

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

(Please Print Plainly)

DATE: 3-24-99

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

SUBJECT Caregiver Law - HSF-12

(NAME) Mara Kieser

(Street Address or Route Number) 425 N. Charter

(City and Zip Code) Madison, WI 53706

(Representing) WW-Madison / Schust of Pharmacy

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

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

Registering in Favor:   
but not speaking:

Registering Against:   
but not speaking:

Speaking for information only; Neither for nor against:

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

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

(Please Print Plainly)

DATE: \_\_\_\_\_

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

SUBJECT Caregiver - HSF-12

(NAME) Mike Snow

(Street Address or Route Number) 1330 University Ave.

(City and Zip Code) Madison, WI 53706

(Representing) WW-Madison - Medical School

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

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

CHR-NO. HSF 12  
OR

SUBJECT Caregiver rule

(NAME) David J. Ward

(Street Address or Route Number) UW System

(City and Zip Code) 5th VP for Academic Affairs

(Representing) UW System

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

(Please Print Plainly)

DATE: 3/24/99

CHR-NO. HFS 12  
OR

SUBJECT W Copyright Law

(NAME) Gregory D Vangt

122 State St Suite 500  
(Street Address or Route Number)

Madison, WI 53703  
(City and Zip Code)

United Council of WIS Students  
(Representing)

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

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

Registering in Favor:

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Registering Against:

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DATE: 3/24/99

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

SUBJECT HFS 12

(NAME) Rebecca Abramson

5900 Menomona Dr.  
(Street Address or Route Number)

Madison, WI 53716  
(City and Zip Code)

Coalition of WIS Aging Groups  
(Representing)

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Speaking Against the Rule:   
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MWFA LEADERSHIP

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

(Please Print Plainly)

DATE: 03/24/99

CHR-NO. Case 9/1/94 Bank Owners  
OR

SUBJECT HFS 12

(NAME) Johanie Morris-Tatum

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

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

STATE Rep 11th District  
(Representing)

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

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

(Please Print Plainly)

DATE: March 24, 1999

CHR-NO. WIS 05, HFS 12 + 13

SUBJECT Amalgam Rule of Merit

(NAME) David B. Stauteback

(Street Address or Route Number) 2607 Arborvitae Blvd

(City and Zip Code) Madison WI 53713-1009

(Representing) AAFP of Wisconsin

Speaking in Favor of the Rule:

Speaking Against the Rule:

Registering in Favor:

Registering Against:

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

(Please Print Plainly)

DATE: 3/24/99

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

SUBJECT HFS 12 + 13

(NAME) Thurley M. Bell

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

(City and Zip Code) Milwaukee WI 53216

(Representing) Alpha Kappa Phi Society Inc  
Emerald Chapter WI

Speaking in Favor of the Rule:

Speaking Against the Rule:

Registering in Favor:

Registering Against:

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

(Please Print Plainly)

DATE: 3-24-99

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

SUBJECT DYES Emergency Rule

(NAME) Jess Keys

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

(City and Zip Code) Madison WI 53714

(Representing) District 195W, SEW

Speaking in Favor of the Rule:

Speaking Against the Rule:

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(Please Print Plainly)

DATE: 3/24/99

CHR-NO. HFS 12\*13  
OR

SUBJECT \_\_\_\_\_

Rep. Gregg Underheim  
(NAME)

(Street Address or Route Number)

(City and Zip Code)

(Representing)

Speaking in Favor of the Rule:  
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**I.C.R.A.R. HEARING SLIP**

(Please Print Plainly)

DATE: 24 Mar 99

CHR-NO. HFS 12/13  
OR

SUBJECT \_\_\_\_\_

William Donaldson  
(NAME)

(Street Address or Route Number)

(City and Zip Code)

(Representing)

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

SUBJECT \_\_\_\_\_

A. Stern Porter  
(NAME)

(Street Address or Route Number)

(City and Zip Code)

(Representing)

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(Please Print Plainly)

DATE: 3-23-99

CHR-NO. 12 & 13

OR

SUBJECT \_\_\_\_\_

Javelle Elder-Green

(NAME) 4333 N. 29th St,

(Street Address or Route Number)

MIL, WI 53216

(City and Zip Code)

Alpha Kappa Alpha Sorority  
(Representing)

Speaking in Favor of the Rule:  
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DATE: 3-23-99

CHR-NO. 12 & 13

OR

SUBJECT \_\_\_\_\_

J. Rhoads

(NAME) 2222 N. 9th St

(Street Address or Route Number)

MIL, WI 53204  
(City and Zip Code)

(Representing)

Speaking in Favor of the Rule:  
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Speaking Against the Rule:  
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**I.C.R.A.R. HEARING SLIP**

(Please Print Plainly)

DATE: 3/24/99

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

OR

SUBJECT HS 12+13

David Stue

(NAME) 217 N. Hamilton

(Street Address or Route Number)

Madison, WI 53703  
(City and Zip Code)

Board on Aging + LTC  
(Representing)

Speaking in Favor of the Rule:  
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Speaking Against the Rule:  
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**I.C.R.A.R. HEARING SLIP**

(Please Print Plainly)

DATE: 3-24-99

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

OR

SUBJECT HFS 12413

John Kressow, Linda Darsen

(NAME)

J. W. Wilson

(Street Address or Route Number)

MADISON

(City and Zip Code)

DHES

(Representing)

Speaking in Favor of the Rule:  
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Speaking Against the Rule:  
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**I.C.R.A.R. HEARING SLIP**

(Please Print Plainly)

DATE: 3-24-99

CHR-NO. HFS 12413

OR

SUBJECT \_\_\_\_\_

Rep. Peggy Krusick

(NAME)

(Street Address or Route Number)

(City and Zip Code)

(Representing)

Speaking in Favor of the Rule:  
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**I.C.R.A.R. HEARING SLIP**

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DATE: 3-24-99

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

OR

SUBJECT HFS 12413

Rep. Len Young

(NAME)

(Street Address or Route Number)

(City and Zip Code)

(Representing)

Speaking in Favor of the Rule:  
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**I.C.R.A.R. HEARING SLIP**

(Please Print Plainly)

DATE: 3/24/99

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

OR

SUBJECT Criminal Background

(NAME) Linda L. Martin

(Street Address or Route Number) W4794 River Road

(City and Zip Code) Fredonia, WI 53081

(Representing) Sheboygan County

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

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DATE: 3-24-99

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

OR

SUBJECT Criminal Back

(NAME) Ann Groundwater

(Street Address or Route Number) 4516 N. Wilshire

(City and Zip Code) Wilmunke 53211

(Representing) WV-Philwaukee

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DATE: 3/24/99

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

OR

SUBJECT HFS 12+13

(NAME) Brian Puteff

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

(City and Zip Code) Madison WI 53703

(Representing) Wisconsin Health Care Association

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

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DATE: 3/24/99

CHR-NO. HES 12 + 13

SUBJECT \_\_\_\_\_

(NAME) TIM HARTIN

(Street Address or Route Number) 5721 DANA ROAD

(City and Zip Code) MADISON WI 53719

(Representing) WI Health & Hospital Ass.

Speaking in Favor of the Rule:

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(Please Print Plainly)

DATE: 3/24/99

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

SUBJECT CRIMINAL BARRETT'S

(NAME) BARBARA JACOBS REVISOR

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

(City and Zip Code) MILWAUKEE 53208

(Representing) UW-Milwaukee

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

(Please Print Plainly)

DATE: 3-24-99

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

SUBJECT Ch. 12 + 13

(NAME) at this time

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

(City and Zip Code) 2544 S. Shore Dr

(Representing) LTC Ambudsmar

Speaking in Favor of the Rule:

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Speaking Against the Rule:

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Madison, WI 53707-7882





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

Tommy G. Thompson, Governor  
Joe Leeán, Secretary



May 12, 1999

The Honorable Rodney C. Moen, Chairperson  
Senate Committee on Health, Utilities and Veterans and Military Affairs  
Room 8 South, State Capitol  
Madison, WI

The Honorable Gregg Underheim, Chairperson  
Assembly Committee on Health  
Room 11 North, State Capitol  
Madison, WI

Dear Senator Moen and Representative Underheim:

The Department on March 9 and 10, 1999, submitted Clearinghouse Rules 98-191 (HFS 12) and 98-188 (HFS 13), relating to caregiver background checks and reporting and investigation of caregiver misconduct, to the presiding officers of the Legislature for review by standing committees. Subsequently, the proposed rules were referred to your committees. Following public hearings held by the Assembly Committee on April 13, 1999, and the Senate Committee on April 28, 1999, both committees asked the Department to consider making modifications in the proposed rules. This letter is the Department's response to those requests.

The Department has carefully reviewed the comments of persons who testified on the proposed rules at the legislative public hearings, and has noted the concerns about the proposed rules expressed at those hearings by committee members.

In its letter of April 14, 1999, the Assembly Committee stated that among modifications the Department should consider is whether to continue with inclusion of persons convicted of murder, sexual assault or sexual exploitation in the bar with rehabilitation list and whether stricter limitations should be imposed on those persons. The Department's list of crimes for which conviction results in permanent bar for all programs was pared to nine crimes, five of them statutory, in amendments to the emergency rules published on February 27, 1999, which have been carried over to the proposed permanent rules. The Department looks to the Legislature to provide guidance through statute change for further modification of the Crimes List.

In its letter of May 6, 1999, the Senate Committee pointed out that at its public hearing on the proposed rules a number of health care providers and other interested parties expressed concerns about the scope of the rules. The Department through its

amendments published on February 27, 1999, to the emergency rules, which have been carried over to the proposed permanent rules, made several changes to limit the scope of the rules as much as possible within the framework of the statutes being implemented. These changes included modifications of the Crimes List, addition of a definition for "access," and significant revision of definitions for "caregiver" and "under the entity's control." Some of the new germane modifications described in this letter further clarify and refine the intended scope of the rules.

Attached are copies of amended Clearinghouse Rules 98-191 (HFS 12) and 98-188 (HFS 13) showing germane modifications the Department has made in the rules in response to the requests of the Assembly and Senate Committees and on the Department's own initiative under the authority of s. 227.19 (4) (b) 3., Stats. In this letter I will summarize the germane modifications. These are the following:

(1) **Definitions of "abuse" and "neglect."** In s. HFS 13.03, there are now separate definitions for "abuse" and "neglect" rather than a definition for "abuse" that includes "neglect." The abuse definition is amended so that it is focused on actions taken purposely with intent to harm, while the neglect definition is focused on actions done purposely without intent to harm but that are sufficiently negligent or reckless. The definition of "neglect" includes the phrase, "including but not limited to restraint, isolation or confinement," that is also part of the separate definition of "abuse."

(2) **Definition of "caregiver."** In s. HFS 12.03 (6) (b) 1., "solely" has been inserted in the "caregiver" definition. It is already in the caregiver definition under ch. HFS 13. It had been mistakenly omitted from the definition of that term in ch HFS 12. The definition part now reads: "Caregiver" does not include...a person who performs solely clerical, administrative, maintenance or other support functions for the entity ~~but~~ and who is not expected to have regular, direct contact with clients or the personal property of clients.

(3) **Permanent prohibition of some nurse aides from being employed by federally-certified nursing homes.** In s. HFS 12.10 (2) (c) Note, a clarification is added that a person listed in the misconduct registry under ch. HFS 13 as having a substantiated finding of abuse or neglect of a client or misappropriation of a client's property is permanently barred from working in a federally-certified nursing home only if the finding is for an action of the person done while he or she worked as a nurse aide in a federally certified nursing home.

(4) **Consideration of substantially related criteria.** In s. HFS 12.11 (3) (b) (intro.), the requirement has been modified that an agency or entity, in determining whether a crime or delinquency adjudication not listed in the Department's Crimes List is substantially related to the care of clients, "may" rather than "shall" consider all of the substantially related criteria set out in par. (b). The amended introduction now reads: ~~In determining~~ To determine whether a crime or delinquency adjudication under

par. (a) is substantially related to the care of a client, the agency or entity ~~shall~~ may consider all of the following:

- (5) **Continuing a person, including a student, under a service contract pending final rehab review decision.** In s. HFS 12.12 (2) (c) (intro.), a clarification is made that students are included where it states that an entity need not bar and may continue to contract for services with persons beyond October 1, 1999, pending a rehabilitation review decision, and a correction is made that what is meant is the "final" rehabilitation decision, not a "favorable" rehabilitation decision.
- (6) **Nonclient resident of a foster home.** In s. HFS 12.12 (2) (d) (intro.) and 5., language is added to permit an agency to continue the regulatory approval of a nonclient resident of a foster home, just as it is permitted to let a licensed foster parent continue as a foster parent, if a new crime committed is found to be not substantially related or the person is otherwise eligible for rehabilitation review and specified conditions are met.
- (7) **Retention of completed forms.** At four places in ss. HFS 12.20 and 12.21, the requirement to maintain forms on file has been changed to a requirement to retain forms so that they can be promptly retrieved for inspection.
- (8) **Background screening of temporary employes and students.** Under s. HFS 12.21 (1) (b) 3. b., a new sentence is added to state that the letter than an entity must obtain from any temporary employment agency, college or university with which it has an agreement for the agency, college or university to retain background information forms for certain students and temporary employes must, in addition to listing the names of the temporary employes or students and stating that they have been screened and have no backgrounds that would bar them from the entity, is also to inform the entity of any other crime a temporary employe or student has been convicted of so that the entity can make a decision about how substantially related the conviction is to the duties the person would be performing.
- (9) **Crimes List - preface.** Three modifications are made to the first page of the Crimes List appended to ch. HFS 12: in the heading, "May 1999" is substituted for "February 1999;" the capitalized sentence beginning on the first line, "THE LIST IS NOT EXHAUSTIVE," is deleted; and a phrase, "as being in the 'substantially related' category," is replaced by "but no longer requires rehabilitation review."
- (10) **Crimes List - applicability to EMTs.** The applicability of the Crimes List to emergency medical technicians (EMTs) has been modified for purposes of the permanent rules so that it is the same as it is now for the emergency rules as amended on February 27, 1999. This is accomplished by reinserting a box in the Crimes List, after the Preface but before the Key, which states that permanent bar crimes apply to EMTs; that EMTs must demonstrate rehabilitation only where there has been a finding by an agency of abuse or neglect of a client or child or misappropriation of a client's

Senator Moen and Representative Underheim

May 12, 1999

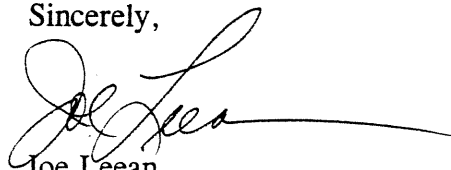
Page 4

property; and that all other criminal convictions are subject to the "substantially related" test by the agency or employer.

I am aware that the effect of making these changes to CR 98-188 (HFS 13) and CR 98-191 (HFS 12) is to extend the review periods of both committees by 10 working days, through May 26, 1999.

If you have any questions about these germane modifications to CR 98-188 and CR 98-191, you may contact Linda Dawson of the Department's Office of Legal Counsel at 266-0355.

Sincerely,

A handwritten signature in black ink, appearing to read "Joe Leean", with a long horizontal flourish extending to the right.

Joe Leean  
Secretary

Attachments



State of Wisconsin  
Department of Health and Family Services

---

Tommy G. Thompson, Governor  
Joe Lekan, Secretary

May 5, 1999

Senator Judith B. Robson  
Senate Co-Chair, Joint Committee for  
Review of Administrative Rules  
P. O. Box 7882  
Madison, WI 53707-7882

Representative Glenn Grothman  
Assembly Co-Chair, Joint Committee for  
Review of Administrative Rules  
P. O. Box 8952  
Madison, WI 53707-8952

Dear Senator Robson and Representative Grothman:

Thank you for the opportunity to appear before your committee on April 27, 1999 to request an extension of the emergency administrative rules relating to the Caregiver Background Check and Complaint Reporting and Investigation rules promulgated on October 1, 1998. During the course of our testimony, the Department expressed concerns with the Wisconsin Hospital Association proposal to change the Chapter 50 portion of the caregiver law. You asked the Department to send you a general statement of these concerns. I have attached a description of the Department's concerns, as well as background information relative to suggested new definitions of abuse and neglect, a suggested listing of offenses that would prohibit employment or licensure; the Assembly Health Committee's requests of the Department for the proposed permanent rules HFS 12 and HFS 13, and the Background Information Disclosure form. I would be happy to answer any questions you may have on these materials.

Sincerely,

John Kiesow  
Executive Assistant

Attachments

**I. WHA PROPOSAL: NEW OR CHANGED CHAPTER 50 PROVISIONS (5/5/99)**

WHA PROPOSAL	CONCERN	DHFS RECOMMENDATION
1. No longer requires background checks of persons who live at a covered entity but who are not clients of the entity ("non-client residents").	Access to clients by non-client residents on a regular basis provides the opportunity for a person with whom DHFS has no regulatory relationship to commit misconduct.	<b>Non-client residents</b> should have their backgrounds checked.
2. Defines "caregivers" as employees or contractors who have "significant, regular client care responsibilities."	"Significant...care responsibilities" is an unclear term; even if clarified, direct access to clients rather than some degree of "significance" of caregiving responsibilities supplies the opportunity for committing misconduct. Current rule covers employees or contractors who have "access" to clients, and "access" is defined as "direct, regular contact" with clients.	Stay with current rule language: "Caregiver" includes all <b>employees or contractors who have access; i.e., direct, regular contact</b> with clients.  Statute should grant rule making authority to DHFS to develop details of the process, including rehabilitation reviews, granting exemptions for persons who were not intended to be covered under the law, etc.
3. WHA proposal covers anyone "licensed, certified, or registered by DHFS to operate an entity."	Proposal is too broad / includes restaurant and other public health workers who have no access to vulnerable populations. Current statute covers the same entities if the entity provides " <b>direct care or treatment services to clients.</b> "	Stay with current statutory language: " <b>direct care or treatment services to clients.</b> "
5. Defines "contractor" as a caregiver "who can reasonably be said to be a surrogate for an employee, and excludes students."	"Surrogate for an employee" is undefined, and exemption for all students is too broad.  HFS 12 covers contractors who are "caregivers" who are "under the entity's control," and who have "access" to clients.	Exclude persons whose <b>sole duties are non-direct care</b> , but include persons, including students, who have both non-direct care and regular direct care duties, regardless of how "significant" those duties are.  Allow students to continue clinical experience while rehabilitation review is pending.
6. Includes " <b>personal care worker agencies</b> " and " <b>supportive home care agencies,</b> " but excludes <b>EMT's.</b>	DHFS has no regulatory authority over PCW and SHC agencies unless they are licensed as home health agencies.  In the past EMT's were asked to self-disclose criminal	Need statutory change to <b>include personal care workers and supportive home care workers</b> who are employed somewhere other than by a licensed home health agency.

**I. WHA PROPOSAL: NEW OR CHANGED CHAPTER 50 PROVISIONS (5/5/99)**

WHA PROPOSAL	CONCERN	DHFS RECOMMENDATION
	<p>histories; under the caregiver law, DHFS has found several EMT's with license-prohibitive convictions who did not disclose their backgrounds.</p> <p>HFS 12 limits PCW and SHC agencies to those also licensed as home health agencies.</p>	
<p>7. Defines "serious crime" as the crimes expressly written in current statute plus findings made by DHFS.</p>	<p>A "finding" is not a crime.</p> <p>At a minimum, offenses that prohibit employment or licensure should include serious misconduct committed against vulnerable adults and children.</p>	<p>Change "serious crime" to "serious offense." Expand prohibitive list to include offenses defined in HFS 12 as permanent bars, including abuse of vulnerable adults and crimes against children. (See attached list.)</p>
<p>8. Permits an employee to work pending receipt of the checks as long as the person is supervised.</p>	<p>Proposal has no time frame for submitting or completing checks; persons with prohibitive backgrounds could work indefinitely.</p> <p>A person's criminal history, abuse history, and license limitation history can change often; changes that would prohibit employment should affect access to clients.</p> <p>HFS 12 allows a <b>60 day provisional employment period</b> pending receipt of the checks, as long as the employee is <b>supervised</b> and the <b>disclosure form indicates eligibility</b> for work, and also requires checks to be repeated at least every four years.</p>	<p>Maintain <b>60 day provisional employment period</b> based on a "clean" disclosure form and supervision.</p>
<p>9. Eliminates as one of the background checks a check of previous license denials, revocations, or suspensions imposed by BQA.</p>	<p>Information about previous licensee performance that was poor enough to cause action against a license directly relates to protecting vulnerable clients and should be checked.</p>	<p>Continue to require and <b>report</b> via the automated Integrated Background Information System (IBIS) previous <b>licensure actions taken against licensees</b>.</p>
<p>10. Allows all employees with an offense in their background requiring</p>	<p>Persons who commit an offense serious enough to require rehabilitation approval</p>	<p>Continue requiring rehabilitation approval <b>before a new applicant</b> for work or licensure <b>can begin work</b></p>

<b>I. WHA PROPOSAL: NEW OR CHANGED CHAPTER 50 PROVISIONS (5/5/99)</b>		
<b>WHA PROPOSAL</b>	<b>CONCERN</b>	<b>DHFS RECOMMENDATION</b>
rehabilitation approval to continue working pending the rehabilitation decision, with no time frames expressed.	should not be able to work indefinitely without pursuing a rehabilitation approval, but those who have "clean" records when hired who subsequently develop unsatisfactory backgrounds should have some time to pursue a rehabilitation decision.	<p><b>and before a person newly convicted of a prohibitive offense can continue working.</b></p> <p>With the smaller number of offenses requiring rehab. review, require employer to request rehabilitation review on potential employee's behalf.</p> <p>Continue to allow persons who had an employment prohibitive offense before 10/1/98, but who were already working before 10/1/98 to continue working pending the rehabilitation decision if they file rehab. application by 10/1/99.</p>
11. Both the WHA proposal and current law require good faith efforts to check the criminal background of a person who has lived outside Wisconsin within the last three years.	Some states will not provide criminal records, and checks are only required in states where a person has admitted to living.	Allow check of National Crime Information Center (NCIC) to be acceptable for out-of-state checks. An NCIC check could find criminal records in more states than the person discloses.
12. Extends effective date for checking existing employees and contractors another year, to October 1, 2000.	Under current law, persons with already known employment prohibitive backgrounds would be able to continue working until 10/1/2000 instead of 10/1/1999. Another full year's extension would significantly undermine the purpose of the law, namely to prohibit persons with certain backgrounds from coming into contact with vulnerable persons cared for by entities.	If the caregiver statutes change significantly in removing time lines and other elements of the process for conducting background checks, extend the effective date covering "current" employees; otherwise, stay with the current full implementation date of October 1, 1999.

<b>II. CURRENT CHAPTER 50 PROVISIONS MISSING FROM WHA PROPOSAL (5/5/99)</b>		
<b>WHA PROPOSAL</b>	<b>CONCERN</b>	<b>DHFS RECOMMENDATION</b>
13. Eliminates current statute's licensure and employment prohibition for a person credentialed by DRL where DRL has limited the person's necessary credential.	If a licensed professional is prohibited from working by their own licensing agency, DHFS should support that decision.	<b>Continue current statutory prohibition of licensure or employment if a required DRL credential is limited.</b>



**II. CURRENT CHAPTER 50 PROVISIONS MISSING FROM WHA PROPOSAL  
(5/5/99)**

WHA PROPOSAL	CONCERN	DHFS RECOMMENDATION
<p>14. Eliminates all provisions relative to the <b>Background Information Disclosure (BID) Form</b>, the form itself, and the current statute's licensure and employment prohibition if the Department or an entity should have known of an unsatisfactory background.</p>	<p>The BID form is a valuable source of background information; to fail to ask an employee about his background is to ignore the most readily available source of background information, and is directly contrary to the goal of protecting vulnerable persons.</p> <p>Deleting the BID form entities to rely strictly on the admittedly incomplete information received from DOJ, without even asking the employee about their background.</p> <p>Requiring entities only to check data bases (IBIS checks), eliminates any requirement for a conviction an employee would admit to on a BID, and for any other conviction not sent to DOJ, or for convictions whose facts are not obvious on the DOJ report.</p>	<p>Continue current statutory provisions requiring the Department and entities to research an offense to the degree necessary to determine whether the offense is employment or licensure prohibitive, and the factual circumstances of any offense whose facts are not obvious from the face of the DOJ report.</p> <p><b>Continue</b> all current statutory provisions related to the <b>BID form</b>.</p>
<p>15. Deletes the exemption from background checks for <b>minors</b> whose disclosure form does not indicate ineligibility for work.</p>	<p>Except for day care providers, juvenile delinquency adjudications are confidential, so the vast majority of checks on minors would be costly while yielding no information.</p>	<p>Continue current requirement that <b>minor employees complete a BID form</b>, and continue the current exemption for minors whose BID forms show eligibility to work.</p>
<p>16. Deletes the current statute's provision that entities that fail to do the background checks, (within the specified time frames, on the right people, etc.), or the 4 year re-checks may be subject to a possible \$1,000 fine or other sanctions determined by DHFS by rule.</p>	<p>These sanctions would normally only be applied in cases of egregious failure, and should be available as one piece of an enforcement package.</p>	<p>Continue current <b>possible sanctions</b> for failure to complete required checks.</p> <p>Continue current requirement to recheck backgrounds at least every 4 years.</p>
<p>17. Deletes Chapter 227 appeal when a person is denied rehabilitation approval.</p>	<p>The consequences of having a "serious offense" in one's background are very serious. Persons who must apply for rehab. approval in order to work or be licensed should also have a due process appeal available if the Department denies approval.</p>	<p>Continue current statutory <b>Chapter 227 appeal</b> for denied rehabilitation approval.</p>
<p>18. Deletes DHFS authority</p>	<p>DHFS has insufficient funds to</p>	<p>Continue current statutory</p>

**II. CURRENT CHAPTER 50 PROVISIONS MISSING FROM WHA PROPOSAL  
(5/5/99)**

WHA PROPOSAL	CONCERN	DHFS RECOMMENDATION
to collect a fee for conducting background checks on persons seeking licensure.	absorb the costs of checking the backgrounds of the thousands of entities it regulates.	authority for DHFS to collect a fee for conducting licensure background checks.

**III. CONCERNS RELATED TO PROPOSED CHAPTER 146 CHANGES (5/5/99)**

WHA PROPOSAL	CONCERN	DHFS RECOMMENDATION
19. Defines an allegation of abuse as an accusation made by someone with <b>“direct knowledge”</b> of the alleged misconduct.	Requiring direct knowledge of an incident of misconduct is far too narrow to cover the ways abuse, neglect, or misappropriation can come to light. Some of these include coming upon an incident shortly after it occurs, learning about an incident from someone who has knowledge of the incident, observing an injury to a client, or discovering personal property of a client to be missing.	Continue following the provisions of BQA Numbered Memo 93-034, which describes incidents of misconduct that must be reported. DHFS will issue an updated version of that memo to all entities previously and newly required to report.
20. Returns to the former HSS 129 definitions of “abuse,” “neglect,” and “misappropriation,” which covered only nurse aides.	The most often expressed concern is that the current HSS 13 abuse definition is too broad because it includes any action that is contrary to facility policies and procedures, contrary to a resident’s care plan, done purposely, and that causes or could reasonably be expected to cause pain or injury.	Continue to define “abuse,” “neglect,” and “misappropriation” by rule.  Change the HFS 13 definition of “abuse” in effect as of February 27, 1999 to <b>separate definitions of “abuse” and “neglect.”</b> (See attached definitions.) <b>“Abuse”</b> would cover acts done purposely with intent to harm, harass, or intimidate a client. <b>“Neglect”</b> would focus on acts not done with intent to harm but done purposely and of significant enough recklessness or negligence to cause or reasonably be expected to cause harm.
21. Directs DHFS to report to the legislature regarding available research describing the nexus between past criminal convictions and future predicted risk to vulnerable persons.	The Department has insufficient resources to conduct what would certainly be an extensive research effort.	Statute should authorize and fund such a study by a third party, such as a college or university.

May 5, 1999

**Suggested "abuse" and "neglect" definitions:**

(1) **"Abuse"** means any of the following:

(a) **An act, or repeated acts** 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 or when not a part of the client's treatment plan, and **when done intentionally to cause harm**, 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 paragraph does not apply to permissible restraint, isolation, or confinement implemented by order of a court or other lawful authority.

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

(c) 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.

(d) 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.

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

(f) "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) **"Neglect"** means an **intentional omission or course of conduct** by a caregiver or nonclient resident that is contrary to the entity's policies and procedures or is not a part of the client's treatment plan, and that **through substantial carelessness or negligence** 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.

(b) Substantially disregards a client's rights under either 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 behavior, agitation, fear of harm or death, or a combination of these behaviors. This subdivision paragraph does not apply to permissible restraint, isolation, or confinement implemented by order of a court or other lawful authority.

(d) "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.

**“Serious Crimes” List  
Draft May 5, 1999**

<b>ALL PROGRAMS</b>		
<b>Wis. Stats.</b>	<b>Crime</b>	<b>Id'd in Stat. (S) or by Dept (D); Req'd by Federal Law for Foster Care(FF)</b>
940.01	1 <sup>st</sup> Degree Intentional Homicide	S, FF
940.225(1)	1 <sup>st</sup> Degree Sexual Assault	S, FF
940.285(2)(b)1 or 2	Abuse of Vulnerable Adults (felony)	D
940.295	Abuse/neglect of patients & residents (felony)	D
948.02(1)	1 <sup>st</sup> Degree Sexual Assault of a Child	S, FF
948.02(2)	2 <sup>nd</sup> Degree Sexual Assault of a Child (greater than 4 year age difference)	S, FF
948.025	Repeated Sexual Assault of a Child (under 13 or greater than 4 year age difference)	S, FF
948.03(2)(a)	Physical Abuse of a Child – Intentional – Cause Great Bodily Harm	D,FF
<b>FOR FOSTER CARE and PERSON'S WITH CONTACT WITH CHILDREN</b>		
346.63	Reckless Driving - cause great bodily harm (felony)	FF
940.02	1 <sup>st</sup> Degree Reckless Homicide	FF
940.03	Felony Murder	FF
940.05	2 <sup>nd</sup> Degree Intentional Homicide	FF
940.06	2 <sup>nd</sup> Degree Reckless Homicide	FF
940.08	Homicide by negligent handling of dangerous weapon, explosives or fire	FF
940.19(2)-(6)	Battery (felony) – where victim is spouse	FF
940.20	Battery – Special Circumstances – where victim is spouse	FF
940.21	Mayhem	FF
940.225(2)	2 <sup>nd</sup> Degree Sexual Assault	FF
940.225(3)	3 <sup>rd</sup> Degree Sexual Assault	FF
940.23	Reckless Injury	FF
940.305	Taking Hostages	FF
940.31	Kidnapping	FF
941.20(2) or (3)	Endangers Safety – Dangerous Weapon	FF
941.21	Disarming Peace Officer	FF
943.10(2)	Burglary while armed	FF
943.23(1g)(1m) or (1r)	OMVWOC	FF
943.32(2)	Robbery w/ dangerous weapon	FF
948	Any felony	FF
948.05	Sexual Exploitation of a child	D, FF
948.055	Causing a child to view or listen to sexual activity	D, FF
948.06	Incest with a Child	D, FF
948.07	Child Enticement	D, FF
948.08	Soliciting a child for prostitution	D, FF
948.11(2)(a) or (am)	Exposing child to harmful materials or harmful descriptions or narrations	D, FF
948.12	Possession of child pornography	D, FF
948.13	Child Sex Offender working with Children	D, FF
948.30	Abduction of another's child; constructive custody	D, FF



State Representative

**GREGG UNDERHEIM**

Chair: Assembly Committee on Health

Chair: Assembly Committee on State & Federal Relations

P.O. Box 8953 • State Capitol  
Madison, WI 53708-8953  
(608) 266-2254

April 14, 1999

Rep.Underheim@legis.state.wi.us

Joe Leean, Secretary  
Department of Health and Family Services  
1 W. Wilson St., Room 650  
Madison, WI 53703

Message Hotline:  
1 (800) 362-9472  
TDD: 1 (800) 228-2115

1652 Beech Street  
Oshkosh, WI 54901  
(414) 233-1082

Dear Secretary Leean:

I am writing to inform you that the Assembly Committee on Health took executive action on April 13, 1999 on Clearinghouse Rules 98-188 and 98-191, which relate to caregiver background checks and investigations of abuse, neglect and misappropriation of property. The Committee approved a motion to request the Department to modify those rules. Among the modifications the Department should consider is a reevaluation of inclusion of persons convicted of murder, sexual assault or sexual exploitation in the bar with rehabilitation list and the Department should consider stricter limitations on those persons. This would be among the modifications that the Department should consider and it is my hope that you work with the Committee in developing modifications to the proposed rules.

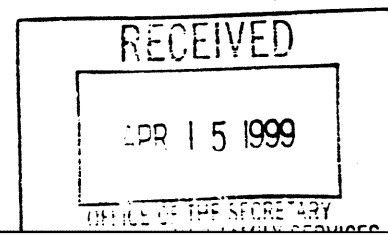
Since the Committee's jurisdiction over the rules ends on April 21, 1999, the Committee needs an agreement from the Department by that date that the Department will modify the rules. The nature of the modifications and the actual language of the modifications can be specified at a later time.

Thank you for your attention to this matter. I look forward to your response.

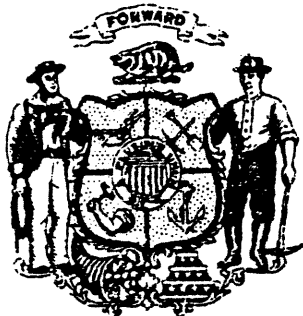
Sincerely,

  
GREGG UNDERHEIM  
Chair  
Assembly Committee on Health

GU/sjl  
cc: Members of the Assembly Committee on Health



WISCONSIN  
STATE  
ASSEMBLY



**SHELDON  
WASSERMAN**  
STATE REPRESENTATIVE

April 7, 1999

Representative Gregg Underheim, Chair  
Assembly Committee on Health  
Room 11-North, State Capitol  
Interdepartmental mail

Dear Gregg:

Per your request, I have reviewed the criminal background check rules that were referred to the Health Committee. It is my opinion that, in addition to those already specified by rule, a permanent bar should also be instituted for all programs under HFS 12 for all classifications of these crimes:

Chapter 940 Crimes Against Life and Bodily Security

1. first degree reckless homicide
2. felony murder
3. second degree intentional homicide
4. sexual exploitation by therapist--sexual contact
5. second degree sexual assault
6. third degree sexual assault

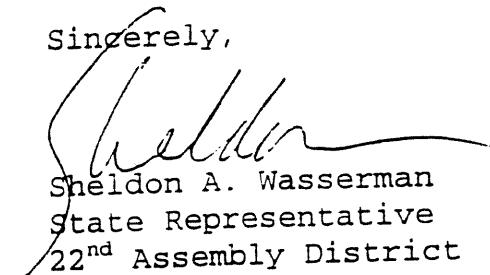
Chapter 948 Crimes Against Children

1. second degree sexual assault of a child
2. sexual intercourse with a child age 16 or older

I would be willing to entertain some exceptions for those facilities that agree to accept full liability for employing anyone who falls under the permanent bar category.

Thank you for seeking my input. Please contact me with any questions.

Sincerely,

  
Sheldon A. Wasserman  
State Representative  
22<sup>nd</sup> Assembly District

SW/so

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## BACKGROUND INFORMATION DISCLOSURE INSTRUCTIONS

The Background Information Disclosure form (HFS64) gathers information as required by the Wisconsin Caregiver Background Check Law to help employers and governmental regulatory agencies make employment, contract, residency, and regulatory decisions. Complete and return the entire form and attach explanations as specified by employer or governmental regulatory agency.

### CAREGIVER BACKGROUND CHECK LAW

In accordance with the provisions of sections 48.685 and 50.065 of the Wisconsin Statutes, for persons who have been convicted of or have charges pending or have committed certain acts, crimes or offenses:

1. The Department of Health and Family Services (DHFS) may not license, certify or register the person or entity (Note: Employers and Care Providers are referred to as "entities");
2. A county agency may not certify a day care or license a foster or treatment foster home;
3. A child placing agency may not license a foster or treatment foster home or contract with an adoptive parent applicant for a child adoption;
4. A school board may not contract with a licensed day care provider; and
5. An entity may not employ, contract with or permit persons to reside at the entity.

A list of barred acts, crimes and offenses is available from the regulatory agencies or through the Internet at [www.dhfs.state.wi.us](http://www.dhfs.state.wi.us) clicking on the Background Check quick link.

### THE NEW LAW COVERS THE FOLLOWING EMPLOYERS / CARE PROVIDERS (REFERRED TO AS "ENTITIES")

Programs Regulated Under Chapter 48 of Wisconsin Statute	Treatment Foster Care, Family Day Care Centers, Group Day Care Centers, Child Caring Institutions, Child Placing Agencies, Day Camps for Children, Family Foster Homes for children, Group Homes for Children, Shelter Care Facilities for Children, and Certified Family Day Care.
Programs Regulated Under Chapters 50, 51, and 146 of Wisconsin Statute	Emergency Mental Health Service Programs, Mental Health Day Treatment Services for Children, Community Mental Health, Developmental Disabilities, AODA Services, Community Support Program, Community Based Residential Facilities, 3-4 Bed Adult Family Homes, Residential Care Apartment Complexes, Ambulance Service Providers, EMTs – Basic, Intermediate, and Paramedic, First Responders – Defibrillation, Hospitals, Rural Medical Centers, Hospices, Nursing Homes, Facilities for the Developmentally Disabled, and Home Health Agencies – including those that provide personal care services.
Others	Day Care Providers contracted through Local School Boards

### THE NEW LAW COVERS THE FOLLOWING PERSONS

- Anyone employed by or contracting with a covered entity who has access to the clients served, except if the access is infrequent or sporadic and service is not directly related to care of the client.
- Anyone who is a Day Care Provider who contracts with a School Board under Wisconsin Statute 120.13 (14).
- Anyone who lives on the premises of a covered entity and is 12 years old or over, but is not a client.
- Anyone who is licensed by DHFS.
- Anyone who has a foster home licensed by DHFS.
- Anyone certified by DHFS.
- Anyone who is a Day Care Provider certified by a county department.
- Anyone registered by DHFS.
- Anyone who is a board member or corporate officer who has access to the clients served.

### FAIR EMPLOYMENT ACT

Wisconsin's Fair Employment Law, ss. 111.31-111.395, Wisconsin Statutes, prohibits discrimination because of a criminal record or pending charge, unless the record or charge is substantially related to the circumstances of the particular job or licensed activity.

**PERSONALLY IDENTIFIABLE INFORMATION:** This information is used to obtain relevant data as required by the provisions set forth by the Wisconsin Caregiver Background Check Law. Providing your social security number is voluntary, however your social security number is one of the unique identifiers used to prevent incorrect matches. For example, the Department of Justice uses social security numbers, names, gender, race, and date of birth to prevent incorrect matches of persons with criminal convictions. The Department of Health and Family Services' Careworker Registry uses social security numbers as one identifier to prevent incorrect matches of persons with findings of resident abuse or neglect or misappropriation of a resident's property.



## BACKGROUND INFORMATION DISCLOSURE

Completion of this form is required under the provisions of sections 48.685 and 50.065 of the Wisconsin Statutes. Failure to comply may result in a denial or revocation of your license, certification or registration; or denial or termination of your employment or contract.

**Please print your answers.**

Check the box that applies to you.

- |   |   |
|---|---|
| <input type="checkbox"/> Employee / Contractor (Including new applicant)<br><input type="checkbox"/> Applicant for a license or certification or registration (including continuation or renewal) | <input type="checkbox"/> Household member/lives on premises - but not a client<br><input type="checkbox"/> Other – specify: |
|---|---|

Name - First and Middle	Name - Last	Position Title (Complete only if you are a prospective employee or contractor, or a current employee or contractor.)		
Any other names by which you have been known (including maiden name)		Birthdate	Gender (M/F)	Race
Address			Social Security Number(s)	
Business Name and Address of Employer or Care Provider (Entity)				

Section A - ACTS, CRIMES AND OFFENSES THAT MAY ACT AS A BAR OR RESTRICTION	YES	NO
1. Do you have <u>criminal charges pending</u> against you or were you <u>ever convicted of any crime</u> anywhere, including in federal, state, local and tribal courts? ➤ If <b>Yes</b> , list each crime, when it occurred or the date of the conviction, and the city and state where the court is located. You may be asked to supply additional information including a certified copy of the judgement of conviction, a copy of the criminal complaint, or any other relevant court or police documents.		
2. Were you <u>ever found to be (adjudicated) delinquent</u> by a court of law on or after your 12 <sup>th</sup> birthday for a crime or offense? (NOTE: A response to this question is <u>only</u> required for group and family day care centers for children and day camps for children.) ➤ If <b>Yes</b> , list each crime, when and where it happened, and the location of the court (city and state). You may be asked to supply additional information including a certified copy of the delinquency petition, the delinquency adjudication, or any other relevant court or police documents.		
3. Has any government or regulatory agency (other than the police) ever found that you <u>committed child abuse or neglect</u> ? ➤ If <b>Yes</b> , explain, including when and where it happened.		
4. Has any government or regulatory agency (other than the police) ever found that you <u>abused or neglected any person or client</u> ? ➤ If <b>Yes</b> , explain, including when and where it happened.		
5. Has any government or regulatory agency (other than the police) ever found that you <u>misappropriated (improperly took or used) the property of a person or client</u> ? ➤ If <b>Yes</b> , explain, including when and where it happened.		
6. Has any government or regulatory agency (other than the police) ever found that you <u>abused an elderly person</u> ? ➤ If <b>Yes</b> , explain, including when and where it happened.		
7. Do you have a government issued credential that is not current or is limited so as to restrict you from providing care to clients? ➤ If <b>Yes</b> , explain, including credential name, limitations or restrictions, and time period.		

(Continued on next page)

Section B – OTHER REQUIRED INFORMATION	YES	NO
1. Has any government or regulatory agency ever limited, denied or revoked your license, certification or registration to provide care, treatment or educational services? ➤ If Yes, explain, including when and where it happened.		
2. Has any government or regulatory agency ever denied you permission or restricted your ability to live on the premises of a care providing facility? ➤ If Yes, explain, including when and where it happened and the reason.		
3. In the past 3 years, have you been discharged from a branch of the US armed forces, including any reserve component? ➤ If Yes, attach a copy of your discharge papers (DD214).		
4. Have you resided outside of Wisconsin in the last 3 years? ➤ If Yes, list each state and the dates you lived there.		
5. Have you had a caregiver background check done within the last 4 years? ➤ If Yes, list the date of each check, and the name, address and phone number of the person, facility or government agency that conducted each check.		
6. Have you ever requested a rehabilitation review with the Wisconsin Department of Health and Family Services, a county department, a private child placing agency, school board, or DHFS designated tribe? ➤ If Yes, list the review date and the review result. You may be asked to provide a copy of the review decision.		

A "NO" answer to all questions does not guarantee employment, residency, a contract or regulatory approval.

I understand, under penalty of law, that the information provided above is truthful and accurate to the best of my knowledge and that knowingly and intentionally providing false information or omitting information may result in a forfeiture of up to \$1000.00 and other sanctions as provided in HFS 12.20 (1) (c), Wis. Adm. Code.

YOUR SIGNATURE	Date Signed
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# FAX

## Cover Sheet

Date: 5-25-99

To: Cory Mason

From: Tim Hartin

Subject: Background Check Draft

Number of pages (includes this cover sheet): 10

Check if urgent  Reply deadline:

Message:



Wisconsin Health &  
Hospital Association

5721 Odana Road  
Madison, WI  
53719-1289

608/274-1820

FAX: 608/274-8554

<http://www.wha.org>

The information in this FAX is intended for the use of the individual or organization to which it is addressed. If you have received this communication in error, please notify Wisconsin Health & Hospital Association by telephone and return the original message to us by mail. Our address and telephone number are to the left. Thank you.

## Chair

George L. Johnson  
Reedsburg

## Chair-Elect

William D. Petasnick  
Milwaukee

## Immediate Past Chair


Mark V. Knight  
Milwaukee

## President/CEO

Robert C. Taylor

May 24, 1999

TO: Interested Parties

FROM: Tim Hartin, General Counsel 

SUBJECT: Background Check Draft

Attached is the latest draft of the background check proposal, redlined against the May 7 draft, reflecting changes from the May 20 meeting between Scott Peterson and Tim Hartin of WHA and Sue Dow and John Kiesow of DHFS, as well as changes from various conversations with coalition members. Significant changes and outstanding issues include the following:<sup>1</sup>

1. The caregiver definition is still under discussion, with the two contending models being a contact- or access-based definition and a client care-based definition. Note that the current draft makes clear that, where a corporate entity is licensed by DHFS, the background check requirement does not include the officers, directors, members, or shareholders of the corporate person.
2. The contractor definition has been further refined to include implied contracts, subcontractors, and agents of contractors. Students are still excluded, although DHFS wants them included.
3. Personal care workers and supportive home care agencies have been added back to the definition of entity. Their deletion in the last draft was due to a misunderstanding on my part.
4. The 9 additional Chapter 148 offenses identified by DHFS have been added to the crimes list for discussion purposes.
5. The background check cycle has been changed from 5 years to 4 years to better synchronize with the 2 year licensing cycle.
6. The provisional employment period pending receipt of the background check has been refined to allow employment of employees and caregivers with clean BIDs, provided that they provide client care only under supervision. The 60 day cap was put back on this period to give a deadline to employers for ordering and reviewing the background

<sup>1</sup> There are a number of purely technical changes as well that are not highlighted or discussed in this memo, but are redlined.



Wisconsin Health &  
Hospital Association, Inc.

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check. With this 60 day cap, the earlier language requiring that the background check be ordered as soon as reasonably possible was deleted.

7. The record-keeping requirement has been amended to require that entities can either retain the information or leave it with a third party, provided that they have access to it upon two days notice. The access standard provides maximum flexibility to allow schools, temp agencies, corporate parents or affiliates, and/or third-party vendors to accumulate and maintain the information, so long as it is available to the employer "entity" for the necessary employment decision-making. Whether an entity has the required agreement and access should be easy to audit for regulatory compliance purposes.
8. Coalition members have asked that the requirement that a rehab review application be sponsored by an employer be dropped, while DHFS has floated the idea of expanding this requirement to allow community organizations (or members?) to sponsor the request.
9. The requirement that a person have a clean record for the past 5 years in order to continue working while their rehab request is being processed has been dropped. The grandfather clause for current employees undergoing rehabilitation review is intended to mirror the current arrangement.
10. A new paragraph was added to make clear that the employment bar applies to all persons as soon as the conviction shows up in the background check materials provided to the employer. This was added to clear up a potential technical problem that might have inadvertently excluded post October 1998 convictions for some people.
11. This new paragraph makes clear that the applicable standard is a "document review" standard, not a "should have known" standard as preferred by DHFS.
12. Coalition members requested that references to the NCIC be dropped.
13. The effective dates are open for discussion.
14. The allegation definition has had references to credibility dropped.
15. The abuse and neglect definitions are open for discussion.

**Proposed Background Check and  
Abuse Reporting Reform**

May ~~7~~24, 1999

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Repeal current background check statute (at 50.065) and replace with:

Section 50.065

(1) In this section:

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

(b) "Caregiver" means:

1. A person who is or is expected to be an employe or contractor of an entity and who is expected to provide direct client care as a regular part of their duties for such entity, and who is not licensed, certified or registered by the Department of Health and Family Services under (1)(b)2.; or
2. A person who has or is actively seeking a license, certification or registration to operate an entity from the Department of Health and Family Services. This shall not apply to officers, directors, members or shareholders of a corporate person.
3. Clerical, administrative, maintenance, dietary, and other support workers whose duties for an entity do not include direct and regular client care are not caregivers.

(c) "Contractor" or prospective contractor, means, with respect to an entity, a person who ~~has provides services to such entity under a n-express contract or sub-contract with the entity, or an agent of such person.~~ A caregiver person with admitting privileges at an entity shall be deemed a contractor of that entity for purposes of this definition. Students fulfilling educational requirements are not contractors for purposes of this definition.

(d) "Entity" means a facility, organization or service that is licensed or certified by or registered with the Department of Health and Family Services to provide direct care or treatment services to clients. "Entity" includes a hospital, a personal care worker agency, a supportive home care service agency, or any other agency which contracts with a county to provide services under ss. 46.27(7), 46.27(11), 46.275, 46.277, or 46.278. "Entity" does not include any of the following:

1. Licensed or certified child care under ch. 48.
2. Kinship care under s. 48.57 (3m) or long-term kinship care s. 48.57(3n).

Background Check and  
Abuse Reporting Reform  
May 24, 1999  
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3. A person certified as a medical assistance provider, as defined in s. 49.43 (10), who is not otherwise approved by the Department of Health and Family Services as a hospital under s. 50.35 or licensed or certified by or registered with the Department of Health and Family Services.
  4. An entity, as defined in s. 48.685(1) (b).
  5. A public health dispensary established under s. 252.10
  6. A person certified as an emergency medical technician under s. 146.50.
- (e) "Serious offense" means the following crimes or offenses, or the equivalent crime in another state:
1. First-degree intentional homicide under s. 940.01.
  2. First degree sexual assault under s. 940.225 (1).
  3. Felony abuse of vulnerable adults under s. 940.285(2)(b)1. or 2.
  4. Felony abuse or neglect of patients or residents under s. 940.295.
  5. First degree sexual assault of a child under s. 948.02 (1).
  6. Second degree sexual assault of a child under s. 948.02 (2) if the person was, at the time of the sexual contact or sexual intercourse, more than 4 years older than the child with whom the person had the sexual contact or sexual intercourse.
  7. Repeated acts of sexual assault of the same child under s. 948.025 if the child had not attained the age of 13, or if the child had attained the age of 13 and had not attained the age of 16 and the person was, at the time of the sexual contact or sexual intercourse, more than 4 years older than the child with whom the person had the sexual contact or sexual intercourse.
  8. Intentional physical abuse of a child resulting in great bodily harm under s. 948.03(2)(a).
  9. Sexual exploitation of a child under s. 948.05.
  10. Causing a child to view or listen to sexual activity under s. 948.055.
  11. Incest with a child under s. 948.06.
  12. Child enticement unders. 948.07.

13. Soliciting a child for prostitution under s. 948.08.

14. Exposing a child to harm materials or harmful descriptions or narrations under s. 938.11(2)(a) or (am).

15. Possession of child pornography under s. 948.12.

16. Child sex offender working with children under s. 948.13.

17. Abduction of another's child under s. 948.30.

9-18. A substantiated report of neglect, or abuse of a client, or misappropriation of a client's property based on information maintained by the Department of Health and Family Services.

- (2) (a) 1. An entity shall request and review the information specified under para. (2)(c) for all prospective contractors who are caregivers specified under para. 1(b)(1), for all prospective employees, and for all prospective non-client residents of the entity. ~~This information shall be requested as soon as reasonably possible for prospective contractors who are caregivers, prospective employees, and prospective non-client residents.~~ Effective [effective date for existing employees], an entity shall have requested and reviewed the information specified under para. (2)(c) for all contractors who are caregivers specified under para. 1(b)(1), for all employees, and for all non-client residents of the entity. ~~This Current background check information shall be obtained reviewed~~ at least once every four five years for existing employees, contractors who are caregivers, and non-client residents of the entity.
2. With respect to any ~~minor~~ minor under the age of eighteen whose background information disclosure form does not disclose a serious offense, an entity shall not be required to request any further background information.
3. A No-prospective employee or prospective caregiver whose background information disclosure form does not reveal any serious offenses may perform client care responsibilities under supervision for up to 60 days until the entity has received and reviewed this information pending the review and receipt of the information specified in para. 2(c).
4. An entity or contractor may provide any information that it has obtained under this paragraph ~~this information~~ to another entity that is a prospective or existing employer or contractor upon request, but if this information is more than one year old the receiving entity shall obtain current information.



Background Check and  
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May 24, 1999  
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(b) The Department of Health and Family Services shall obtain the information specified under para. (2)(c) with respect to a person specified under para. 1(b)(2) at least once every ~~five~~ four years. The Department of Health and Family Services shall provide this information to an entity that is a prospective or existing employer or contractor upon request, but if this information is more than one year old the receiving entity shall obtain current information.

(c) The Department of Health and Family Services or an entity is required to obtain and ~~keep on review~~ file the following information when conducting a background check required by para. (2)(a) or (2)(b):

1. A background information disclosure form, as provided by the Department of Health and Family Services by rule. ~~This form shall require the person completing the form to include his or her date of birth and social security number.~~
  2. A criminal history search from the records maintained by the Department of Justice.
  3. Information that is contained in the registry under s. 146.40 (4g) regarding any findings against the person.
  4. Information maintained by the Department of Regulation and Licensing regarding the status of the person's credentials, if applicable.
  5. Information maintained by the Department of Health and Family Services regarding any substantiated reports of child abuse or neglect against the person.
  6. Information maintained by the Department of Health and Family Services under this section regarding any denial to the person of a license, certification, certificate of approval or registration or of a continuation of a license, certification, certificate of approval or registration to operate under section (3)(a)1. and regarding any denial to the person of employment at, a contract with or permission to reside at an entity under section (3)(a)2.
- (3) For caregivers or non-client residents convicted of or found to have committed a serious offense or, in the case of a position for which the person must be credentialed by the Department of Regulation and Licensing, the caregiver's credential is not current or is limited so as to restrict the person from providing adequate care to a client:-
1. Notwithstanding s. 111.335, the Department of Health and Family Services shall refuse to license, certify or register, or continue to license, certify or register any such caregiver to operate an entity.

2. Notwithstanding s. 111.335, an entity shall refuse to employ or contract with or continue to employ or contract with any such caregiver, and shall refuse to allow the non-client resident to reside at the entity.
- (b) 1. Sections (3)(a) 1. and 2. may be waived by the Department of Health and Family Services for any person who demonstrates to the Department of Health and Family Services that he or she has been rehabilitated by clear and convincing evidence and in accordance with the procedures established by the Department of Health and Family Services by rule.
2. An application for a rehabilitation waiver under para. (3)(b)(1) must include a written statement of support by an entity that is the person's prospective or existing employer or contractor, or by one or more community organizations or members of the community where the person will be employed, under contract, or a non-client resident.
  3. An entity may continue to employ or contract with a person who has requested a rehabilitation waiver while the rehabilitation review is pending, provided that such person ~~has not been imprisoned or convicted of a felony within the past five years~~, has been continuously employed by or under contract with the entity since October 1, 1998, and has submitted a rehabilitation waiver request by [effective date for current employees].
  4. Any person who is permitted but fails under para. (3)(b)1. to demonstrate to the Department of Health and Family Services that he or she has been rehabilitated may appeal to the secretary of health and family services or his or her designee. Any person who is adversely affected by a decision of the secretary or his or her designee under this subsection has a right to a contested case hearing under ch. 227.
- (c) The provisions of this section (3) shall apply to any employee, contractor who is a caregiver, or non-client resident who is convicted of or found to have committed a serious offense or, in the case of a position for which the person must be credentialed by the Department of Regulation and Licensing, the caregiver's credential is not current or is limited so as to restrict the person from providing adequate care to a client, provided that such conviction, finding or credential expiration or limitation is reflected in the background check information received and reviewed by an entity or the department.
- (4) If the person who is the subject of the criminal history search under para. (2)(a) or (b) is not a resident of this state, or if at any time within the 3 years preceding the date of the search that person has not been a resident of this state, the department or entity shall make a good faith effort to obtain from any state in which the person is a resident or was a resident within the 3 years preceding the date of the search information that is equivalent of the information obtained in a criminal history search from the records maintained by the Department of

Background Check and  
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Justice. ~~A request for information from the National Crime Information Center shall be deemed a good faith effort to obtain such information from other states.~~

(5) An entity shall either retain the most current background check information that it has obtained pursuant to para. 2(a) or, when such information is retained by another person, shall have access to it within two business days of submitting a request pursuant to a written agreement with the person retaining the records.

~~(5)~~(6) These requirements shall apply to:

(a) all persons specified under para. 1(b)(2) ~~license applications or renewals submitted to DHFS~~ on or after \_\_\_\_\_.

(b) all prospective contractors who are caregivers and all prospective employees on or after \_\_\_\_\_.

(a) all existing contractors who are caregivers and all existing employees on or after {October 1, 2000} \_\_\_\_\_.

~~(6)~~(7) The Department of Health and Family Services may charge a fee for obtaining the information required under sub. (2)(b). The fee may not exceed the reasonable cost of obtaining the information. No fee may be charged to a nurse's assistant, as defined in s. 146.40 (1) (d), for obtaining or maintaining the information if to do so would be inconsistent with federal law.

(a) An entity that violates para. (2)(a)1. or (3)(a)2. may be required to forfeit not more than \$1,000 and may be subject to other sanctions specified by the Department of Health and Family Services by rule.

(b) A person who provides false information on a background information disclosure form required under para (2)(a)2. may be required to forfeit not more than \$1,000 and may be subject to other sanctions specified by the Department of Health and Family Services by rule.

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Amend the current abuse reporting statute (§ 146.40(4r)(am)1.) as follows.

(a) Except as provided in subd. 2, an entity shall report to the department any allegation of misappropriation of property or of neglect or abuse of a client by an employee or contractor of the entity.

(b) For purposes of this paragraph, "allegation" means an accusation made orally or in writing for the purpose of starting an investigation, that an employee, ~~or contractor~~ or

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non-client resident of the entity committed misappropriation of property or neglect or abuse, ~~which a reasonable and disinterested person would consider to be credible.~~

- (c) For purposes of this paragraph, "neglect or abuse" means conduct evidencing 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 reportable neglect or abuse.
- (d) For purposes of this paragraph, "contractor" shall have the meaning set forth in s. 50.065(1)(c).

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#### Nonstatutory provisions

The Department of Corrections, in conjunction with the University of Wisconsin, shall prepare a report based upon peer-reviewed and published research that details any crimes, the conviction for which are empirically correlated to an individual's propensity to commit future acts of abuse, or neglect of a client, or misappropriation of a client's property. If the report indicates that there are additional crimes which are reasonably predictive of an individual's propensity to commit future acts of abuse, neglect or misappropriation of client property, the report shall indicate such crimes, as well as the methodology utilized and the data which supports the findings. The Department of Corrections shall submit the report to the legislature in the manner provided under section 13.172(2) of the statutes no later than July 1, 2000.



WISCONSIN STATE SENATE  
**RODNEY C. MOEN**  
SENATOR – 31ST DISTRICT

Senator Judy Robson, Member  
Senate Committee on Health, Utilities  
and Veterans and Military Affairs  
Room 15 South, State Capitol

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State Capitol, P.O. Box 7882, Madison, Wisconsin 53707-7882 Phone: (608) 266-8546 Toll-free Hotline: 1-800-362-9472

**To:** Members, Senate Committee on Health, Utilities and Veterans and Military Affairs

**From:** Senator Rod Moen, Chair

**Re:** Clearinghouse Rules Relating to Caregiver Background Checks

**Date:** May 14, 1999

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Attached please find modified versions of Clearinghouse Rules 98-191 and 98-188, relating to caregiver background checks and reporting and investigation of caregiver misconduct, which were recently submitted by the Department of Health and Family Services. Also attached is a letter from Secretary Joe Leean outlining the Department's modifications to the rules.

Because standing committees have 10 working days to consider modified rules, the committee's review period over CR 98-191 and CR 98-188 ends May 26, 1999. Given this timeline, the earliest date the rules could go into effect is July 1, 1999. Unfortunately, the emergency rules will expire on June 20, 1999, meaning that there will be a lag time between the promulgation of the permanent rules and the expiration of the emergency rules.

Many people expressed concerns about caregiver background checks during the committee's public hearing on CR 98-191 and CR 98-188. However, it appears that most of the concerns relate to the statutory language passed in the budget adjustment bill last session, and cannot be addressed through the rule making process.

I believe we must move ahead with the promulgation of these rules to keep the lag time between the emergency rules and permanent rules, and the confusion that may result from it, as short as possible. If you wish to discuss this matter further, please do not hesitate to contact me.

12

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

FINDING OF EMERGENCY

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

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

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

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

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

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

### ORDER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

c. The tasks performed by the person.

d. The person's work schedule.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Evidence of successful adjustment or compliance with or proof of successful completion of parole, probation, incarceration or work release privileges.

3. Proof that the person has not had subsequent contacts with law enforcement agencies resulting in probable cause for arrest or evidence of noncompliance resulting in an investigation by any other regulatory agency.

4. Whether the person has any pending or existing arrest warrants or civil judgements or other legal enforcement actions or injunctions.

5. Aggravating or mitigating circumstances surrounding the crime, act or offense.

6. Evidence of rehabilitation, such as public or community service, volunteer work, recognition by other public or private authorities for accomplishments or efforts or attempts at resitution.

7. The amount of time that has passed between the crime, act or offense and the request for rehabilitation review.

8. Whether the person is on the sexual offender registry under s. 301.45, Stats., or under a similar authority.

9. Victim's impact statement, if appropriate.

10. Employment history, including demonstrated ability to develop positive social interaction and increased independence or autonomy of daily living and evidence of competency in position and dedication to profession.

(d) Rehabilitation review decision response. 1. a. The review panel shall meet to review and issue a written decision within 90 working days of the receipt of the requester's complete written request for rehabilitation review.

b. The review panel's decision shall be in writing and sent to the requester with a copy provided, if applicable, to the entity and, if the entity is a department-designated tribe, a copy shall also be sent to the department along with a copy of the requester's submitted application materials.

**Note:** See note under subd. 4. regarding the department's reporting form for rehabilitation decision reporting by review panels. A department-designated tribe is to send its rehabilitation decision and copies of the requester's application materials to: Office of Legal Counsel, Department of Health and Family Services, P.O. Box 7850, 1 West Wilson St., Rm 651, Madison, WI 53701-7850.



2. If the review panel finds sufficient evidence to support rehabilitation approval, the decision shall indicate, as applicable, whether the person is eligible for regulatory approval, employment, contracting or residency at an entity. The decision shall describe the scope of the rehabilitation approval with any conditions or limitations that may be prescribed, that is, whether the approval is only for certain job functions, activities or arrangements and for what type of entity or, if a regulatory approval, for what type of entity, and any conditions or limitations that may be prescribed for regulatory approval.

3. If the review panel's decision is to deny approval for the rehabilitation request, the written response shall explain the reasons for denial and inform the requester that he or she has the right to file an appeal under par. (e) on the decision as follows:

a. Any person who is permitted but fails under subd. 1., to demonstrate to the department, a department-designated tribe or a child-placing agency that he or she has been rehabilitated and should be considered eligible for regulatory approval or for employment at or contracting with an entity or residency as a nonclient at an entity, may appeal to the secretary of the department or his or her designee. Any person adversely affected by a decision of the secretary or his or her designee under this paragraph may request a contested case hearing under ch. 227, Stats.

b. Any person who is permitted but fails under subd. 1., to demonstrate to the county department that he or she has been rehabilitated and should be considered eligible for regulatory approval or for employment at or contracting with or residency as a nonclient at an entity, may appeal to the director of the county department or his or her designee. Any person who is adversely affected by a decision of the director or his or her designee under this paragraph has a right to appeal the decision under ch. 68, Stats.

c. Any person who is permitted but fails under subd. 1., to demonstrate to the school board that he or she has been rehabilitated and should be considered eligible for regulatory approval or for employment at or contracting with or residency as a nonclient at an entity, may appeal to the superintendent of public instruction or his or her designee. Any person who is adversely affected by a decision of the superintendent or his or her designee under this paragraph has a right to a contested case hearing under ch. 227, Stats.

4. If a review panel's decision is to defer a rehabilitation decision, the written decision shall indicate the reason or reasons for the deferral and the duration of the deferral may not be for longer than 6 months from the date of the deferral.

5. The review panel shall send a completed copy of the department's required reporting form regarding any rehabilitation decision to the subunit of the department responsible for collecting that information.

**Note:** Send a written rehabilitation decision to: Office of Legal Counsel, Department of Health and Family Services, P.O. Box 7850, 1 West Wilson St., Rm 651, Madison, WI 53701-7850.

6. The review panel shall maintain on file a copy of the written decision under this paragraph along with any decisions from filed appeals that may result. The agency or tribe shall maintain on file the rehabilitation review request and all materials requested in that request and any other materials or information or notes obtained as a part of the rehabilitation review decision.

(e) Appeal. 1. A person aggrieved by an agency's or tribe's decision under par. (d) that the person did not produce sufficient evidence to support rehabilitation approval may request a hearing on that decision by filing a written request for a hearing with the department of administration's division of hearings and appeals within 10 days after receiving the notice under par. (d).

2. The appellant shall bear the burden of proving by a preponderance of the evidence that the agency or tribe abused its discretion in deciding that the person did not show sufficient evidence to support rehabilitation approval.

**Note:** Submit a request for a hearing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

(4) REHABILITATION APPROVAL COMPLIANCE. (a) Approval status. A person under sub. (2) (a) who has had his or her rehabilitation review request approved under sub. (3) (d), and subsequently was, as applicable, given regulatory approval or approval to be employed at or to contract with or reside at an entity, shall comply with all conditions and limitations as may be imposed with that approval. A person who has received rehabilitation approval and fails to comply with the conditions for rehabilitation approval or who subsequently commits a crime, act or offense that is cause for a bar under s. HFS 12.10 (2) shall, as provided under par. (b), have his or her rehabilitation approval withdrawn by the approving agency or tribe.

(b) Violation of rehabilitation approval. An agency, entity or tribe aware of any person who has violated his or her rehabilitation approval for a reason under par. (a) shall inform the agency or department-designated tribe that approved the person's rehabilitation. The applicable approving agency or tribe or the department may immediately temporarily deny or rescind a rehabilitation approval of a person when the agency or tribe has knowledge that the person has done any of the following:

1. Fails to comply with or abide by the conditions or limitations of an approval granted under sub. (3) (d).