

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 contrary to the entity's policies and procedures, not a part of the client's treatment plan and done intentionally to cause harm ~~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, or a fear of harm or death, or a combination of these behaviors. This subdivision does not apply to permissible restraint, isolation, or confinement implemented by order of a court or as permitted by statute.

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 an act or 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 to 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) (a) "Neglect" means an intentional omission or intentional course of conduct by a caregiver or nonclient resident, including but not limited to restraint, isolation or confinement, that is contrary to the entity's policies and procedures, is not part of the client's treatment plan and, through substantial carelessness or negligence, does any of the following:

1. Causes or could reasonably be expected to cause pain or injury to a client or the death of a client.

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

3. 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 behavior, agitation, fear of harm or death, or a combination of these behaviors. This subdivision does not apply to permissible restraint, isolation or confinement implemented by order of a court or as permitted by statute.

(b) "Neglect" does not include an act or 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.

~~(14)~~ (15) "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)~~ (16) "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)~~ (17) "Reasonable cause" means that the greater weight of evidence provides a reasonable ground for belief that the individual committed the act as alleged.

~~(17)~~ (18) "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)~~ (19) "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 Caregiver Registry and Investigation Unit, Bureau of Quality Assurance, P.O. Box 309, Madison, Wisconsin 53701-0309; 608-261-7650. 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: For notification to the Department that the report has been made, write Caregiver Registry and Investigation Unit, Bureau of Quality Assurance, P.O. Box 309, Madison, Wisconsin 53701-0309; or phone 608-261-7650.

(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 608-261-7650. For a copy of the report form, write or phone the Caregiver Registry and Investigation Unit, Bureau of Quality Assurance, P.O. Box 309, Madison, Wisconsin 53701-0309; 608-261-7650. 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. ~~141.15(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 Leean
Secretary

SEAL:

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

February 2, 1999

Secretary Joe Leean
Department of Health and Family Services.
1 West Wilson
Suite 650
Madison, WI 53702

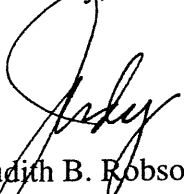
Dear Secretary Leean:


Recently legislators have been hearing complaints and concerns regarding the caregiver background checks. We commend DHFS for organizing statewide hearings and taking testimony on this issue.

Now that public testimony has been completed we understand you may be redrafting some of the rules. We would like to meet to discuss the direction for drafting of those new rules as well as suggestions for any statutory changes.

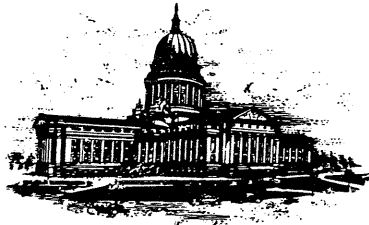
Since two of these emergency rules expire near the end of this month, we would like to meet soon with representatives of the department to discuss these concerns. Thank you for this consideration, we look forward to meeting you at your earliest convenience

Sincerely,


Judith B. Robson
State Senator
15th Senate District


Glenn Grothman
State Representative
59th Assembly District

JBR:chmiv



Wisconsin Legislature
Assembly Chamber

P.O. Box 8952
Madison, Wisconsin 53708

February 25, 1999

Senator Judy Robson, Co-Chair
Representative Glenn Grothman, Co-Chair
Joint Committee for Review of Administrative Rules

Dear Co-Chairs and Members of the Committee:

We are writing in support of the Department of Health and Family Services' request for a 60-day extension of the caregiver background check emergency rules, HFS 12 and 13.

While we recognize that there may still be some areas that need modification before the emergency rules are made permanent, Department officials have assured us that they will continue working with all interested parties to address the concerns that have been raised by employees, employers, providers and advocates.

A great deal of time and effort has been expended to develop these rules that provide new protections for our most vulnerable individuals. The department's efforts to seek input from all parties impacted by this initiative has been instrumental in accomplishing the ultimate goal of this law – to protect the health, safety, welfare and rights of vulnerable adults and children.

We urge you to extend the emergency rules to provide health, child and long-term care facilities with the tools to implement this comprehensive, proactive method of conducting criminal history searches.

Sincerely,

~~Peggy Kusick~~
State Representative
97th Assembly District

Gregg Underheim
State Representative
54th Assembly District



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PROFESSIONAL
SOCIAL
WORK

TESTIMONY BY MARC HERSTAND, EXECUTIVE DIRECTOR OF THE WISCONSIN CHAPTER, NATIONAL ASSOCIATION OF SOCIAL WORKERS, TO THE JOINT LEGISLATIVE COMMITTEE ON ADMINISTRATIVE RULES REGARDING CH. HFS 12, WIS. ADM. CODE AND CH., HFS 13, WIS ADM. CODE

The Wisconsin Chapter of the National Association of Social Worker represents over 2500 social workers statewide who work in a wide variety of settings including human service departments, outpatient mental health clinics, public schools, nursing homes, hospitals, community based organizations, HMO's, mental health departments and other settings.

NASW WI supports the purpose of the caregiver law. We believe the State of Wisconsin has an obligation to protect vulnerable clients against caregivers who are abusive. Within our own profession we strongly support efforts to root out individuals who behave unethically and/or abusively to clients. The National Association of Social Workers itself has a Committee of Inquiry that handles complaints against social workers made by clients. When our Committee of Inquiry finds that one of our members has behaved in an unethical manner, they can take such actions as informing the Department of Regulation & Licensing, informing the person's employer, requiring supervision and psychological treatment in order to continue their membership and barring them from membership. The Department of Regulation & Licensing also investigates ethics complaints against certified social workers (and all other professionals regulated by the Department) and in the most extreme cases can terminate an individual's certification as a social worker.

Despite our support for the purpose of the caregiver law, we would like to share some concerns regarding the proposed caregiver rules based upon problems a few of our members have encountered. First in October I was contacted by one of our members who has worked as a clinical social worker for over 20 years. About 25 years ago she was convicted of one of the felonies that would permanently bar employment as a caregiver. She has since served her time, obtained a Masters of Social Work degree and has worked without incident throughout her career. The proposed rules would cause her to lose her livelihood. In a second situation, one of our members who works in a county in north central Wisconsin complained to me that the county was requiring all its employees to be fingerprinted and photographed as part of the background check for the new caregiver law. He felt the fingerprinting was a major invasion of privacy and wondered if background checks couldn't be conducted in a less invasive manner. Finally some social work students who have had prior convictions have raised concerns that the proposed rules have no consideration for the time period since a conviction occurred.

The new caregiver law and in particular the Department's proposed rules raise the issue of whether individuals who have paid the price for their crime (i.e. jail time or other punishment) should be permanently barred from employment as a caregiver. The rules also implicitly suggest that individuals can never be rehabilitated. Ironically at the same time that the Department is implementing major barriers to individuals with criminal records from ever obtaining employment as caregiver, they are also requiring almost all former W-2 recipients to find work.

At least some of these individuals have criminal records that would permanently bar them from work as a caregiver.

Contrary to the apparent implications of the proposed rules, NASW WI does believe that some people can be treated and rehabilitated. While some offenses may justify permanently barring individuals from certain types of employment, it seems to us that permanently barring someone from employment should be done only when it is clear that: 1) the individual has not been rehabilitated; 2) the person would pose a threat to the clients they might serve; 3) the offense for which they were convicted relates substantially to serving as a caregiver.

Aside from the question of fairness to individuals who have paid the price for their crimes and are not a danger to society or their clients, there is also the issue of potential benefit to society for some of these individuals working as caregivers. Individuals who combine both professional education and training and extensive life experience (including turning their life around after some bad choices) can make some of the best caregivers. Due to their deep sensitivity and understanding of their clients' problems, these individuals can be particularly effective in working with and assisting clients.

Therefore, NASW WI would like to recommend the following changes to the proposed caregiver rules:

First, we would suggest that with the exception of the five crimes specified by the law, the Department's Rehabilitation Review Panel handle all felonies on a case by case basis. In this review, consideration would be given for the amount of time that has lapsed since the crime occurred as well as evidence that rehabilitation has occurred. The Rehabilitation Review Panel would then either permanently bar someone from employment, bar someone for a certain number of years pending clear and convincing evidence of rehabilitation or allow someone to work in a caregiver role immediately.

Secondly we would recommend that all Wisconsin certified or licensed professionals who have already been screened by the Department of Regulation & Licensing for felony convictions be exempt from the caregiver screening process. Social workers, marriage and family therapists and professional counselors are examples of three professions regulated by the Department of Regulation and Licensing where screening for felony convictions occurs during the application procedure. We do not believe it is necessary for more than one state department to screen individuals with misdemeanor or felony convictions.

Finally, we would recommend that the Department of Health and Family Services consider "grandfathering" individuals who have worked at least five years in a caregiver capacity without incident.

In conclusion NASW WI believes that by implementing the three recommendations the Department of Health and Family Services could meet the goals of:

1. Protecting vulnerable consumers
2. Retaining in the workforce those caregivers with criminal records who pose no threat to consumers and are rehabilitated and
3. Allowing individuals with criminal records who pose no threat to consumers and are rehabilitated to work as caregivers.

Thank you for your consideration of our thoughts on this matter.



February 22, 1999

Senator Judith Robson
PO Box 7882
Madison, WI 53707-7882

Dear Senator Robson:

I am writing in response to your letter dated February 19, 1999 regarding the upcoming public hearing on the Caregiver Background Checks.

I am in support of an extension of the effective period of the Emergency Rule HFS 12 Wisconsin Administrative Code and Emergency Rule HFS 13 Wisconsin Administrative Code only if the Department of Health and Family Services makes major revisions in the rules based on concerns voiced during the public hearings in January 1999.

I believe the Caregiver Background Checks are a positive move 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 in judgement they made in the past.

I am enclosing a copy of my concerns sent to the Department of Health and Family Services during the January public hearings.

Your interest and support on these issues is appreciated.

Sincerely,

A handwritten signature in cursive script that reads 'Phyllis T. Williams'.

Phyllis T. Williams
Administrator

PTW/lmb

Enclosure



Tommy G. Thompson
Governor

Joe Leean
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

February 24, 1999

~~The~~ The Honorable Judy Robson, Co-Chairperson
Joint Committee for Review of Administrative Rules
Room 15 South, State Capitol
Madison, Wisconsin

The Honorable Glenn Grothman, Co-Chairperson
Joint Committee for Review of Administrative Rules
Room 15 North, State Capitol
Madison, Wisconsin

Dear Senator Robson and Representative Grothman:

This is notification that on Saturday, February 27, 1999, the Department will publish an emergency rulemaking order. The order will (1) amend the ch. HFS 12 emergency rules which were published October 1, 1998, to implement the caregiver background check requirements in ss. 48.685 and 50.065, Stats., and amended on December 12, 1998 to revise the appended Crimes List, and (2) amend the ch. HFS 13 emergency rules, which were published on October 1, 1998, to implement the requirements in s. 146.40 (4g) and (4r), Stats., for caregiver misconduct reporting and expansion of the caregiver misconduct registry. A copy of the emergency order is attached to this letter.

The changes we are making through this order in the chs. HFS 12 and 13 emergency rules are in response to comments received during recent public review of the emergency rules and the proposed permanent rules. The changes are being made by emergency order because of the critical importance of the rules for proper implementation of the statutory caregiver background check and caregiver misconduct reporting requirements. Those statutory requirements, and the rules, are meant to help protect people receiving care and treatment at facilities or from agencies or programs regulated by the Department or a related local agency from being harmed by their caregivers or by nonclient residents.

If you have have any questions about these amendments to the chs. HFS 12 and 13 emergency rules, you may contact Linda Dawson of the Department's Office of Legal Counsel at 266-0355.

Sincerely,


Paul E. Menge
Administrative Rules Manager

Attachment

Chair
George L. Johnson
Reedsburg

Chair-Elect
William D. Petasnick
Milwaukee

Immediate Past Chair
Mark A. Knight
Milwaukee

President/CEO
Robert C. Taylor



Wisconsin Health &
Hospital Association, Inc.

5721 Odana Road
Madison, WI
53719-1289

608/274-1820

FAX: 608/274-8554

<http://www.wha.org>

February 24, 1999

To: Joint Rules Committee

From: Tim Hartin, General Counsel
Scott Peterson, Director, State Issues

Subject: HFS 13 – Mandatory Abuse Reporting Emergency Rules

Hospitals and health systems are devoted to the well-being of their patients and do not tolerate abusive staff. They put significant resources into hiring, training, and educating their staff, including pervasive quality monitoring and improvement programs that are intended, in large part, to eliminating negligent or unintentional errors. In every Wisconsin hospital, employment policies and quality improvement programs alike call for the investigation of abuse and neglect.

In this factual context, mandatory abuse reporting rules in HFS 13 continue to have the potential to be needlessly costly, disruptive, and even counterproductive to patient safety and well-being. Conducting a complete investigation and submitting a report to DHFS on every single allegation of abuse or neglect will serve to unfairly stigmatize and demoralize hospital staff, create a damaging and untrue image of hospitals and other providers, and distract DHFS staff from the truly significant aberrations that rightfully require their attention.

The problems with HFS 13 can be traced to four sources. First, the rule continues to create a broad and confusing definition of abuse and neglect that should be significantly clarified. Second, the rule still contains no definition of "allegation." Third, the rule continues to require that a full report of every allegation and investigation be reported to DHFS regardless of merit. Third, the rule continues to require that every single allegation of abuse or neglect generate a full investigation.

- **The definition of abuse and neglect should be clarified.** We continue to believe the following definition of misconduct, based on that in *Boynton Cab Co. v. Neubeck*, 237 Wis. 249 (1941), as modified below for its application in the context of health care and the abuse registry system, would be appropriate.

"Abuse" means conduct evincing such disregard of a client's physical and mental needs and interests as is found in deliberate violations or disregard of client rights, or in carelessness or negligence of such degree or frequency as to

manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the person's duties and obligations to the client. Mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertency or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not deemed to be abuse. Neglect and mistreatment must meet this definition to rise to the level of "abuse".

The proposed new definition of abuse is an improvement over the previous definition in a number of ways, but it is very long and complex and continues to raise as many questions as it answers. For example:

1. Occasionally, restraint or other steps must be taken for good clinical reasons that are not part of the "treatment plan," simply because it is not practical to amend the treatment plan before taking these steps. The language exempting actions done as part of the treatment plan may be too narrow. Language exempting any action done for the purpose of providing care and treatment to the patient might be more appropriate.
 2. The exclusionary language in par. f., stating that ordinary negligence, isolated instances of good faith errors in judgment, etc. are not abuse, is cross-referenced in only two of the several provisions of this definition. Does this mean that it does not apply where it is not cross-referenced? This exclusionary language should apply across the board, not only to a few isolated provisions.
 3. Sub(1)(a)3., referring to "mental or emotional damage to a client," appears to be redundant with sub(1)(a)4, referring to "harm to the mental health of a client." Further, sub(1)(a)(3) continues to raise concerns among providers of psychiatric services, who use confrontation that is likely to trigger the symptoms listed in this provision. It would appear that sub(1)(a)(3) could be deleted, with sub(1)(a)(4) requiring investigation and reports of allegations about harm to the mental health of clients.
- **Definition of "allegation."** The key term "allegation" is still not defined anywhere in HFS 13. While it may appear that this term has a general meaning that is easily understood, in practice there is a great deal of confusion about what counts as an allegation that must be investigated. For example, is a rumor an allegation? Is gossip an allegation? Is something overheard in an elevator or a lunchroom an allegation?

We suggest that "allegation" be defined to require that a caregiver be accused of abuse and neglect by someone with direct knowledge of the incident at issue, and that the allegation be made in writing, in order for it to trigger the investigation and reporting requirements of HFS 13.

- **Reporting requirement.** The current language in both the statute and the administrative rule requires that an entity “shall report to the department any allegation” This language was unchanged in the proposed revision of HFS 13. Having such a report on file will be devastating for many caregivers who have done nothing wrong, but who will nonetheless have a file in Madison detailing unfounded allegations.

Rather than invite a deluge of reports that have no reason to be reviewed and filed by DHFS, we propose that the rule be changed so that only allegations that have a reasonable foundation need to be reported to DHFS. We propose that the reporting requirement in HFS 13.05(3) be changed mandate a complete report only when the entity has reasonable grounds for concluding that the allegation is based on fact.

For unfounded allegations, the entity could periodically submit a summary report to DHFS listing the allegations that it had investigated that turned out to be unfounded. This report should not contain any caregiver names, but should instead indicate what the substance of the allegation was and the entity’s conclusion. Rather than submitting the documentation for unfounded allegations to DHFS, entities could be required to keep it on file for a set period of time, where it would be available to DHFS surveyors or auditors on request.

- **Investigation requirement.** The current language requires that every allegation be reported to the department, and that every report be on the department form, including “whatever information the department requires.” This language was unchanged in the proposed revision of HFS 13. Taken as a whole, this means that every investigation must generate a completed investigation report, requiring in turn a one-sizes-fits-all investigation of every allegation regardless of what might be reasonable or appropriate.

Some flexibility should be introduced into this requirement. Eliminating unfounded allegations from the reporting requirement could be done in such a way that also releases the investigation and documentation of unfounded reports from the current format as well. In addition, the reporting form should be revised to make it clear that only relevant information needs to be pursued and reported as part of the investigation.

ORDER OF THE
DEPARTMENT OF HEALTH AND FAMILY SERVICES
REPEALING, 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:

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 include that part in 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.

This order creating ch. HFS 13 and amending ch. HSS 129 is being published as an emergency rulemaking order to take effect on October 1, 1998. That is the date on which the amendments to s. 146.40 (4g) and (4r), Stats., that expand the misconduct part of the registry will take effect. The rules are necessary for implementation of the amended statutes. The intent of the amended statutes and new rules is to better protect clients of the specified Department-regulated facilities, agencies, programs and services from being harmed. The rules are being published as emergency rules so that they can go into effect when the amended statutes take effect rather than up to 9 months later which is how long it will take to promulgate permanent rules.

ORDER

Pursuant to authority vested in the Department of Health and Family Services by s. 146.40(4g) and (4r), Stats., as affected by 1997 Wisconsin Act 27, and ss. 227.11(2) and 227.24(1), Stats., the Department of Health and Family Services hereby repeals, amends, repeals and recreates and creates rules interpreting s. 146.40(4g) and (4r), Stats., as affected by 1997 Wisconsin Acts 27 and 237, as follows:

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) "Abuse" means any of the following, if done intentionally:

(a) An act, omission or course of conduct by another that is not part of a treatment plan or is contrary to entity policies and procedures and does any of the following:

1. Results in physical pain or injury, illness, or any impairment of physical condition or great bodily harm to a client.

2. Intimidates, humiliates, threatens, frightens or otherwise harasses a client.

3. Substantially disregards a client's rights as defined in either ch. 50 or 51, Stats. or a caregiver's duties and obligations to the client.

(b) Sexual intercourse or sexual contact under s. 940.225, Stats.

(c) Restraint, isolation or confinement that causes or could reasonably be expected to cause bodily harm or great bodily harm or mental or emotional damage, including harm to the client's psychological or intellectual functioning that is exhibited by anxiety, depression, withdrawal, regression or outward aggressive behavior or a combination of these behaviors. This paragraph does not apply to restraint, isolation or confinement by order of a court or other lawful authority.

(d) 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.

(e) An act that does not constitute self-defense as defined in s. 939.48, Stats.

(2) "Bodily harm" has the meaning given in s. 939.22(4), Stats.

(3) "Caregiver" means a person who is employed by or under contract with an entity who has access to the entity's clients and who is under the entity's control.

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

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

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

(10) "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

(11) "Great bodily harm" has the meaning given in s. 939.22(14), Stats.

(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. "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 such 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) "Neglect" means an act, omission or course of conduct by a caregiver that results in failure to provide adequate food, shelter, clothing, medical care or dental care to a client,

and that is due to such substantial carelessness or negligence of the caregiver's duties and obligations to the client as to create a significant danger to the physical or mental health of the client.

(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 that an entity, other than as provided under s. HFS 12.21(1)(b)2., may choose and affect whether a person employed by or under contract with the entity may have contact with clients the entity serves.

(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(6)(c) 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(6)(c) 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 brief rebuttal statement with the department under s. HFS 13.05 disputing that finding.

(3) **RELEASE OF CAREGIVER MISCONDUCT REGISTRY INFORMATION.** With the exception of sub. (2)(a), 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, if notice of appearance in the matter has been filed by an attorney, the attorney representing the person against whom an allegation of misconduct has been made.

(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: Federally certified nursing homes are required under 42 CFR 483.13 (c) (2) to forward to the Department all reports of alleged caregiver misconduct, whether or not the reports describe abuse, neglect or misappropriation of property as defined in this chapter.

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 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 sub. (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.

(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, and the reporter. 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, and to the reporter. 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 within 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 parties 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 or neglect, as defined in ch. HFS 13, 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(4)(g), 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(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 10. HSS 129.11 is repealed.

SECTION 11. HSS 129.12(2) is 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 as emergency rules on October 1, 1998.

Wisconsin Department of Health and Family Services

Date: September 25, 1998

By: 

Joe Lee
Secretary

SEAL:

LRB or Bill No./Adm. Rule No.
HFS 13
Amendment No. if Applicable

FISCAL ESTIMATE
DOA-2048 N(R10/96)

ORIGINAL UPDATED
 CORRECTED SUPPLEMENTAL

Subject

REPORTING AND INVESTIGATION OF CAREGIVER MISCONDUCT

Fiscal Effect

State: No State Fiscal Effect

Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation.

Increase Costs - May be possible to Absorb Within Agency's Budget Yes No

Increase Existing Appropriation Increase Existing Revenues
 Decrease Existing Appropriation Decrease Existing Revenues
 Create New Appropriation

Decrease Costs

Local: No local government costs

1. Increase Costs
 Permissive Mandatory
2. Decrease Costs
 Permissive Mandatory

3. Increase Revenues
 Permissive Mandatory
4. Decrease Revenues
 Permissive Mandatory

5. Types of Local Governmental Units Affected:
 Towns Villages Cities
 Counties Others _____
 School Districts WTCS Districts

Fund Sources Affected

GPR FED PRO PRS SEG SEG-S

Affected Ch. 20 Appropriations

Assumptions Used in Arriving at Fiscal Estimate

This order expands the misconduct part of what has been called the nurse aide registry that s. 146.40 (4g), Stats., requires the Department to maintain. The misconduct part of the registry prior to October 1, 1998, listed nursing assistants working in hospitals and nursing homes, home health agency aides and hospice program aides for whom there was a substantiated allegation of abuse or neglect of a patient or resident or misappropriation of a patient's or resident's property. Subsections (4g) and (4r) of s. 146.40, Stats., Stats., were amended by 1997 Wisconsin Acts 27 and 237 to require the Department to include in the misconduct part of the registry caregivers working for other specified facilities, service organizations and programs regulated by the Department and therefore to make them subject to having allegations of misconduct reported to the Department, Department review of reports and investigation and decision whether an allegation is substantiated, a right to appeal the Department's decision to the Department of Administration's Division of Hearings and Appeals, and for the Department to enter the caregiver's name and the Department's or Division of Hearings and Appeals' decision on the registry. Entities are required to report caregiver misconduct, and the Department is required to review all reports received, conduct further investigation as necessary, make decisions as to whether allegations are substantiated, enter names and findings on the registry, and disclose registry information upon request.

To expand the misconduct part of the registry, this order creates ch. HFS 13 and amends ch. HSS 129. Under ch. HFS 13, the registry name is now caregiver registry. The qualifications part of the registry, which applies only to hospital and nursing home nursing assistants, home health aides and hospice aides, remains in ch. HSS 129. The misconduct part of the registry is consolidated for all caregivers in ch. HFS 13.

This order will not affect the expenditures or revenues of state government or local governments. Any increased costs to the Department for operating the expanded registry are the result of Acts 27 and 237 and were taken into consideration during deliberations on the bills that became Acts 27 and 237.

Long-Range Fiscal Implications

Agency/Prepared by: (Name & Phone No.)

H&FS/Larry Hartzke, 267-2943

Authorized Signature/Telephone No.


Richard W. Lorang, 266-9622

Date

7-25-98