



Wisconsin Legislature  
Assembly Chamber

P.O. Box 8952  
Madison, Wisconsin 53708

February 25, 1999

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

Dear Co-Chairs and Members of the Committee:

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

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

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

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

Sincerely,

~~Peggy Kusick~~  
Peggy Kusick  
State Representative  
97<sup>th</sup> Assembly District

Gregg Underheim  
State Representative  
54<sup>th</sup> Assembly District



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PROFESSIONAL  
SOCIAL  
WORK

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



February 22, 1999

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

Dear Senator Robson:

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

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

I believe the Caregiver Background Checks are a positive move to protect those we provide services to. However, without modifications, the staffing situations facing long term care providers may be worsened due to needing to terminate "good" employees because of errors in judgement they made in the past.

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

Your interest and support on these issues is appreciated.

Sincerely,

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

Phyllis T. Williams  
Administrator

PTW/lmb

Enclosure



Tommy G. Thompson  
Governor

Joe Leean  
Secretary

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

OFFICE OF LEGAL COUNSEL

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February 24, 1999

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

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

Dear Senator Robson and Representative Grothman:

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

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

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

Sincerely,

  
Paul E. Menge  
Administrative Rules Manager

Attachment

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

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

### **HFS 12**

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

## HFS 13

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

Chair

George L. Johnson  
Reedsburg

Chair-Elect

William D. Petasnick  
Milwaukee

Immediate Past Chair

Mark V. Knight  
Milwaukee

President/CEO

Robert C. Taylor

February 24, 1999

TO: Joint Rules Committee

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

SUBJECT: HFS 12 - Background Check Emergency Rules

Hospitals and health systems are devoted to the well-being of their patients and do not want them exposed to any dangerous people, employees<sup>1</sup> or situations. They put significant resources into ensuring patient safety and well-being, from investments in their physical plant and equipment to intensive staffing patterns. While conducting a background check can provide important information, WHA does not believe that restricting the discretion of hospitals and health systems to decide who they can hire will have any appreciable impact on patient safety in the hospital environment.

Some of the difficulties posed by the current emergency rules are mitigated by the proposal before the Committee. However, we believe that these difficulties are symptoms of underlying problems with the background check statute itself. The past year has taught us many lessons about how background checks and employment mandates play out in the health care world, and the best way to put these lessons into effect is through statutory change.

The widely acknowledged need for statutory change overshadows the current rules. In the four months since the background check went into effect, we have already had one major revision to the crimes list, and we are now contemplating another major revision. The current revision will have a very short effective life, and then another revised version of the rules (in the form of permanent rules) will be adopted. At some point, the statute will probably be amended, requiring in turn another round of rule drafting. All told, we can reasonably expect the current process to result in no less than five major changes to the background check requirement in less than a year. This kind of instability is very disruptive to both hospitals and their employees.

<sup>1</sup> The term "employee" is used throughout this testimony to refer to both employees and any contractors who are covered by the background check statute or rules.



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The current draft of the rules represents a large step in the right direction. However, as outlined below, there are still significant legal and operational shortcomings, and extensive further revisions are still needed.

- **Eliminate the 18 point checklist (HFS 12.11(3)(b)) for evaluating whether something that is not a “serious crime” is nonetheless “substantially related” to the job.** The emergency rules regulate the employment decision for non-serious crimes by creating a mandate that:

“in determining whether a crime or delinquency adjudication [of a non-serious crime] is substantially related to the care of a client, the agency or entity shall consider at a minimum the following [eighteen criteria].”

The checklist is not required by the statute, and in fact goes well beyond the scope of the statute by regulating the employment decision for non-serious crimes. The “substantial relationship” concept regulated by this provision is created by Wisconsin’s fair employment law statute as an employer’s defense to a charge of employment discrimination. Wisconsin law prohibits an employer from discriminating against a person because of their criminal history.<sup>2</sup> However, “it is not employment discrimination because of arrest record” to fire or refuse to hire someone who has a conviction or a pending charge “the circumstances of which *substantially relate* to the circumstances of the particular job . . .”<sup>3</sup> (emphasis added) The concept arises only as an exception from the fair employment laws and is used only as a defense against charges of discrimination.

The background check statute says, in effect, that employers may not hire employees who have a conviction or a pending charge for certain listed “serious crimes.” It does not address in any way the hiring decision relating to crimes that are not designated as serious crimes, although it does allow DHFS to specify crimes for which “special precautionary measures” may be appropriate.

The background check statute leaves the employment decision to employer discretion, subject to the fair employment laws, on anyone who has only non-serious crimes on their record. However, HFS 12 attempts to bring that decision within the regulatory scope of DHFS by specifying “at a minimum” eighteen criteria for making that decision. We believe that HFS 12.11(3)(b) should be deleted from the rule. We do not believe that this deletion will create any gaps or cause any compliance problems.

- **Further clarification of what persons or positions are subject to the rule.** The new definitions of “caregiver,” “access,” and “under the entity’s control” go a long

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<sup>2</sup> § 111.335(1)(a), Wis. Stats.

<sup>3</sup> § 111.335(1)(b) and (c), Wis. Stats.

way toward resolving the overbreadth of the previous rules. However, additional clarification is needed to focus the extraordinary mandate imposed by this law on the appropriate class of people. We suggest that the following language be adopted to further clarify what contractors are covered by the rule:

“A person is a contractor or prospective contractor, or is under contract with, an entity only when that person can reasonably be said to be a surrogate for an employee of the entity for purposes of providing patient or client care.”

- **Withdraw the current “policy statement” on the DHFS web site extending the background check requirement to physicians with admitting privileges.** This policy statement extends the background check requirement beyond the language of either the statute or the rules. Medical staff physicians are not “under the entity’s control” in any real sense of the phrase, and are not the kind of employee-surrogate contractors intended to be covered by the statute.

Background checks on all licensed caregivers should be done at the licensing level, not at the employment level. The Department of Regulation and Licensing (DRL) already has ample authority to obtain background information, and arguably has a duty to do so in licensing caregivers, both of which are separate and independent of the background check statute. It makes no sense for DRL to state on the one hand that someone is fully qualified to be a licensed practitioner, and for DHFS to state on the other hand that they cannot practice.

- **The filing requirement needs to be more flexible to allow real-world arrangements.** The current requirement that every entity have on its premises a copy of the background file on every single employee or contractor covered by the rule is unnecessarily rigid and creates unnecessary burdens. The proposed change allowing these records to be maintained by temporary employment agencies and/or schools for their temps or students is a step in the right direction. However, the record-keeping requirement should be broadened further to allow the records to be kept by anyone, so long as the entity has access to the records and can review and copy them at any time. This will allow arrangements to evolve that are efficient and meet the need for access to information.
- **The disclaimer that the Crimes List is not exhaustive should be removed.** The introduction to the crimes list contains (in all capital letters) the statement that “THE LIST IS NOT EXHAUSTIVE.” It is not clear what it means. The published list by definition is the complete and only list of “serious crimes” that trigger the regulatory mandates. There are no other crimes that are “serious” for purposes of triggering the mandates. What does it mean to say that the regulatory list is not exhaustive? We raise the because the crimes list does create a regulatory mandate that certain persons be fired. It is disturbing to see language that creates doubt and uncertainty about when employers will be required by law to fire an employee. This statement sends a

message that the crimes list cannot be relied upon as definitive and authoritative, a message we believe is unjustified and confusing.

We do not see what purpose this statement serves, and believe that it should be removed from the rule.

- **The crimes list still needs to be significantly shortened.** The proposed crimes list represents a large first step in the right direction. In particular, we applaud the adoption of a kind of statute of limitations that requires DHFS review of crimes only for a specified period of time after conviction.

While the permanent bar list is almost down to an appropriate level, there are still too many rehabilitation review crimes. As set forth in the attached table, there are still over 40 crimes that require lifetime DHFS rehabilitation review, including a number of misdemeanors. In addition, there are over 40 additional crimes that require rehabilitation review by DHFS for varying periods of time, depending on the circumstances, including a number of misdemeanors.

The Crimes List should be further shortened based on the following general principles.

1. No misdemeanors.
2. No traffic, property, or other crimes that are not clearly and substantially related to patient care.
3. Only the most serious crimes should require rehabilitation review by DHFS.

The tables on the following pages are based upon the proposed Crimes List dated February, 1999. For purposes of analysis, the proposed list has been reorganized into

- Permanent bar crimes;
- DHFS lifetime review crimes; and
- DHFS short-term review crimes; and
- Crimes reclassified as “substantially related” crimes.

### Permanent Bar Crimes

Wis. Stats.	Crime
940.01	1 <sup>st</sup> Intentional homicide.
940.225(1)	1 <sup>st</sup> sexual assault.
940.285 (2)(b)1 or 2	Abuse of vulnerable adults. (F)
940.295	Abuse/neglect of patients & residents. (F)
948.02(1)	1 <sup>st</sup> sexual assault of a child.
948.02(2)	2 <sup>nd</sup> sexual assault of a child (certain circumstances)
948.025	Repeated acts of sexual assaults of a child (certain circumstances)
948.03(2)(a)	Physical Abuse of a child—Intentional—Cause Great Bodily Harm.

**DHFS Lifetime Review Crimes**

<b>Wis. Stats.</b>	<b>Crime</b>
940.02	1 <sup>st</sup> Reckless Homicide.
940.03	Felony Murder.
940.05	2 <sup>nd</sup> Intentional homicide.
940.06	2 <sup>nd</sup> Reckless homicide.
940.07	Homicide by negligent control of a vicious animal.
940.08	Homicide by negligent handling of dangerous weapon, explosives or fire.
940.09	Homicide by intoxicated use of vehicle or firearm.
940.12	Assisting suicide.
940.19 (2) – (6)	Battery. (F)
940.22(2)	Sexual exploitation by therapist-sexual contact.
940.22(3)	Sexual exploitation by therapist-duty to report.
940.225(2)	2 <sup>nd</sup> sexual assault.
940.225(3)	3 <sup>rd</sup> sexual assault.
940.225(3m)	4 <sup>th</sup> sexual assault.
940.285(2)(b)3, 4 or 5	Abuse of vulnerable adults. (F or M)
940.29	Abuse of residents of a penal facility.
940.295	Abuse/neglect of patients & residents. (M)
940.305	Taking hostages.
940.31	Kidnapping.
941.38	Criminal gang member solicitation and contact.
948.02(2)	2 <sup>nd</sup> sexual assault of a child.
948.02(3)	Sexual Assault of a Child-Failure to Act.
948.02(3m)	Sexual Assault of a Child-Penalty enhancement; sexual assault by certain persons.
948.025	Repeated acts of sexual assault of same child.
948.03(2)(b) or (c)	Physical Abuse of a child-Intentional-Cause Bodily Harm.
948.03(3)	Physical abuse of a child-reckless.
948.03(4)	Physical abuse of a child-failure to act.
948.04	Causing mental harm to a child.
948.05	Sexual exploitation of a child.

948.055	Causing a child to view or listen to sexual activity.
948.06	Incest with a child.
948.07	Child enticement.
948.08	Soliciting a child for prostitution.
948.10	Exposing genitals or pubic area.
948.11(2)(a) or (am)	Exposing child to harmful material or harmful descriptions or narrations. (F).
948.21(1)	Neglect a child-result in death. (F)
948.21(1)	Neglecting a child. (M)
948.30	Abduction of another's child; constructive custody.
961.455	Using a child for illegal drug distribution or manufacturing purposes.
961.46	Distribution to persons under 18. (F)
961.46	Distribution to persons under 18. (M)
961.575	Delivery of drug paraphernalia to a minor. (M)

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

FINDING OF EMERGENCY

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

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

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

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

The new ch. HFS 13 covers the structure of the misconduct part of the caregiver registry, the information included in it and release of registry information; a requirement that an entity upon learning of an incident of alleged caregiver misconduct take whatever

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

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

### ORDER

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



SECTION 1. Chapter HFS 13 is created to read:

## CHAPTER HFS 13

### REPORTING AND INVESTIGATION OF CAREGIVER MISCONDUCT

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

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

**HFS 13.02 APPLICABILITY.** This chapter applies to the department, to all specified department-licensed, certified, approved or registered entities and to all persons employed by or under contract with an entity and who have access to the entity's clients and who are under the entity's control.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

HFS 34	Emergency mental health service programs
HFS 40	Mental health day treatment services for children
HFS 61	Community mental health, alcoholism and other drug abuse (AODA) programs

HFS 63	Community support programs for chronically mentally ill persons
HSS 82	Certified adult family homes
HFS 83	Community-based residential facilities
HSS 88	Licensed adult family homes
HFS 89	Residential care apartment complexes (formerly, assisted living facilities)
HSS 110	Ambulance service providers
HFS 124	Hospitals
HFS 127	Rural medical centers
HSS 131	Hospices
HFS 132	Nursing homes
HSS 133	Home health agencies
HFS 134	Facilities for the developmentally disabled

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. The nurse aide waives a hearing to contest the listing of the finding in the registry or fails to file a timely request for a hearing under s. HFS 13.05(6)(c) after receipt of the department's notice of the department's intent to enter its findings about the nurse aide in the registry.

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

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

1. The person waives a hearing to contest the listing of the finding in the registry or fails to file a timely request for a hearing under s. HFS 13.05(6)(c) after receipt of the department's notice of the department's intent to enter its findings about the person in the registry.

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

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

- (a) The person's social security number, if available.
- (b) The person's full name, including middle initial.
- (c) The person's mailing address.
- (d) The person's date of birth.

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

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

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

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

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

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

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

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

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

(f) "Subject of the report" means the person against whom an allegation of misconduct is made or, if notice of appearance in the matter has been filed by an attorney, the attorney representing the person against whom an allegation of misconduct has been made.

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

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

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

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

(b) Entity's duty to report to the department of regulation and licensing. In addition to the reporting requirement under par. (c), an entity shall report to the department of regulation and licensing any allegation of misconduct committed by any person employed by or under contract with the entity, if the person holds a credential from the department of regulation and licensing that is related to the person's employment at, or contract with, the entity. The entity's report shall be made within 7 calendar days from the date the entity knew or should have known about the misconduct.

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

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

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

(d) Entity's duty to notify subject of the report. An entity shall notify the subject of a report under par. (a), (b) or (c) that an allegation of abuse or neglect of a client or misappropriation of a client's property has been made and that the report is being forwarded

to the appropriate authority. Notice to the subject of the report shall be given as soon as practicable, but within 7 calendar days of the entity's reporting to the appropriate authority.

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

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

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

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

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

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

1. In accordance with s. 48.981, Stats., immediately notify county authorities with reasonable particularity if the action that forms the basis for the allegation of abuse or neglect involves a victim who is a minor.
2. Immediately notify the department of regulation and licensing if the subject of the report holds a credential from the department of regulation and licensing.

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

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

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

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

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

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

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

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

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

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



- a. A brief statement regarding the nature and purpose of the investigation.
- b. The sanctions that will result if the allegation of misconduct is substantiated.
- c. A statement that if additional allegations are discovered during the course of the investigation, the additional allegations will be investigated as part of the report that is the subject of the notice.

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

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

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

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

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

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

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

registry. The notice shall also describe the consequences of entering the finding on the registry.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

e. Other parties as required by law.

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

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

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

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

SECTION 2. HSS 129.03(1) is repealed.

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

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

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

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

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

(b) A hospice that directly provides inpatient care.

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

(d) A nursing home.

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

HSS 129.03(10) "Home health agency" has the meaning specified in s. ~~141.15(1)(a)~~ 50.49(1)(a), Stats.

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

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

HSS 129.07(2)(f)2.g. To report every instance of abuse or neglect, as defined in ch. HFS 13, of a client to appropriate facility staff.

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

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

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

SECTION 9. HSS 129.10(5) and Note are repealed and recreated to read:

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

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

SECTION 10. HSS 129.11 is repealed.

SECTION 11. HSS 129.12(2) is amended to read:

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

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

The rules contained in this order shall take effect as emergency rules on October 1, 1998.

Date: September 25, 1998

Wisconsin Department of Health and Family Services

By: 

Joe Lelan  
Secretary

SEAL:

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

**FISCAL ESTIMATE**

DOA-2048 N(R10/96)

- ORIGINAL       UPDATED  
 CORRECTED       SUPPLEMENTAL

**Subject**

**REPORTING AND INVESTIGATION OF CAREGIVER MISCONDUCT**

**Fiscal Effect**

State:  No State Fiscal Effect

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

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

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

Decrease Costs

Local:  No local government costs

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

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

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

**Fund Sources Affected**

- GPR     FED     PRO     PRS     SEG     SEG-S

**Affected Ch. 20 Appropriations**

**Assumptions Used in Arriving at Fiscal Estimate**

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

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

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

**Long-Range Fiscal Implications**

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

H&FS/Larry Hartzke, 267-2943

Authorized Signature/Telephone No.

Richard W. Lorang, 266-9622

Date

7.25.98

ORDER OF THE  
DEPARTMENT OF HEALTH AND FAMILY SERVICES  
REPEALING AND RECREATING RULES

FINDING OF EMERGENCY

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

Since October 1, 1998, the Department has been implementing statutes that became effective on that date that require use of uniform procedures to check the backgrounds of persons who apply to the Department, to a county social services or human services department that licenses foster homes for children and carries out adoption home studies, to a private child-placing agency that does the same or to a school board that contracts for day care programs, to provide care or treatment to persons who need that care or treatment, or who apply to a regulated entity to be hired or contracted with to provide services to the entity's clients or who propose to reside as a non-client at the entity. The statutes, ss. 48.685 and 50.065, Stats., direct the regulatory agencies and regulated entities to bar persons, temporarily or permanently, depending on the conviction, finding or charge, who have in their backgrounds a specified conviction, finding or charge substantially related to the care of clients, from operating a service provider organization, providing care or treatment to persons who need that care or treatment or otherwise having contact with the clients of a service provider.

The new statutes, commonly referred to as the Caregiver Law, were effective on October 1, 1998, for applicants on or after that date for licensure, certification or other agency approval, and for persons applying to be hired by or to enter into a contract with a regulated entity on or after that date to provide services to clients or to take up residence as a non-client at a regulated entity.

For regulated agencies approved before October 1, 1998, and for persons employed by, under contract to or residing as non-clients at regulated entities before October 1, 1998, the Caregiver Law's required uniform procedures and "bars" are to apply beginning on October 1, 1999. That is to say, by October 1, 1999, background checks, using the uniform procedures, are to be completed for all service providers who were approved before October 1, 1998, and for all employes, contractors and non-client residents employed by, under contract to or living at a regulated entity before October 1, 1998, and action taken to withdraw approval, terminate employment or end a contract, as appropriate.

To implement the new Caregiver Law, the Department on October 1, 1998, published administrative rules, ch. HFS 12, Wis. Adm. Code, by emergency order.



Chapter HFS 12 included an appendix which consisted of a list of crimes. The original list specified 159 crimes for conviction of any one of which a person would be barred permanently (45 crimes), all programs, or would be barred temporarily, all programs, pending demonstration of rehabilitation, from being approved to be a service provider or from providing care or treatment to clients or otherwise having access to clients. The October 1998 emergency rules were modified in December 1998 and February 1999 by emergency order, and were replaced by permanent rules effective July 1, 1999. The Crimes List in the current permanent rules specifies 117 crimes with 9 being permanent bar crimes for all programs.

This order again modifies ch. HFS 12, but only the Crimes List and not the text of the chapter. The number of specified crimes is reduced to 79, with 6 of them, all taken from ss. 48.685 and 50.065, Stats., being permanent bar crimes for all programs. The change to the ch. HFS 12 Crimes List is being made at this time because the 1999-2001 Budget Bill, now before the Legislature but not likely to take effect before October 1, 1999, is expected to provide for a more modest Crimes List than the one now appended to ch. HFS 12. This means that the Legislature intends that some persons who under the current rules would lose their jobs effective October 1, 1999, will be able to keep their jobs. The Department has the authority to further modify the Crimes List so that it corresponds to how the Legislature, after having heard arguments since October 1998 about how the Caregiver Law should be amended and implemented, wants it to work. This is what the Department is doing through this order.

### ORDER

Pursuant to authority vested in the Department of Health and Family Services by ss. 48.685 (5) and (7) (a) and 50.065 (5) and (7) (a), 1997-98 Stats., and 227.11 (2), Stats., the Department of Health and Family Services hereby creates rules interpreting ss. 48.685 and 50.065, 1997-98 Stats., as follows:

SECTION 1. Appendix A of chapter HFS 12 is repealed and recreated to read:

## Chapter HFS 12

### APPENDIX A -- CRIMES LIST SEPTEMBER 1999

This document contains a list of Wisconsin crimes current as of September 3, 1999. The statute numbers have been provided on this table for ease in identifying crimes. Unless otherwise indicated, the crimes listed have been determined by the Department of Health and Family Services to be "substantially related" to positions covered by the Caregiver Law, ss. 48.685 and 50.065, Wis. Stats.

Crimes also charged under ch. 939, Wis. Stats., are to be treated as provided for the companion crime, unless otherwise indicated. For example, ss. 939.05, 940.19(2) (Party to the Crime, Battery) would be in the "bar with rehab" category because the list provides that felony battery is in that category. However, ss. 939.32, 940.01 (Attempted 1<sup>st</sup> Degree Intentional Homicide) would be in the "bar with rehab" category rather than in the "permanent bar" category because there is a special condition or comment that so indicates.

If a person has been convicted of a crime in another state or jurisdiction, the entity or regulatory agency must locate on the table below the Wisconsin crime which is identical or most similar to the crime for which the person was convicted and apply the consequence identified. This instruction also applies if the person was convicted in Wisconsin but the statute number or crime title has been changed or amended.

Notwithstanding s. 111.335, Wis. Stats., ss. 48.685(5m) and 50.065(5m), Wis. Stats., permit a regulatory agency to deny regulatory approval or an entity to refuse to employ, contract with or permit to reside at the entity a person whom the regulatory agency or entity determines has been convicted of a crime that is "substantially related" to the care of a client. The agency or entity may review a conviction to make that determination when: (a) The person has been convicted in Wisconsin or another state or jurisdiction of any crime that is not listed in this appendix; or (b) The person has been convicted of a crime that is listed in this appendix but no longer requires rehabilitation review.

Under the Caregiver Law, other acts or offenses may carry regulatory or employment consequences. Persons with findings by a governmental agency of neglect or abuse of a client, or misappropriation of a client's property; persons with findings by a governmental agency of child abuse or neglect; and persons with current limitations on their professional credentials must demonstrate to the regulatory agency that they are rehabilitated.

#### KEY

**Shaded cell** = Bar or limitation applies to all programs and entities.

**FC** = Foster Care By federal law, conviction acts as bar for Foster Homes/Treatment Foster Homes, as follows:  
FC = Conviction acts as permanent bar.  
FC - spouse = Permanent bar applies when spouse was the victim in the offense.  
FC - 5 years = Bar is for 5 years from time crime committed, then must show rehabilitation.  
FC - spouse / 5 years = Bar is permanent when spouse was the victim, and in other cases bar is for 5 years from time crime committed and then must show rehabilitation.

\*1 = "Bar w/ rehab" if the entity serves any clients who are under the age of 18.

\*2 = "Bar w/ rehab" if conviction is for attempted crime (s. 939.32, Wis. Stats.).

**Chapter 346  
Rules of the Road**

Wis. Stats.	Crime	Permanent Bar	Bar w/ rehab.	Federal Law / Foster Care
346.62(4)	Reckless driving - cause great bodily harm (felony)			FC

**Chapter 940  
Crimes Against Life and Bodily Security**

Wis. Stats.	Crime	Permanent Bar	Bar w/ rehab.	Federal Law / Foster Care
940.01	1 <sup>st</sup> ° Intentional homicide		*2	
940.02	1 <sup>st</sup> ° Reckless homicide			FC
940.03	Felony murder			FC
940.05	2 <sup>nd</sup> ° Intentional homicide			FC
940.06	2 <sup>nd</sup> ° Reckless homicide			FC
940.08	Homicide by negligent handling of dangerous weapon, explosives or fire			FC
940.12	Assisting suicide			
940.19 (2) - (6)	Battery			FC- spouse / 5 years
940.20	Battery - special circumstances			FC - spouse
940.203	Battery or threat to judge			FC - 5 years
940.205	Battery or threat to a Department of Revenue employe			FC - 5 years
940.207	Battery or threat to a Department of Commerce or DIHLR employe			FC - 5 years
940.21	Mayhem			FC
940.22(2)	Sexual exploitation by therapist - sexual contact			
940.22(3)	Sexual exploitation by therapist - duty to report			

940.225(1)	1 <sup>st</sup> ° sexual assault		*2	
940.225(2)	2 <sup>nd</sup> ° sexual assault			FC
940.225(3)	3 <sup>rd</sup> ° sexual assault			FC
940.23	Reckless injury			FC
940.285 (2)(b)1 or 2	Abuse of vulnerable adults (felony)			
940.285 (2)(b)3, 4, or 5	Abuse of vulnerable adults (felony or misdemeanor)			
940.29	Abuse of residents of a penal facility			
940.295	Abuse/neglect of patients & residents (felony)			
940.295	Abuse/neglect of patients & residents (misdemeanor)			
940.305	Taking hostages			FC
940.31	Kidnapping			FC

**Chapter 941  
Crimes Against Public Health and Safety**

Wis. Stats.	Crime	Permanent Bar	Bar w/ rehab.	Federal Law/ Foster Care
941.20(2) or (3)	Endangers safety by use of a dangerous weapon			FC
941.21	Disarming a peace officer			FC

**Chapter 943  
Crimes Against Property**

Wis. Stats.	Crime	Permanent Bar	Bar w/ rehab.	Federal Law/ Foster Care
943.10 (2)	Burglary while armed			FC
943.23(1g), (1m) or (1r)	Operating motor vehicle without owner's consent (OMVWOC)			FC
943.32 (2)	Robbery w/ dangerous weapon			FC

## Chapter 948 Crimes Against Children

Wis. Stats.	Crime	Permanent Bar	Bar w/ rehab.	Federal Law/ Foster Care
948.02(1)	1st° sexual assault of a child		*2	
948.02(2)	2nd° sexual assault of a child		*1	FC
	<ul style="list-style-type: none"> <li>• If person was, at the time of assault, more than 4 years older than the child</li> </ul>		*2	
948.02(3)	Sexual assault of a child – failure to act			FC
948.02(3m)	Sexual assault of a child – penalty enhancement; sexual assault by certain persons			FC
948.025	Repeated acts of sexual assault of same child			FC
	<ul style="list-style-type: none"> <li>• If child has not attained the age of 13</li> </ul>		*2	
	<ul style="list-style-type: none"> <li>• If child was over 13 but under 16 and the person was more than 4 years older</li> </ul>		*2	
948.03(2)(a)	Physical abuse of a child – intentional – cause great bodily harm			FC
948.03(2)(b) or (c)	Physical abuse of a child – intentional – cause bodily harm		*1	FC
948.03(3)	Physical abuse of a child – reckless			FC
948.03(4)	Physical abuse of a child – failure to act			FC
948.04	Causing mental harm to a child			FC
948.05	Sexual exploitation of a child		*1	FC
948.055	Causing a child to view or listen to sexual activity		*1	FC
948.06	Incest with a child		*1	FC
948.07	Child enticement		*1	FC
948.08	Soliciting a child for prostitution		*1	FC
948.095	Sexual assault of student by school staff			FC
948.11(2)(a) or (am)	Exposing child to harmful material or harmful descriptions or narrations (felony)		*1	FC

948.12	Possession of child pornography		*1	FC
948.13	Child sex offender working with children		*1	FC
948.20	Abandonment of a child			FC
948.21(1)	Neglect of a child - result in death (felony)		*1	FC
948.22	Failure to support (felony)			FC
948.23	Concealing death of child			FC
948.24	Unauthorized placement for adoption			FC
948.30	Abduction of another's child; constructive custody		*1	FC
948.31	Interference with custody by parent or others			FC
948.35	Solicitation of a child to commit a felony			FC
948.36	Use of a child to commit a class A felony			FC
948.40	Contributing to the delinquency of a minor (felony)			FC
948.51	Hazing (felony)			FC
948.60	Possession of a dangerous weapon by a person under 18 (felony)			FC
948.605(3)	Gun-free school zones; Discharge of firearm in a school zone (felony)			FC
948.61	Dangerous weapons other than firearms on school premises (felony)			FC
948.62	Receiving stolen property from a child (felony)			FC
All other ch. 948 crimes that are felonies				FC

**Chapter 961**  
**Uniform Controlled Substances Act**  
(NOTE: Previously Chapter 161)

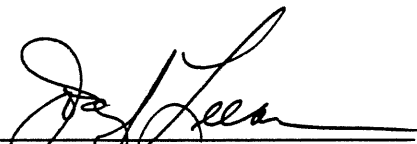
Wis. Stats.	Crime	Permanent Bar	Bar w/ rehab.	Federal Law/ Foster Care
961.41(1)	Manufacture, distribution or delivery (felony)			FC- 5 years
961.41 (1m)	Possession with intent to manufacture, distribute, or deliver (felony)			FC- 5 years
961.41 (3g)	Possession (felony)			FC- 5 years

961.43 (1)(a)	Acquire or obtain possession of controlled substances by fraud, misrepresentation, or forgery, deception, or subterfuge (felony)			FC- 5 years
961.43 (1)(b)	To possess/make a counterfeit substance or to duplicate the appearance, packaging, form or label of a controlled substance (felony)			FC- 5 years
961.455	Using a child for illegal drug distribution or manufacturing purposes (felony)			FC- 5 years
961.46	Distribution to persons under 18 (felony)			FC- 5 years
961.465	Distribution to prisoners			FC- 5 years
961.49	Distribution of or possession with intent to deliver at or near certain places			FC- 5 years
961.492	Distribution of or possession with intent to deliver on public transit (felony)			FC- 5 years
All other ch. 961 offenses that are felonies				FC- 5 years

The rules contained in this order shall take effect as emergency rules upon publication in the official state newspaper as provided in s. 227.24 (1) (c), Stats.

Wisconsin Department of Health and  
Family Services

Dated: **September 10, 1999**

By:   
\_\_\_\_\_  
Joseph Lee  
Secretary

SEAL:



FISCAL ESTIMATE FORM

1999 Session

- ORIGINAL
- CORRECTED
- UPDATED
- SUPPLEMENTAL

LRB #

INTRODUCTION #

Admin. Rule # HFS 12

Subject

CAREGIVER BACKGROUND CHECKS: AMENDMENTS TO THE CRIMES LIST

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

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

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

Local:  No local government costs

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

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

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

Fund Sources Affected

- GPR  FED  PRO  PRS  SEG  SEG-S

Affected Ch. 20 Appropriations

Assumptions Used in Arriving at Fiscal Estimate:

This order revises the list of crimes appended to the ch. HFS 12 permanent rules that were effective on July 1, 1999 and that replaced emergency rules first published on October 1, 1998 to implement the Caregiver Law, ss. 48.685 and 50.065, Stats.

The Caregiver Law requires the Department in its regulatory activities, county social service and human service departments and private child-placing agencies that license foster care providers and approve adoptive family homes and school boards that contract for day care services to do the following: (1) use uniform procedures to check the backgrounds of persons approved, hired or contracted with to provide care or treatment to persons who need the care or treatment or who will otherwise have access to those persons, and (2) bar, permanently or temporarily, persons from providing services to clients or from residing at a regulated entity who have in their backgrounds a specified conviction, finding or charge substantially related to the care of clients.

Chapter HFS 12 was effective on October 1, 1998 for persons who were seeking regulatory approval, applying for employment or for a contract with a regulated entity or proposing to reside as a non-client at a regulated entity on or after that date. Chapter HFS 12 will be effective October 1, 1999 for persons who before October 1, 1998 had regulatory approval, were employed by or under contract to a regulated entity or resided as a non-client at a regulated entity.

The Crimes List is revised to reduce the number of specified crimes from 119 to 79 and the number of crimes from 9 to 6 for which a conviction would permanently bar a person, for all programs, from receiving regulatory approval or being hired or contracted with to provide services to clients or to reside at a regulated entity.

The effect of this order should be some reduction in the number of rehabilitation review requests received by the Department, counties and school boards to review and process. However, it is not possible to accurately estimate the number of requests that will be received and what this means for workload and staffing needs of the Department and local units of government. In any case, the substantial new workload involved for the Department, counties and some school boards in implementing the caregiver background check requirements is the result of ss. 48.685 and 50.065, Stats.

Long-Range Fiscal Implications:

Prepared By: / Phone # / Agency Name

DHFS/Paul Menge, 266-5602

Authorized Signature Telephone No.

John Kiesow, 266-9622

Date

9-14-99

ORDER OF THE  
DEPARTMENT OF HEALTH AND FAMILY SERVICES  
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:

Sections 48.685 and 50.065, Stats., recently created by 1997 Wisconsin Act 27, apply to the Department in its functions of licensing, certifying, registering or approving some persons to provide care or treatment to other persons; to county social service and human service departments that license foster homes or treatment foster homes for children and carry out adoption home studies; to private child-placing agencies licensed to do the same; and to school boards that contract for day care programs under s. 120.13(14), Stats. The law also applies to the entities licensed, certified, registered or approved and their employes or contracted service providers.

An agency is prohibited from licensing, certifying, registering or approving a person if the agency knew or should have known that the person has been convicted of, or has a pending charge for, a serious crime, is found to have abused or neglected a client or child or to have misappropriated a client's property; or is required to be credentialed by the Department of Regulation and Licensing (DRL) but whose credential is not current or is limited so as to prevent the provision of adequate client care. Similarly, entities planning to hire or contract with a person expected to have access to clients or children may not hire or contract with the person if the entity knew or should have known of the existence of a prohibited condition.

With respect to a person applying for a license to operate an entity or for approval to reside at an entity, an agency is required to obtain a criminal history search, information contained in the Department's caregiver misconduct registry, DRL information regarding credential status, if applicable, and Department information regarding any substantiated reports of child abuse or neglect and licensing history information. That information must also be obtained by entities for prospective employes and contractors.

The Department is required to develop a background information form and provide it to any regulated or approved person, and a county department and licensed child-placing agency is required to provide it to a foster home or treatment foster home applicant or pre-adoptive applicant and a school board is to provide the Department's background information form to any proposed contracted day care applicant or provider under s. 120.13 (14), Stats. Likewise, an entity is to provide the background information form to any employe or prospective employe having or expected to have access to any of its clients. If the background information form returned to an entity by an employe or prospective employe indicates that the person is not ineligible to be employed or

contracted with or permitted to reside at an entity for a reason specified under the statutes or as provided in rule, an entity may employ or contract with the person or permit the person to reside at the entity for not more than 60 days pending the receipt of background check information.

For some serious crimes that would otherwise bar a person from regulatory approval or from being employed by or under contact with or residing at an entity, the statutes permit a person convicted of a crime, provided certain conditions are met, to ask an agency for rehabilitation review, that is, for an opportunity to demonstrate that he or she is rehabilitated and so the bar can be lifted.

These are the Department's rules for administration of ss. 48.685 and 50.065, Stats., as created by Act 27 and amended by 1997 Wisconsin Act 237. The rules repeat the statutory requirements and add more detail for administering them, add procedures for handling rehabilitation review requests, add definitions for "serious crime" and "under the entity's control" and other pertinent definitions and add a crimes list as Appendix A.

The rules are being published by emergency order to take effect on October 1, 1998, the same date that the statutes they implement will take effect, rather than up to 9 months later which is how long it will take to promulgate permanent rules. The rules are necessary for implementation of the new statutes. The intent of the statutes and rules is to better protect clients of the regulated service providers from being harmed.

The new background check statutes and rules apply beginning October 1, 1998 to entities initially approved on or after that date, persons that entities hire or contract with on or after that date and nonclients who take up residence at an entity on or after that date. The statutes and rules apply beginning October 1, 1999 to entities initially approved prior to October 1, 1998, persons that entities hired or contracted with prior to October 1, 1998 and nonclients who lived at an entity prior to October 1, 1998.

### ORDER

Pursuant to authority vested in the Department of Health and Family Services by ss. 48.685 (4), (5), (6) (b) and (c) and (7) (a) and (b) and 50.065 (1) (d) and (f), (4), (5), (6) (b) and (c) and (7) (a) and (b), Stats., as created by 1997 Wisconsin Act 27 and amended by Wisconsin Act 237, and s. 227.11 (2), Stats., the Department of Health and Family Services hereby creates rules interpreting ss. 48.685 and 50.065, Stats., as created by 1997 Wisconsin Act 27 and amended by 1997 Wisconsin Act 237, and s. 120.13 (14), Stats., as amended by 1997 Wisconsin Act 27, as follows:

SECTION 1. Chapter HFS 12 is created to read:

## Chapter HFS 12

### CAREGIVER BACKGROUND CHECKS

#### Subchapter I - General Provisions

- HFS 12.01 Authority and Purpose
- HFS 12.02 Applicability
- HFS 12.03 Definitions

#### Subchapter II - Personnel Care Services Qualifications Assessment

- HFS 12.10 Background-Related Barriers to Regulatory Approval and Client Access
- HFS 12.11 Criminal and Abuse History and Client Access
- HFS 12.12 Rehabilitation Review

#### Subchapter III - Background Information Collection

- HFS 12.20 Background Information Gathering and Screening
- HFS 12.21 Criminal and Background History Information Search

## SUBCHAPTER 1 - GENERAL PROVISIONS

**HFS 12.01 AUTHORITY AND PURPOSE.** This chapter is promulgated under the authority of ss. 48.685 (4), (5) (6) (b) and (c) and (7) (a) and (b), 50.065 (1) (d) and (f), (4), (5), (6) (b) and (c) and (7) (a) and (b) and 227.11 (2), Stats., to protect clients served in department- regulated programs and in foster homes or treatment foster homes licensed by county departments of social or human services or private child-placing agencies, including homes licensed for placement of children for adoption under s. 48.833, Stats., for whom adoption assistance will be provided under s. 48.975, Stats., and pre-adoptive applicants who contract for a home study with a private child-placing agency for placement of a child for adoption and in day care programs contracted by local school boards under s. 120.13 (14), Stats., by requiring uniform background information screening of persons regulated and persons who are employed or contracted by an entity or who are nonclient residents at an entity.

**HFS 12.02 APPLICABILITY.** (1) **SCOPE.** (a) **Persons, facilities, agencies and organizations affected.** This chapter applies to the department, to applicants for a department license, certification, certificate of approval, registration, or approval for an adoption home study, to all department licensed, certified and registered persons, facilities, agencies and organizations, to foster home and treatment foster home license applicants and applicants for an adoption home study and foster home licensees of a county department or child placing agency, to school boards that contract for day care programs under s. 120.13 (14), Stats., and to applicants and persons contracted to operate a day care program under s. 120.13 (14), Stats.

(b) **Entities covered.** The entities subject to this chapter are those regulated under: chs. HSS or HFS 34, 38, 40, 45, 46, 52, 54, 55, 56, 57, 59, 61, 63, 83, 89, 110, 111, 112, 113, 124, 127, 131, 132, 133 and 134, Wis. Adm. Code, and any other direct client care or treatment program that may be licensed, certified or registered by the department, including programs under ch. HSS 82 and 88, Wis. Adm. Code.

(2) **IMPLEMENTATION.** (a) **Agencies and new entities.** Beginning October 1, 1998, all agencies and all prospective entities and all prospective employees of an entity, persons wishing to contract with an entity and prospective nonclient residents of an entity who will have access to clients and be under the entity's control shall comply with this chapter.

(b) **Existing entities.** Beginning October 1, 1999, an entity that existed prior to October 1, 1998, all employees or persons under contract with the entity and nonclient residents living at the entity having access to entity clients prior to and since October 1, 1998, shall comply with this chapter.

(c) **Child abuse and neglect reports.** An agency other than a school board shall meet the provision of s. HFS 12.21 (1) (a) 1. d., by checking with the appropriate county department of social or human services for any substantiated child abuse or neglect report as provided for under s. 49.981 (7) (a) 9. and 13., Stats.

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

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

(b) "Background information form" refers to the department self-disclosure form that requires a person to provide certain information concerning the person's background.

(c) "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.

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

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

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

(g) "Crimes list" means the list of statutes in appendix A.

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

(i) "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.

(j) "Permanent bar crime" means a crime listed in part I or II of the crimes list in appendix A.

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

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

(m) "Under the entity's control" means that an entity, other than as provided under s. HFS 12.21 (1) (b) 2., may choose and affect whether a person who is employed by or contracted with the entity or who is a nonclient resident of the entity and may have contact with clients the entity serves.

(n) "Unit of government" or "state agency" means any officer, commission, board, department or bureau of state government.

(2) CHAPTER 48 REGULATED CHILDREN'S PROGRAMS. In this chapter:

(a) "Adoption home study" means an evaluation of a prospective adoptive family under ch. HSS 51 or 54.

(b) "Child-placing agency" means a child welfare agency licensed under s. 48.60, Stats., as a private child-placing agency.

(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 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.

(d) "Regulatory approval" means issuance of a license or continuation or renewal of a license and includes an adoptive parent applicant home study approval by the department or issuance by a county department or licensed child placing agency of, or renewal of, a foster home or treatment foster home license under s. 48.62 or 48.75, Stats., including homes licensed for placement of children for adoption under s. 48.833, Stats., for whom adoption assistance will be provided under s. 48.975, Stats., and includes pre-adoptive applicants who contract for a home study with a licensed private child placing agency for approval of a placement of a child for adoption and includes a contract approval by a school board under s. 120.13 (14), Stats., with a day care provider to provide day care services licensed under s. 48.65, Stats.

(3) CHAPTER 50 REGULATED PROGRAMS. In this chapter:

(a) "Certificate of approval" means a certificate of approval issued under s. 50.35, Stats.

(b) "Entity" means a facility, organization or service licensed or certified by or registered with the department to provide direct care or treatment services to clients, including a hospital, a personal care worker agency or a supportive home care service agency, but not including a person certified as a medical assistance provider as defined in s. 49.43 (10), Stats., who is not otherwise approved under s. 50.065 (1) (cm), Stats., or licensed or certified by or registered with the department, or a public health dispensary established under s. 252.10, Stats.

(c) "Hospital" means a facility approved as a hospital under s. 50.35, Stats.

(d) "Personal care worker agency" means a home health agency licensed under s. 50.49, Stats., and ch. HSS 133 and certified as a personal care worker agency under s. HFS 105.17 (1).

(e) "Regulatory approval" means issuance by the department of a license, certification, a certificate of approval or registration, or approval of the continuation of a license, certification, certificate of approval or registration.

(f) "Supportive home care service agency" means a home health agency licensed under s. 50.49, Stats., and ch. HSS 133.

## **SUBCHAPTER II - PERSONAL CARE SERVICES QUALIFICATIONS ASSESSMENT**

**HFS 12.10 BACKGROUND-RELATED BARRIERS TO REGULATORY APPROVAL AND CLIENT ACCESS.** (1) **AGENCY AND ENTITY PROHIBITIONS.** (a) **Agency responsibilities.** Notwithstanding s. 111.335, Stats., and as otherwise provided under s. HFS 12.20 (2) (a) 2. d. and in accordance with s. HFS 12.11 (1) and (2), the department may not give regulatory approval to a person to operate an entity or approve an adoptive home on the basis of an adoption home study, a county department or a child-placing agency may not license or renew the license of a foster home or treatment foster home under s. 48.62 and 48.75, Stats., or approve an adoption home on the basis of an adoption home study and a school board may not contract with a person under s. 120.13 (14), Stats., if the agency knows or should have known any information about the operator or other person as described under sub. (2).

(b) **Entity responsibilities.** Notwithstanding s. 111.335, Stats., and as provided under s. HFS 12.20 (2) (a) 2. and 3. and in accordance with s. HFS 12.11 (1) and (2), an entity may not hire or contract with a person who will be under the entity's control and who is expected to have access to its clients, or permit to reside at the entity a person who is not a client but who is expected to have access to a client, if the entity knows or should have known any information about the person as described under sub. (2).

(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 under s. HFS 12.12.

(2) **REGULATORY AND PERSONAL CARE INTEGRITY STANDARDS.** An agency shall comply with sub. (1) (a) and an entity shall comply with sub. (1) (b) for any person whose background records indicate any of the following:



(a) The person has been convicted of a serious crime, act or offense or was adjudicated delinquent for a serious crime, act or offense on or after his or her 12<sup>th</sup> birthday.

(b) The person has pending against him or her a charge for a serious crime, act or offense.

(c) 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.

**Note:** Any person who is listed in the Department's caregiver misconduct registry under ch. HFS 13 as having a substantiated finding of abuse or neglect of a client or misappropriation of client's is permanently prohibited from being employed in a federally-certified nursing home or a federally-certified intermediate care facility for the mentally retarded (ICF/MR). See 42 CFR 483.13 and 483.400.

(d) 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.

(e) 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 involves direct client care or treatment services and is not current or is limited so as to restrict the person from providing adequate care to a client.

#### **HFS 12.11 CRIMINAL AND ABUSE HISTORY CLIENT ACCESS STANDARDS.**

(1) **SERIOUS CRIMES AND OTHER CATEGORICALLY NONREHABILITATIVE CRIMES, ACTS OR OFFENSES.** (a) **Agency or entity determinations.** An agency or an entity in deciding on a bar on regulatory approval or on a bar on employment, contracting or residency at an entity, shall consider the act or offense under which a person was convicted of a crime and determine whether that act or offense is comparable in nature to acts or offenses otherwise found in appendix A which bar a person, even though the crime under which the person was convicted is a lesser crime. Crimes, acts or offenses under this section also include similar crimes, acts or offenses committed in jurisdictions outside of Wisconsin.

(b) **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 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:

1. First degree intentional homicide under s. 940.01, Stats.

2. First degree sexual assault under s. 940.225 (1), Stats.

3. First degree sexual assault of a child under s. 948.02 (1), Stats.

4. Second degree sexual assault of a child under s. 948.02 (2), Stats., 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.

5. Repeated acts of sexual assault of the same child under s. 948.025, Stats., 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.

(c) Other 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 on or after his or her 12<sup>th</sup> birthday has been convicted or adjudicated delinquent of a serious crime or has committed a serious act or offense identified as a permanent bar crime in Appendix A considered substantially related to the care of a client and for which rehabilitation may not be demonstrated and that includes certain crimes, act or offenses involving abuse or neglect of a client and misappropriation of the property of a client.

(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) and can demonstrate to, as applicable, the department, a county department, a child-placing agency or a school board, 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) 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