may separately inform the subject of the report of the additional allegation and of the department's decision regarding the additional allegation.

2. 'Reasonable cause to substantiate the allegation.' If the department determines there is reasonable cause to substantiate the allegation, the department's written decision shall be provided to the subject of the report, the involved entity or staffing agency, if known, the reporter and to other agencies as appropriate. The decision shall contain all of the following:

a. A description of the allegation, a summary of the investigation conducted by the department and a statement of the findings and conclusions. If an additional allegation was discovered during the investigation related to the report, the department's decision may include information about the additional allegation and of the department's decision regarding the additional allegation, or the department may separately inform the subject of the report of the additional allegation and of the department's decision regarding the additional allegation.

b. Notice that the subject of the report may contest the department's decision by timely requesting a hearing before the department of administration's division of hearings and appeals. The notice shall describe the appeal process under sub. (7).

c. Notice that the subject of the report may waive the right to a hearing, but, that if the subject waives the right to a hearing, the finding will be entered on the caregiver misconduct registry.

d. Notice that if the subject of the report does not contest the department's decision by timely requesting a hearing, the department will find that the subject committed the alleged act of misconduct and that the finding will be entered on the caregiver misconduct registry. The notice shall also describe the consequences of entering the finding on the registry.

e. Notice that the subject of the report, whether or not the subject appeals the department's decision, may submit a short written rebuttal statement to dispute the finding, and that the statement's existence will be included in the caregiver misconduct registry but will not, by itself, have any effect on the consequences of having the finding entered on the registry.

(7) APPEAL. (a) Right to a hearing. The subject of a report may appeal the department's decision that the misconduct took place.

(b) Request for a hearing. 1. An appeal shall be in writing and shall take the form of a request for a hearing. The request for a hearing shall be filed with the department of administration's division of hearings and appeals within 30 calendar days after the date the subject of the report receives the department's decision under sub. (6), and is considered filed when received by that office.

2. If the decision under sub. (6) has been sent via certified mail and the return receipt does not come back to the department, the subject of the report shall be presumed to have received the department's decision 5 calendar days after the date the decision was mailed.

**Note:** Send requests for a hearing to Division of Hearings and Appeals, P.O. Box 7875, Madison, Wisconsin 53707. An appeal may be delivered to the Division at 5005 University Avenue, Room 201, Madison, Wisconsin.

(c) Department action. 1. If the subject of a report files a timely appeal, the department may not enter the subject's name and a summary of the department's decision on the caregiver misconduct registry until the hearing examiner's decision is mailed and then only in accordance with par. (d).

2. If the subject of a report waives the right to a hearing or does not file a timely appeal pursuant to this paragraph, the department shall enter, as applicable, a substantiated finding of misconduct on the caregiver misconduct registry within 10 business days after the last day of the period during which the subject may appeal the department's decision. The department shall maintain the person's name, documentation of the department investigation, including the nature of the allegation and evidence that led the department to conclude the misconduct took place and the person's rebuttal statement, if provided, on the caregiver misconduct registry. The department shall include on the registry the information that the person did not appeal the decision.

(d) Hearing and decision. 1. Where the acts involved in the department's investigation are the same as those involved in a judgment of conviction of a state court, the judgment of conviction is admissible in evidence and constitutes substantial evidence adverse to the subject of the report.

2. The provisions of subch. III of ch. 227, Stats., apply to hearings and subsequent proceedings held under this section.

3. If a subject of the report files a timely appeal, the department of administration's division of hearings and appeals shall hold a hearing within 90 days in accordance with s. 227.42, Stats., and issue a written decision within 30 calendar days after the conclusion of the hearing.

4. The division of hearings and appeals shall provide copies of the written decision to the subject, the department's bureau of quality assurance and, if known, to the reporter and the entity involved in the alleged incident or the staffing agency.

5. If the division of hearings and appeals finds that there is no reasonable cause to believe that the subject of the report performed the alleged abuse or neglect of a client or misappropriation of a client's property, a finding substantiating the allegation shall not be entered on the caregiver misconduct registry.

6. If the division of hearings and appeals finds that there is reasonable cause to believe that the subject of the report performed the alleged abuse or neglect of a client or misappropriation of a client's property, the department shall enter the subject's name and the division of hearings and appeals' decision on the caregiver misconduct registry within 10 business days after the date on which the decision was received by the department's bureau of quality assurance.

7. The division of hearings and appeals' written decision shall include:

a. Notice that the subject of the report may submit a brief written rebuttal statement to the department to dispute the hearing examiner's decision and that, if submitted, the caregiver misconduct registry will indicate that the department has a rebuttal statement available upon request.

b. Notice that the subject of the report has the right to petition for further review pursuant to s. 227.53, Stats.

(8) DISCLOSURE OF FINDINGS. (a) Substantiated allegations. 1. The department, in response to an inquiry made to the caregiver misconduct registry, shall indicate whether the person's name is listed on the registry as having a finding of misconduct and, if listed, whether a rebuttal statement exists.

2. The department's decision pertaining to a listed finding and any related rebuttal statement may be obtained only by sending a written request to the department pursuant to s. HFS 13.04(3).

(b) Unsubstantiated allegations. 1. Except as provided in subd. 2., the department in response to an inquiry made to the caregiver misconduct registry may not release information from a report under any of the following circumstances:

a. When there is an investigation pending into allegations of misconduct.

b. When the department's investigation and review does not lead to a substantiation of the allegation of misconduct.

c. When the department of administration's division of hearings and appeals does not find reasonable cause that the subject of the report performed the alleged acts of misconduct.

2. Information pertaining to unsubstantiated allegations of misconduct may be disclosed only to any of the following:

a. Authorized staff of the department and of the federal department of health and human services for purposes related to performance of their departmental duties.

b. A law enforcement officer or agency for purposes of related investigations or prosecutions.

c. A court or administrative agency for use in related investigations or proceedings regarding licensing or regulation of an entity, licensing or regulation of a licensed health professional or regulation of a person about whom notification is made under s. 146.40(4), Stats., except that information that is part of a child abuse or neglect record subject to s. 48.981, Stats., may be released only as allowed by s. 48.981(7), Stats.

d. A person engaged in bona fide research who, at the department's discretion, has been granted access but only if information that identifies the person, client, complainant and entity involved is not disclosed to the researcher.

e. Other persons as required by law.

(c) Duration of placement on the caregiver misconduct registry. The information placed on the caregiver misconduct registry relating to findings of client abuse or neglect or misappropriation of client property shall remain on that registry permanently unless any of the following occurs:

1. The division of hearings and appeals' decision is reversed by a court of law.

2. The department is notified of the death of the person listed on the caregiver misconduct registry.

3. The information is required to be altered by law.

SECTION 2. HSS 129.03(1) is repealed.

SECTION 3. HSS 129.03(6) is amended to read:

HSS 129.03(6) "Department" means the Wisconsin department of health and ~~social~~ family services.

SECTION 4. HSS 129.03(8) is repealed and recreated to read:

HSS 129.03(8) "Facility for the developmentally disabled" means a place or a distinct part of a place where 5 or more unrelated persons reside who, because of their developmental disabilities, require access to 24-hour nursing care or to treatment for a developmental disability as defined in s. HFS 134.13(9). "Facility for the developmentally disabled" does not include any of the following:

(a) A convent or facility owned or operated exclusively by and for members of a religious order that provides reception and care or treatment of an individual.

(b) A hospice that directly provides inpatient care.

(c) A residential care apartment complex, as defined under s. 50.01(1d), Stats.

(d) A nursing home.

SECTION 5. HSS 129.03(10) and (11m) are amended to read:

HSS 129.03(10) "Home health agency" has the meaning specified in s. ~~441.15(1)(a)~~ 50.49(1)(a), Stats.



(11m) "Hospice" ~~means a hospice that is licensed under subch. IV of ch. 50, Stats.,~~ has the meaning specified in s. 50.90(1), Stats., and ~~that~~ is certified as a provider of services under 42 USC 1395 to 1395ccc.

SECTION 6. HSS 129.07(2)(f)2.g. is amended to read:

HSS 129.07(2)(f)2.g. To report every instance of abuse, as defined in s. HFS 13.03(1), or neglect, as defined in s. HFS 13.03(14), of a client to appropriate facility staff.

SECTION 7. HSS 129.10(1) Note is created to read:

HSS 129.10(1) **Note:** The registry under this chapter is the list of qualified caregivers required under s. 146.40(4g)(a)1., Stats. It is one of 2 parts of the Department's caregiver registry required under s. 146.40(4g), Stats. See ch. HFS 13 for the other part, the list of caregivers who have been found to have abused or neglected a client or misappropriated a client's property.

SECTION 8. HSS 129.10(2)(b) is repealed.

SECTION 9. HSS 129.10(2)(a)(intro.) and 1. to 9. are renumbered 129.10(2)(intro.) and (a) to (i).

SECTION 10. HSS 129.10(5) and Note are repealed and recreated to read:

HSS 129.10(5) RELEASE OF REGISTRY INFORMATION. With the exception of sub. (2)(a)2., and to the extent permitted by state and federal law, the information included in the registry about individuals is public information. The department shall respond promptly to inquiries concerning registry information. A request for registry information shall be in writing and accompanied by a self-addressed stamped envelope.

**Note:** Send a request for registry information to: Bureau of Quality Assurance, P.O. Box 309, Madison, Wisconsin 53701-0309.

SECTION 11. HSS 129.11 is repealed.

SECTION 12. HSS 129.12(2) and Note are amended to read:

HSS 129.12(2) An appeal shall be in writing and shall take the form of a request for a hearing. The request for a hearing shall be filed with the ~~department's office of administrative hearings~~ department of administration's division of hearings and appeals no later than 30 days after the date of the denial, suspension or revocation and is considered filed when received by ~~that office~~ the division of hearings and appeals.

**Note:** The address of the ~~Department's Office of Administrative Hearings~~ Division of Hearings and Appeals is P.O. Box 7875, Madison, Wisconsin 53707. Appeals may be delivered in person to that office at 5005 University Avenue, Room 201, Madison, Wisconsin.

The rules contained in this order shall take effect on the first day of the month following publication in the Wisconsin Administrative Register, as provided in s. 227.22(2), Stats.

Wisconsin Department of Health and  
Family Services

Date:

By: \_\_\_\_\_  
Joe Llean  
Secretary

SEAL:

**Summary of Changes to Chapters HFS 12 & 13**  
**Emergency Rules Effective February 28, 1999**

The Department of Health and Family Services made numerous changes to chapters HFS 12 & 13 following the January public hearings. The most noteworthy changes are identified below. Persons desiring more detailed descriptions are encouraged to consult the specific provisions of ch. HFS 12 or 13. Copies of the rules, related forms and other information are on the DHFS website: [www.dhfs.state.wi.us](http://www.dhfs.state.wi.us)

**HFS 12**

- **Who's covered:** The Department received many comments that the rules covered too many persons working in or contracting with entities. Under the revised rules, the Department modified the definition of "under the entity's control" to exclude many contractors, administrative and non-direct care support staff.
- **"Access" defined:** The Department received many comments that the rules are applicable to too many persons who have irregular or infrequent client contact. In response, the Department has clarified that, when used in reference to a person's access to clients, persons subject to the rule are those who, in the course of performing their expected duties or as a non-client resident, have or may have direct, regular contact with clients served by the entity.
- **Covered crimes:** Previously, all crimes were taken into account indefinitely, including crimes that bar employment or licensure statutorily. Under the revised rules, the definition of "serious crimes" moved many crimes from the *permanent bar* category to the *bar with rehabilitation* category. In addition, many crimes previously in the *bar with rehab.* category have been moved from the list altogether or are removed from the list a certain number of years after the conviction. For crimes not listed or which move off the list after time, the employer may determine whether the conviction is *substantially related* to the person's duties or position.
- **Rehabilitation review process:** In response to comments that the rehabilitation review process was too cumbersome, the Department has made fewer crimes subject to rehab. review, allowed entities and tribes to make hiring decisions for more crimes, made rehab. approval more "portable," enabled anyone to file a first rehab. application at any time and streamlined the application.
- **Crimes categorization:** In response to comments that the Department categorized crimes too harshly and that the categorization would disproportionately affect persons in certain professions, poorer economic classes and minorities, the Department has reduced the number of permanent bar crimes from 96 to 14, the number of rehab. approval-required crimes from 273 to 100 (of which 38 are subject to the *substantially-related test* if the conviction occurred more than 5 years ago and of which another 10 are subject to the *substantially-related test* if the conviction occurred more than 10 years ago.)
- **Schools:** Representatives of academia expressed concern that the rules requiring entities to maintain background documents on file for every student training in the entity were burdensome. In response, the Department has modified the rules to enable schools to perform the background checks, maintain paper files of the results and simply inform entities of the results of the checks.

## HFS 13

- **Definition of "abuse":** The Department received many comments about how broad and vague the original definition of abuse was. In response, the definition has been changed to focus on intentional acts that are outside entity policy and procedure or care plan and done with intent to cause physical, mental or emotional pain or injury.
- **Complaint reporting form:** In response to comments that the complaint reporting form requires entities to submit too much documentation with the report, the Department is revising the form to more clearly indicate the minimum elements and documentation of an appropriate incident inquiry.
- **Accused right to representation:** The Department has included language in the revised emergency and permanent rules that requires the Department to notify subjects of reports that they may have a representative of their choice present when there is any contact with the Department's investigators during the course of the investigation.
- **Guidance to entities:** Some entities expressed the need for more direction on what to do while an investigation is pending. While the rule is silent on this issue, the Department will conduct periodic training on the caregiver law. DHFS will also continue to address these issues through memoranda and information on its website.

SENATOR JUDITH B. ROBSON  
CO-CHAIR

PO BOX 7882  
MADISON, WI 53707-7882  
(608) 266-2253



REPRESENTATIVE GLENN GROTHMAN  
CO-CHAIR

PO BOX 8952  
MADISON, WI 53708-8952  
(608) 264-8486

## JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES

March 24, 1999

Secretary Joe Leean  
Department of Health and Family Services  
PO Box 7850  
1 West Wilson Street  
Madison, WI 53707-7850

Dear Secretary Leean:

We are writing to inform you that the Joint Committee for the Review of Administrative Rules (JCRAR) held a public hearing on March 24, 1999. At that meeting, JCRAR received public testimony regarding **Emergency Rule HFS 13**, relating to reporting of caregiver misconduct.

The Joint Committee for the Review of Administrative Rules met in Executive Session on March 24, 1999 and adopted the following motion:

Carried unanimously: Pursuant to §227.24(2)(a), *Wisconsin State Statutes*, the Joint Committee for Review of Administrative Rules extends the effective date of **HFS 13** by 36 days, at the request of the Department of Health and Family Resources.

Ayes: (10) Senators Robson, Grobschmidt,  
\*Shibilski, Welch, and \*Darling;  
Representatives Grothman, Seratti,  
Gunderson, Kreuser, and Black

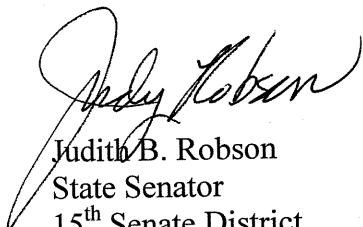
Noes: (0)

Absent: (0)\* Roll held open, voted by phone

**Motion Carried: Extension Granted.**  
10 Ayes, 0 Noes, 0 Absent.

Pursuant to §227.24(2)(c), *Wisconsin State Statutes*, we are notifying the Secretary of State and the Revisor of Statutes of the Committee's action through copies of this letter.

Sincerely,



Judith B. Robson  
State Senator  
15<sup>th</sup> Senate District  
Co-Chair, JCRAR



Glenn Grothman  
State Representative  
59<sup>th</sup> Assembly District  
Co-Chair, JCRAR

JBR:chmiv

cc: Secretary of State La Follette  
Revisor of Statutes Gary Poulson

SENATOR JUDITH B. ROBSON  
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PO Box 7882  
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REPRESENTATIVE GLENN GROTHMAN  
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**JOINT COMMITTEE FOR  
REVIEW OF ADMINISTRATIVE RULES**

***Emergency Rule Extension Motion Form***

*Last Modified March, 1999*

**Date:** March 24, 1999

**Location:** Wisconsin State Capitol, 300 SE, Madison, WI

Moved by Robson, Seconded by Kreuser

**THAT**, pursuant to § 227.24(2)(a), *Wisconsin State Statutes*, the Joint Committee for the Review of Administrative Rules extend the effective period of Emergency Rule HFS 13 by 36 days, at the request of the Department of Health and Family Services.

COMMITTEE MEMBER	Aye	No	Absent
1. Senator ROBSON	X		
2. Senator GROBSCHMIDT			
3. Senator SHIBLISKI	X		
4. Senator WELCH	X		
5. Senator DARLING	X		
6. Representative GROTHMAN	X		
7. Representative GUNDERSON	X		
8. Representative SERATTI	X		
9. Representative KREUSER	X		
10. Representative BLACK	X		
Totals	9		

Motion Carried

Motion Failed



# MEMORANDUM

January 26, 1999

TO: LARRY HARTZKE  
FROM: PHYLLIS T. WILLIAMS, ADMINISTRATOR <sup>PTW</sup>  
TOPIC: COMMENTS ON PROPOSED CAREGIVER BACKGROUND CHECKS RULES

\*\*\*\*\*

The following comments are submitted for consideration to modify the proposed regulations on the Caregiver Background Checks:

1. The broad expansion to apply the rule to all individuals having possible access to residents and not an employee of the entity goes beyond the intent of the rule.
2. An employee receiving rehabilitation approval should not need to reapply if the employee changes jobs for which the rehabilitation was originally approved. This will be timely, costly and have no improved outcome.
3. The Department needs to relook at serious crimes which an individual committed years ago, has fulfilled any court requirements and since has been an exemplary employee. Rehabilitation review should be available rather than needing to terminate the employee. This process will only compound the staffing issue faced by many facilities and ultimately impact on resident quality care. An employee should not be penalized for a single mistake committed years before if there has been no further violation.
4. There needs to be clarification of the Department's expanded interpretation of the HFS definition of abuse—especially HFS 13.03(1)(a)2. There are many situations/occurrences that are not intentional and are not part of the treatment plan that may be interpreted as abuse because the resident was frightened, etc. Will this open the door for another broad interpretation by surveyors resulting in facility citations?

Caregiver Background Checks are a positive move in trying to protect those we provide services to. However, without modifications, the staffing situations facing long term care providers may be worsened due to needing to terminate "good" employees because of errors of judgement they made in the past, employees voluntarily leaving employment because they are unwilling to go through the required rehabilitation review process and, even worse, not even applying for a job at a facility due to the required process. All of the above will definitely have an impact on the quality of care provided to our residents.

Thank you for your attention to these comments.

PTW/lmb

W3930 Co. Rd. NN  
Elkhorn, Wisconsin 53121  
414.741.3600 Tel  
414.741.3682 Fax



ORDER OF THE  
DEPARTMENT OF HEALTH AND FAMILY SERVICES  
REPEALING, RENUMBERING, AMENDING, REPEALING AND RECREATING  
AND CREATING RULES

FINDING OF EMERGENCY

The Department of Health and Family Services finds that an emergency exists and that the rules included in this order are necessary for the immediate preservation of the public peace, health, safety or welfare. The facts constituting the emergency are as follows:

The Department on October 1, 1998 published an emergency rulemaking order creating ch. HFS 12, relating to uniform procedures for checking the backgrounds of persons who apply to provide or are providing care or treatment to persons who need that care or treatment, and for barring persons because of specified convictions, findings or charges substantially related to the care of clients from operating a service provider organization, providing care or treatment to the clients of a service provider or otherwise having contact with the clients of a service provider. Chapter HFS 12 included an appendix which consisted of a list of crimes. That Crimes List was modified by emergency order published on December 12, 1998. This order, which is being published following the Department's public hearings on the emergency rules and the proposed replacement permanent rules, makes further significant changes in the Crimes List and other parts of the ch. HFS 12 emergency rules.

The Crimes List appended to ch. HFS 12 is modified by this order to move several crimes from "permanent bar" status to "bar with rehabilitation" status, to place time limits on having to demonstrate rehabilitation for certain other crimes, and to remove some crimes altogether from the Crimes List. Also in ch. HFS 12, definitions have been added for "access" and "Department-designated tribe" and have been significantly revised for "caregiver" and "under the entity's control." Indian tribes designated by the Department are permitted to conduct rehabilitation reviews for bar with rehabilitation crimes.

This order also makes changes in ch. HFS 13, emergency rules for reporting caregiver misconduct and for maintenance of a caregiver misconduct registry. Those emergency rules were also published on October 1, 1998. Changes made in ch. HFS 13 by this order include addition of definitions for "access" and "course of conduct" and significantly revised definitions for "abuse," "caretaker," and "under the entity's control," and permission is given for the subject of a report to have a representative present when the subject has any contact with Department investigators.

The Department is modifying the chs. HFS 12 and 13 emergency rules by emergency order at this time because of their critical importance for proper implementation of the statutory caregiver background check and caregiver misconduct

reporting requirements. Those requirements are directed at protecting people receiving care and treatment from being harmed. The rule changes, including revision of the Crimes List, have been incorporated in the proposed permanent rules that will replace the emergency rules, but the replacement permanent rules will not take effect until June 1, 1999 at the earliest.

### ORDER

Pursuant to authority vested in the Department of Health and Family Services by ss. 48.685 (5) and (7) (a), 50.065 (5) and (7) (a) and s. 227.11 (2), Stats., the Department of Health and Family Services hereby creates rules interpreting ss. 48.685, 50.065 and 120.13 (14), Stats., as follows:

SECTION 1. HFS 12.02 (2) (c), as created by emergency order effective October 1, 1998, is repealed.

SECTION 2. HFS 12.03 (1), as created by emergency order effective October 1, 1998, is repealed and recreated to read:

HFS 12.03 (1) ALL PROGRAMS. In this chapter:

(a) "Access" means that in the course of performing the person's expected duties for or functions with the entity, or as a nonclient resident of the entity, the person has or may have direct, regular contact with clients served by the entity.

(b) "Agency" means the department, a county department, a child welfare agency licensed under s. 48.60, Stats., as a child-placing agency or a school board.

(c) "Background information form" means the department's form, DHFS 64, on which a person provides certain information concerning the person's background.

(d) "Bar" means, as a noun, that a person is not permitted to receive regulatory approval or to be employed by or be under contract with an entity or to reside at an entity.

(e) 1. "Caregiver" means a person who is all of the following:

a. A person who has received regulatory approval from an agency or is employed by or under contract with an entity.

b. A person who has access to the entity's clients.

c. A person who is under the entity's control.

2. "Caregiver" does not include any of the following:

a. A person who performs clerical, administrative, maintenance or other support functions for the entity and is not expected to have regular, direct contact with clients or the personal property of clients.

b. A person who is employed by or under contract with an entity to provide infrequent or occasional services, such as delivering items to the facility, equipment maintenance, groundskeeping, construction or other similar services not directly related to the care of a client.

(f) "Client" means a person who receives direct care or treatment services from an entity.

(g) "County department" means a county department of social services established under s. 46.215 or 46.22, Stats., or a county department of human services established under s. 46.23, Stats.

(h) "Crimes list" means the list of statutory crimes in appendix A.

(i) "Department" means the Wisconsin department of health and family services.

(j) "Department-designated tribe" means a federally recognized American Indian tribe designated by the department as having the authority to conduct rehabilitation reviews for bar with rehabilitation crimes listed in appendix A.

(k) "Nonclient resident" means a person 12 years of age or older who is not a client of an entity but who resides at the entity and is expected to have access to entity clients.

(L) "Permanent bar crime" means a crime listed in appendix A which permanently bars a person from receiving regulatory approval or being employed by or under contract with an entity or residing at an entity.

(m) "Rehabilitation review" refers to an agency, entity or tribal process where a person who is eligible under this chapter may seek removal of a bar with rehabilitation crime for purposes of regulatory approval, employment, contracting or residency with an entity.

(n) "Serious crime" means a crime identified under s. HFS 12.11 (1) (a) and (b) and (2).

(o) "State agency" means any office, commission, board, department or bureau of state government.

(p) "Under the entity's control" means that, other than as provided under s. HFS 12.21 (1) (b) 2., an entity does both of the following:

1. Determines whether a person employed by or under contract with the entity who has access to clients served by the entity may provide care, treatment or other similar services or support functions to clients.

2. Directs or oversees one or more of the following:

a. The policies or procedures the person must follow in performing his or her duties as a caregiver.

b. The conditions under which the person performs his or her duties.

c. The tasks performed by the person.

d. The person's work schedule.

e. The supervision or evaluation of the person's work or job performance, including imposing discipline or awarding performance awards.

f. The compensation the person receives for performing his or her duties as a caregiver.

SECTION 3. HFS 12.03 (2) (c), as created by emergency order effective October 1, 1998, is amended to read:

HFS 12.03 (2) (c) "Entity" means a child welfare agency licensed as a child-placing agency under s. 48.60, Stats., to provide care and maintenance for children, to place children for adoption or to license foster homes or treatment foster homes, or licensed under s. 48.60, Stats., as a child caring institution to provide residential care and treatment; a group home licensed under s. 48.625, Stats.; a shelter care facility licensed under s. 938.22, Stats.; a day care center licensed under s. 48.65, Stats., or established or contracted for under s. 120.13 (14), Stats., or a foster home or treatment foster home licensed under s. 48.62 or 48.75, Stats.; including a home licensed for placement of children for adoption under s. 48.833, Stats., for whom adoption assistance will be provided under s. 48.975, Stats.

SECTION 4. HFS 12.10 (1m), as created by emergency order effective October 1, 1998, is amended to read:

HFS 12.10 (1m) LIFTING OF BAR. An agency may give regulatory approval to the operator of an entity otherwise barred under sub. (1) (a) and an entity may employ or contract with a person or may allow a person to reside at the entity who is otherwise barred under sub. (1) (b), if that person ~~is eligible under s. HFS 12.12 (1) for~~

~~rehabilitation review and~~ makes a sufficient showing of rehabilitation as evidenced by a rehabilitation approval received from an agency or a department-designated tribe under s. HFS 12.12.

SECTION 5. HFS 12.11 (1) (a), as created by emergency order effective October 1, 1998, is repealed.

SECTION 6. HFS 12.11 (1) (b) and (c), as created by emergency order effective October 1, 1998, are renumbered 12.11 (1) (a) and (b), and 12.11 (1) (a) (intro.), as renumbered, is amended to read:

HFS 12.11 (1) (a) (intro.) Serious crimes, acts or offenses. No person may be granted regulatory approval to operate an entity or may be permitted to be employed, contracted with or reside at an entity if that person has been convicted of any of the following offenses or has committed any of the following acts or offenses, or who is an applicant for issuance or continuation of a license to operate a day care center or who is proposing to contract with or renew a contract with a school board under s. 120.13 (14), Stats., or who is an employe, prospective employe, contractor, prospective contractor, nonclient resident or prospective nonclient resident of a licensed day care center and who has been convicted of any of the following offenses or adjudicated delinquent on or after his or her 12<sup>th</sup> birthday for committing any of the following offenses:

SECTION 7. HFS 12.11 (2) and (3) (b) 3. b. and g., as created by emergency order effective October 1, 1998, are amended to read:

HFS 12.11(2) **SERIOUS CRIMES AND DEMONSTRATION OF REHABILITATION.** (a) Rehabilitation approval and removal of bar. The department may give regulatory approval to operate an entity or give approval of an adoption home, a county department or a child placing agency may license a foster home under ss. 48.62 and 48.75, Stats., or give approval of an adoption home study and a school board may contract with under s. 120.13 (14), Stats., a person who otherwise may not be regulated, certified or contracted with for a reason specified in s. HFS 12.10 (2), and an entity may employ, contract with or permit to reside at the entity a person who otherwise may not be employed, contracted with or permitted to reside at the entity for a reason specified in s. HFS 12.10 (2), if the person has not committed a crime specified under sub. (1) ~~(b) or (c)~~ (a) or (b) and can demonstrate to, as applicable, the department, a county department, a child-placing agency ~~or~~, a school board or a department-designated tribe, by clear and convincing evidence and in accordance with procedures established under s. HFS 12.12, that he or she has been rehabilitated and is eligible for regulatory approval to operate an entity or to be employed at or contract with or reside at an entity.

(b) Rehabilitation for certain serious crimes. A person under par. (a) who has not committed a serious crime identified under sub. (1) ~~(b) and (c)~~ (a) and (b) and who

is otherwise not ineligible, but has been convicted of other serious crimes identified as rehabilitative in the crimes list in appendix A and as provided under s. 48.685 (5) (bm) 4., Stats., or committed other acts or offenses substantially related to the care of a client as specified under s. HFS 12.10 (2) (c) to (e), including crimes or acts involving misappropriation of a client's property or abuse or neglect of a client, may seek a rehabilitation review under s. HFS 12.12.

(3) (b) 3. b. The length of time between the conviction or convictions and the employment decision.

g. The age of the individual on the date of conviction or the dates of the convictions.

SECTION 8. HFS 12.11 (5) (a) 1. and 2. and (b), as repealed and recreated by emergency order effective December 12, 1998, are renumbered 12.11 (5) (b) 1. and 2. and (c).

SECTION 9. HFS 12.11 (5) (a) is created to read:

HFS 12.11 (5) (a) Does not preclude imposing a bar. Nothing in this subsection precludes an agency or entity from determining under sub. (3) that a lesser crime, act or offense under this subsection is substantially related to the care of clients and cause for a refusal.

SECTION 10. HFS 12.11 (5) (a) 3., as created by emergency order effective December 12, 1998, is repealed.

SECTION 11. HFS 12.12, as created by emergency order effective October 1, 1998, is repealed and recreated to read:

**HFS 12.12 REHABILITATION REVIEW.** (1) **REHABILITATION REVIEW AUTHORITY.** (a) Agency rehabilitation review authority. Except as provided under par. (b), an agency shall conduct rehabilitation reviews as described in this section for the entities the agency regulates and for persons employed by, contracted with and who reside at those entities who have a bar with rehabilitation crime as indicated in appendix A and who meet the eligibility requirements under sub. (2).

(b) Tribal rehabilitation review authority. 1. Upon written request of a federally recognized American Indian tribe, the department may permit and, if so, shall designate a tribal agency to conduct rehabilitation reviews on prospective or current employes or contractees and on prospective or current nonclient residents of department-licensed entities operated by the tribe who are eligible under sub. (2) for rehabilitation review of any bar with rehabilitation crime as indicated in appendix A.

2. The letter of request under subd. 1. shall identify a tribal social services or human services department or a tribal human resource or personnel department to be responsible for conducting the rehabilitation reviews and shall provide an explanation or description of the procedures for the tribe's rehabilitation review process.

3. The department shall review and approve the tribe's procedures for rehabilitation review before a tribe may implement its rehabilitation review process.

**Note:** A tribe's request should be addressed to: Office of Legal Counsel, Department of Health and Family Services, P.O. Box 7850, 1 West Wilson St., Rm 651, Madison, WI 53701-7850.

(c) Rehabilitation reviews under this subsection shall be done in accordance with provisions of this section and as may be provided in department guidelines.

(2) **ELIGIBILITY.** (a) Request. A person barred under s. HFS 12.10 (2) for any of the following may request a rehabilitation review under par. (e) if he or she meets the criteria applicable to the situation, as provided under par. (b), (c) or (d), for requesting a review:

1. The person has committed a serious crime, act or offense identified by the department under s. HFS 12.11 (2) or s. 48.685 (5) (bm) 4., Stats., for which rehabilitation review is required and does not have a pending charge for any criminal or municipal ordinance charges including traffic other than parking or speeding.

2. A unit of government or a state agency or other similar authority has made a finding that the person has abused or neglected a client or misappropriated the property of a client.

3. A determination has been made under s. 48.981 (3) (c) 4., Stats., or other similar authority that the person has abused or neglected a child.

4. In the case of a position for which the person must be credentialed by the department of regulation and licensing or other similar authority, the person's credential is not current or is limited so as to restrict the person from providing adequate care to a client.

(b) Requester status criteria. A person under par. (a) may request a rehabilitation review if that person meets all of the following conditions or, if applicable, conditions under par. (c) or (d):

1. The person has not committed a serious crime, act or offense that prohibits rehabilitation under s. HFS 12.11 (1).

2. The person does not have a charge pending for a serious crime, act or offense under s. HFS 12.11 (1) and (2).

3. If the person is a foster home license applicant under s. 48.62, Stats., or an applicant for an adoption home study, the person has not committed a serious crime, act or offense under s. 48.685 (5) (bm), Stats., or a similar serious crime, act or offense in another jurisdiction or, if the person was convicted of a crime under s. 48.685 (5) (bm) 4., Stats., the background check was not made within 5 years of a crime committed under s 48.685 (5) (bm) 4., Stats.

4. The person has not requested a rehabilitation review for a similar type of regulatory approval, job function or activity or nonclient resident status within the last year.

**Note:** "Similar" in the previous paragraph means regulatory approval, job function or activity that could be categorized in a general way, such as: a review involving the question of direct client contact or that would involve a similar job function or activity that allows unsupervised client access or the review involved a family day care and now the applicant seeks a group day care license or the applicant sought a group home license and now seeks a child caring institution license.

(c) Eligibility criteria for existing entities, employes, contracted persons or persons residing at an entity. An agency need not bar and may continue the regulatory approval of an entity and an entity need not bar and may retain a person on staff or continue a contract for services with a person or permit a person to continue to reside at an entity beyond October 1, 1999, until a favorable rehabilitation review decision has been reached by the agency or department-designated tribe and all of the following are met:

1. The entity or person has submitted a completed rehabilitation review request form prior to October 1, 1999 to the agency or tribe that must review the rehabilitation request.

2. The person shall show that he or she is otherwise eligible for rehabilitation review under pars. (a) and (b).

3. The person shall have been operating the regulated or approved entity or been working for or under contract in the same capacity with the entity or residing at the entity prior to October 1, 1998 and the crime, act or offense which is the basis for a rehabilitation request was committed prior to October 1, 1998.

4. If the person is awaiting rehabilitation review from an agency or department-designated tribe and the agency or tribe is unable to complete a rehabilitation review request for the person prior to October 1, 1999.



(d) Foster homes. An agency may allow a foster parent licensed under s. 48.62 or 48.75, Stats., to continue as a foster parent if a new crime, act or offense committed is found to be not substantially related or if that person is otherwise eligible for a rehabilitation review under pars. (a) and (b) 1., 3. and 4. and all of the following conditions are met:

1. None of the children in foster home placement was a witness to or the victim of the underlying crime or act for which the foster parent was charged or convicted and is seeking a rehabilitation review.

2. The foster parent has submitted to the agency a completed rehabilitation review request form for agency rehabilitation review, and the agency is persuaded by clear and convincing information that removing the children would be contrary to the best interests of the children currently in foster home placement.

3. The agency has shown that the circumstances for waiver of immediate rehabilitation review does not pose any jeopardy to, and will not adversely impact the care of any foster child in placement and would not be contrary to the best interests of any foster child placed in the foster home.

4. The agency determined that continued licensure of the foster parent is appropriate and within 3 working days of this determination submitted to the department for its consideration and approval the information that forms the basis for this conclusion.

Note: Send agency approved determinations for Department review and approval to: Bureau of Programs and Policies, Division of Children and Family Services, P.O. Box 8916, Madison, WI 53708-8916

5. The department, after reviewing the information under subd. 4., issued a written approval to the agency for continued licensure of the foster parent. If the department does not agree with the agency's findings and conclusions, the agency shall immediately request the foster parent to surrender the license or, as applicable and as necessary, shall deny or revoke the license of the foster parent.

Note: Send information on a denial or revocation (including voluntary surrender) of a foster home license or denial of an adoptive home study application for a reason specified in s. HFS 12.10 (2) to: Bureau of Regulation and Licensing, Division of Children and Family Services, P.O. Box 8916, 1 West Wilson St., Madison, WI 53708-8916.

(e) Rehabilitation request. 1. a. If the person is otherwise eligible, the agency shall provide information on eligibility criteria for a rehabilitation review to any person who is barred from regulatory approval under this chapter and to any nonclient resident who is barred from residing at an entity. If the person is eligible to request a

rehabilitation review, the agency shall provide to the person information on how to obtain the rehabilitation review request form.

b. If an entity wishes to employ a person or be able to contract for the person's services, but the person is barred under this chapter from being employed by or contracting with the entity, the entity shall provide information on eligibility criteria for a rehabilitation review to the person. If the person is eligible to request a rehabilitation review, the entity shall provide to the person information on how to obtain the rehabilitation review request form.

2. a. To initiate a rehabilitation review, an eligible person shall obtain a rehabilitation review request form developed by the department and submit the completed form, including the requested supporting documents and information, to the agency which regulates the entity or, as appropriate, the department-designated tribe or, for a day care provider under s. 120.13 (4), Stats., to the school board that contracts with the day care provider.

b. A person requesting rehabilitation review shall provide to the agency or department-designated tribe all information requested on the rehabilitation request review form. The agency or tribe shall not review a request until all information necessary for the review is provided.

(3) REVIEW PROCEDURES. (a) Processing rehabilitation review requests. Upon receipt of a person's completed rehabilitation review request, including supporting documentation and other requested information, the agency or tribe shall appoint a review panel of at least 2 persons to review the information submitted.

(b) Rehabilitation request information review. 1. The review panel shall review the rehabilitation review request form and accompanying documents. The panel may request additional information from the person or from other agencies or persons familiar with the person requesting the review.

2. The review panel shall give the person an opportunity to appear before the review panel to answer any questions the review panel may have.

(c) Rehabilitation decision. Upon review of the information obtained, the review panel shall decide whether the information provided establishes by clear and convincing evidence that the person has demonstrated rehabilitation so that the bar to regulatory approval, employment, contracting or residency may be lifted and the person may be eligible for the position or functions indicated in the rehabilitation review request form. The panel shall consider at least the following factors, as applicable:

1. Favorable personal reference checks and comments from employers, other persons and agencies familiar with the applicant and statements from therapists, counselors and other professionals.