

- John
- George A. Johnson
- Scottsburg
- Charles E. ...
- William D. Peterson
- Mills, Mike
- Immediate Past Chair
- Mark A. Knutson
- Mills, Mike
- President Ed ...
- Robert C. Taylor

April 28, 1999

TO: Senate Health 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' 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 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.

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 evaluation of whether something that is not a "serious crime" is mentioned

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



Wisconsin Health & Hospital Association, 600  
 7721 Odessa Road  
 Madison, WI  
 53716-1200  
 608/271-1120  
 FAX 608/271-1131

Next Page

"substantially related" to the job. The emergency rules regulate the employment decision for non-serious crimes by creating a mandate that:

OK  
Change "shall" to "MAY"  
This is good

"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]."

Information for the entity out should not be mandatory

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 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 pending charge "the circumstances of which substantially relate to the circumstances of the particular job . . ." (emphasis added) The concept arises only as an exception to 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 deletion will create any gaps or cause any compliance problems.

NO  
This is the  
physicians  
issue

Further clarification of what persons or positions are subject to the rule. The definitions of "caregiver," "access," and "under the entity's control" go a long 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 who 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

<sup>2</sup> § 111.335(1)(a), Wis. Stats.  
<sup>3</sup> § 111.335(1)(b) and (c), Wis. Stats.

DHFS 12  
April 28, 1999

surrogate for an employe of the entity for purposes of providing patient or client care."

NO

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 the 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 for 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 not qualified to be a licensed practitioner, and for DHFS to state on the other hand that they cannot practice.

There is room for movement here but "Anyone" is too broad administratively or otherwise  
OK

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 others 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 "THIS 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 employees 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.

over

The crimes list still needs to be significantly shortened. The proposed changes represents a large first step in the right direction. In particular, we applaud the adoption

# FAX

## Cover Sheet

Date: 5-10-99  
 To: Sen. Rod *maen*  
 From: Scott Peterson  
 Subject:

Number of pages (includes this cover sheet): 9

Check if urgent  Reply deadline:

Message:



Wisconsin Health &  
Hospital Association

5721 Odana Road  
Madison, WI  
53719-1289

608/274-1820

FAX: 608/274-8554

<http://www.wha.org>

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

Chair

George L. Johnson  
Reedsburg

Chair-Elect

William D. Petaszek  
Milwaukee

Immediate Past Chair

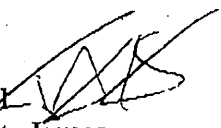
Mark V. Knight  
Milwaukee

President/CEO

Robert C. Taylor

May 10, 1999

TO: Interested Legislators

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

SUBJECT: HFS 12 - Background Check 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 original emergency rules are mitigated by the draft permanent rules. However, we believe that the many continuing substantive 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 months since the background check went into effect, we have already two major revisions to the crimes list, and one revision of the emergency rules. We are now considering another version of the administrative rules and the crimes list. 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.

Wisconsin Health &  
Hospital Association, Inc.

5721 Odana Road  
Madison, WI  
53719-1289

608/274-1820

FAX: 608/274-8554

<http://www.wha.org>

<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.



The draft permanent 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

<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 emergency 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 provide patient or client care as a significant part of their duties for the entity..”

- **Withdraw the current “policy statement” on the DHFS web site extending the background check requirement to physicians with admitting privileges.** This policy statement is a unilateral extension of 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 crimes list still needs to be significantly shortened.** The proposed crimes list (as contained in the current emergency rules) 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. There are still over 40 crimes that require lifetime

HFS 12 Rules

May 10, 1999

Page 4

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 now contains a number of special provisions that further complicate the legal requirement and make it difficult for sophisticated and well-meaning employers to understand and comply with.

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.
4. The special conditions should be eliminated and replaced with a much simpler system.





---

---

## WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

One East Main Street, Suite 401; P.O. Box 2536; Madison, WI 53701-2536

Telephone: (608) 266-1304

Fax: (608) 266-3830

Email: leg.council@legis.state.wi.us

---

---

DATE: April 26, 1999

TO: MEMBERS OF THE JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES

FROM: Ronald Sklansky, Senior Staff Attorney

SUBJECT: Background Checks of Caregivers

This memorandum responds to a question raised at a previous meeting of the Joint Committee for Review of Administrative Rules (JCRAR), regarding emergency rules that regulate background checks of caregivers. Specifically, a member of JCRAR asked whether recently enacted statutes governing background checks of caregivers could be implemented if the emergency rules were allowed to expire prior to the promulgation of permanent rules.

### A. BACKGROUND

Sections 48.685 and 50.065, Stats., as created by 1997 Wisconsin Act 27, regulate background checks for caregiving employees of entities regulated by the Department of Health and Family Services (DHFS) and other specified persons. The provisions in ch. 48, Stats., relate to programs for children that are regulated by DHFS and the provisions in ch. 50, Stats., relate to other programs regulated by DHFS. An entity includes a licensed and certified child care provider, child welfare agency, foster home, treatment foster home, group home, shelter care facility, nursing home, hospital, community-based residential facility and home health agency.

The statutory provisions generally took effect on October 1, 1998 for persons hired on or after that date. There is an additional one-year delay in the background check requirements for persons who were employees as of that date (that is, the requirements will apply as of October 1, 1999).

Prior to the October 1, 1998 effective date for new employees and licensees, DHFS promulgated an emergency rule relating to background checks for caregivers. The rule created ch. HFS 12. A related rule, ch. HFS 13, promulgated at the same time as an emergency rule, relates to reports of misappropriation of property, abuse and neglect of clients. In February

1999, JCRAR extended the expiration for both emergency rules by 30 days. On March 24, JCRAR granted an additional extension of 36 days.

## **B. DISCUSSION**

The statutes provide that a person may not be licensed, certified or contracted to operate an entity if the person has a defined criminal background. Similarly, the entity itself may not: (1) hire or contract with a person who has that criminal background, who is under the entity's control and who has or is expected to have access to the entity's clients; or (2) permit a person with that criminal background and who is not a client to reside at the entity's place of operation. In general, because of the construction of the statutes, if administrative rules are not promulgated to implement the background check law, only the licensure, certification or contracting of an entity will continue to be regulated.

### **1. Provisions That Can Be Implemented Without Administrative Rules**

Under the statutes, DHFS may not license or renew a license of a person to operate an entity, if DHFS knows or should have known of any of the following:

- a. That the person has been convicted of a "serious crime." For day care licensure or certification, this includes an adjudication of delinquency, on or after the person's 12th birthday, for committing a serious crime.
- b. That the person has pending against him or her a charge for a serious crime.
- c. That a unit of government or state agency has made a finding that the person has abused or neglected any client or misappropriated the property of any client.
- d. That a determination has been made under the child abuse and neglect statutes that the person has abused or neglected a child.
- e. That, in the case of a position for which the person must be credentialed by the Department of Regulation and Licensing, the person's credential is not current or is limited so as to restrict the person from providing adequate care to a client.

Provisions of the statutes that relate to DHFS licensure apply also to county certification of child care and to a school board providing or contracting for child care.

Although the statutes require DHFS to promulgate a rule defining the term "serious crime," the law directs the department to include in that definition the following crimes: (a) first-degree intentional homicide; (b) first-degree sexual assault; (c) first-degree sexual assault of a child; (d) second-degree sexual assault of a child if the person was more than four years older than the child; and (e) repeated acts of sexual assault of the same child if the child is under age 13 or if there is more than a four-year age difference between the person and the child who is age 13 to 15. Consequently, even without an administrative rule, a person who has been convicted of one of these serious crimes may not be licensed, certified or contracted to operate an entity. In addition, the statutes provide that a person may be refused permission to operate an

entity and an entity may refuse to employ, contract with or permit to reside at the entity a person who has, or is expected to have, access to clients if the person has been convicted of an offense that DHFS has not defined to be a "serious crime" or a crime that is substantially related to caregiving, but that is, in the case-by-case estimation of DHFS or an entity, substantially related to the care of a client.

Under the statutes, a licensing, certifying or contracting body must conduct a search to determine the criminal background of a potential operator of an entity and to determine whether the potential operator's credentials are appropriate. A person securing a license, certification or contract may be charged a fee for obtaining the required information. The fee may not exceed the reasonable cost of obtaining information. A person also must complete a background information form every time a license, certification or contract is considered for renewal. A person who provides false information on a background information form may be required to forfeit not more than \$1,000.

## 2. Provisions of the Statutes That Cannot Be Implemented Without an Administrative Rule

The statutes prohibit an entity from hiring or contracting with a person under the entity's control who has or is expected to have access to its clients or from permitting a person who is not a client to reside at the entity who is expected to have access to a client, if the entity knows or should have known any of the following:

- a. That the person has been convicted of a "serious crime."
- b. That the person has pending against him or her a charge for a serious crime.
- c. That a unit of government or state agency has made a finding that the person has abused or neglected any client or misappropriated the property of any client.
- d. That a determination has been made under the child abuse and neglect statutes that the person has abused or neglected a child.
- e. That, in the case of a position for which the person must be credentialed by the Department of Regulation and Licensing, the person's credential is not current or is limited so as to restrict the person from providing adequate care to a client.

Because the term "under the entity's control" must be defined by rule, none of the statutory provisions relating to hiring or contracting a caregiver may be implemented without such a rule. Further, it may be very difficult to implement the provisions of the statutes relating to permitting a person who is not a client to reside at an entity when that person is expected to have access to a client without an administrative rule interpreting or defining the phrase "expected to have access to a client." Consequently, the provisions of the statutes relating to the retention of, and background checks for, individuals providing caregiver services probably cannot be implemented without an administrative rule.

The statutes provide that a person may be deemed to be rehabilitated from the effects of certain crimes under procedures established by DHFS by rule. If rehabilitated, the person is

eligible to operate or provide caregiver services or to be a nonclient resident of an entity. A person who is adversely affected by a decision relating to rehabilitation has a right to review under ch. 227, Stats. Without an implementing administrative rule, the provisions of the statutes relating to rehabilitation cannot be enforced and persons who might otherwise be able to perform caregiver services will be prevented from doing so because they cannot be deemed rehabilitated.

RS:jal;ksm

**Wisconsin Association of Homes and Services for the Aging, Inc.**

204 South Hamilton Street • Madison, Wisconsin 53703 • 608-255-7060 • FAX 608-255-7064 • www.wahsa.org

April 15, 1999

**To:** State Senator Brian Burke, Co-Chair  
State Representative John Gard, Co-Chair  
Members, Joint Committee on Finance

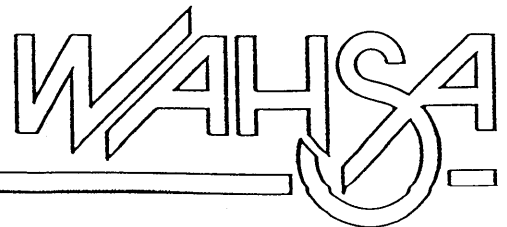
**From:** John Sauer, Executive Director  
Tom Ramsey, Director of Government Relations

**Subject:** WAHSA Biennial Budget Recommendations

The Wisconsin Association of Homes and Services for the Aging (WAHSA) is a statewide membership organization of not-for-profit corporations principally serving the elderly and disabled. Membership is comprised of 190 religious, fraternal, private and governmental organizations, which own, operate and/or sponsor 145 not-for-profit and 48 county-operated nursing homes, 26 facilities for the developmentally disabled, 71 community-based residential facilities, 34 residential care apartment complexes, 100 independent living apartment complexes for the elderly, 40 adult daycare programs, and over 375 community service agencies which provide programs ranging from Alzheimer's support, child daycare, hospice and home care to Meals on Wheels. WAHSA members employ over 22,000 dedicated workers and serve over 31,000 elderly and disabled persons.

WAHSA members respectfully request your consideration of the following modifications to 1999 Assembly Bill 133, the 1999-2001 biennial budget bill:

- 1) **Nursing Home Employee Wage Pass-Through.** Support for the 7% Nursing Home Employee Wage Pass-Through proposed by the Coalition for Quality Nursing Home Care (please see the attached position statement). In addition to the 7% wage pass-through in FY '99, that proposal includes a Medicaid rate increase for nursing homes of 3.3% in each year of the biennium, compared to the Governor's request of the equivalent of 1.77% in FY '99 and 1% in FY '00. (See Item #5 Nursing Home Reimbursement on Page 267 of the Legislative Fiscal Bureau Budget Review Document).
- 2) **Family Care.** Support for the Resource Center and Care Management Organization (CMO) pilots proposed under the Family Care provisions of the budget; **Opposition** to any statewide implementation of Family Care beyond the pilot counties until the pilots are concluded and the data



collected has been thoroughly analyzed by a qualified, independent third-party. The length of time the pilots should operate should be determined by that independent third-party; as a member of the Long-Term Care Provider Coalition, WAHSA suggests the Coalition's "Required Elements of the Family Care Pilot Projects and Evaluation" (please see the attached position statement) be used as a guide to decide the appropriate length of the pilots and what data should be collected and analyzed. To ensure Family Care will be piloted only and not implemented statewide prior to the thorough evaluation of those pilots, the Long-Term Care Provider Coalition suggests the Family Care provisions be deleted from the statutes in AB 133 but rather be placed in the budget as a nonstatutory provision. Consistent with that position, s.45.281(1)(e) under Section 1069 of AB 133, which would permit statewide implementation of Family Care as of July 1, 2001, should be deleted. (See pages 336-355 of the LFB Budget Review Document for the Family Care analysis).

Other proposed changes to the Family Care provisions include:

- A) Delete s.46.283(4)(g) under Section 1074 of the bill. This provision would require a Resource Center to provide a functional and financial screen for Family Care eligibility to any person, including private payors, seeking admission to a nursing home, CBRF, residential care apartment complex or adult family home. In place of this provision, language should be inserted to prohibit any entity from denying the Family Care benefit to a person who previously elected not to submit to a functional and/or financial screen if that person would otherwise be eligible for the Family Care benefit. Private pay individuals should not be coerced into submitting to a functional/financial screen if they prefer not to exercise that option. By the same token, they should not be prohibited from accessing the Family Care benefit if they are otherwise eligible simply because they previously chose not to exercise the functional/financial screen option.
  - B) WAHSA does not oppose the expansion of CMO pilots from 5 to 9; however 2 of those counties should be required to pilot an integrated model of managed care which would include physician and other acute care services as well as long-term care services.
  - C) Amend Sections 1499, 1503 and 1510 of the bill to direct the DHFS to develop a form which could be used by residential care apartment complexes, CBRFs and nursing homes to provide the information they are required to provide under those sections to their tenants and residents.
- 3) **CBRF License and Adult Day Care Certification Fee Increases.** Delete Section 1509 of the bill and return to current law. This would eliminate the near doubling of the current biennial fee paid by CBRFs. At a time of limited resources and a tight labor market, with resultant concerns about potential understaffing and threats to quality care, it is inopportune to suggest that the limited funds available to CBRFs, the vast majority of which come from private payors, be taken away from resident care and shifted to fund a DHFS responsibility. If the Department can justify additional staff (which we believe it can), it should ask the Legislature for the funds needed to add those necessary positions and allow CBRFs to use the funds at their disposal to care for their residents. The same argument applies to the proposed adult day care fees contained in Section 1429 of the bill, which WAHSA members also would like to see eliminated. The imposition of these fees may have the unintended consequence of driving out adult day care providers of this MA-certified program and serving only a private pay clientele. (See Item #5 on Page 327 of the LFB Budget Review Document).
- 4) **Nursing Home Reimbursement.** Delete Sections 1392, 1394, 1395 and 1397 of the bill and return to current law. The budget would repeal statutory provisions which require DHFS to base Medicaid payments to nursing homes on a percentage of the median costs incurred by facilities in the direct

care, support services, fuel and utilities, and administrative and general cost centers. Instead, the budget directs the DHFS to "take into account" those costs. With the Boren Amendment protections (which required "reasonable" rates for "economically and efficiently operated" nursing homes) recently eliminated from both federal and state law, WAHSA members are concerned the DHFS could translate "take into account" into "choose to ignore" when establishing Medicaid rates for facilities. To ensure we avoid any future "race to the bottom," we request that current language be maintained so we at least have median costs for the payment floor. (See Item #5 on Page 267 of the LFB Budget Review Document).

- 5) **Caregiver Background Checks.** The budget bill contains some changes to the caregiver background checks statute under Sections 1516-1522. WAHSA members, along with a coalition of other providers and labor organizations, would like to see even broader changes to the caregiver background checks law. We offer two alternatives to the current statute. The first would require criminal background checks of all licensees of health care entities and all employees of those entities. Unlike current law, however, once those checks are completed, employment decisions would be left solely to employer discretion. The second alternative also would mandate criminal background checks of all licensees and employees but would place limitations on employer discretion in some cases. Under this proposal, direct caregivers convicted of one or more of the five statutory "serious crimes" or with a substantiated finding of client abuse, neglect or misappropriation of client property would be permanently barred from employment in a health care setting unless they successfully completed a rehabilitation review conducted by the DHFS. Employment decisions on all other non-direct caregivers would continue to be left to employer discretion. We believe both these alternatives provide an equitable balance between protection of our most vulnerable citizens and the principle that all people have the capability to be rehabilitated. Although these changes probably are more appropriate for introduction as separate legislation, WAHSA members are concerned a bill could not be passed and signed into law prior to the October 1, 1999 effective date applying the caregiver background check provisions to current employees and therefore seek a budget response.
- 6) **MA Provider Fraud and Abuse.** WAHSA members are concerned with the provider fraud and abuse provisions identified under Item #18 on pages 273-277 of the LFB Budget Review Document. These provisions are both complex and potentially controversial and we believe are more appropriate to the closer scrutiny of separate legislation.
- 7) **RCAC Microwave Oven Option.** S.50.01(1d) defines a "residential care apartment complex" (RCAC) to mean "a place where 5 or more adults reside that consists of independent apartments, each of which has an individual lockable entrance and exit, a kitchen, including a stove, an individual bathroom, sleeping and living areas, and that provides, to a person who resides in the place, not more than 28 hours per week of services that are supportive, personal and nursing services.... In this section, 'stove' means a cooking appliance that is a microwave oven of at least 1,000 watts or that consists of burners and an oven." We have heard from a number of WAHSA members who operate RCACs that some tenants either don't want a stove in their unit or would prefer to use their own microwave but are unable to do so because their microwave is not at least 1,000 watts. WAHSA members seek to amend the statute to require a proactive signoff by a prospective tenant stating that a stove, including a 1,000 watt microwave, was offered by the RCAC at no charge to the tenant but the tenant decided either he/she did not want a stove or he/she wished to install their own stove/microwave, regardless of the microwave's wattage. Consumer choice should be the driving force for this change.

Thank you for this opportunity to convey our views on AB 133.

## Executive Summary

### Background Check and Abuse Reporting Reform

To achieve a workable and effective abuse reporting and background check for Wisconsin caregivers, employees, and their clients, the current statute needs to be amended to focus and streamline the abuse reporting and background check process and allow employers to make good, informed employment decisions. WHA is exploring the following proposal with a number of interested groups and legislators.

- All employees of covered entities and all contractors with significant patient care responsibilities (including medical staff) will have their backgrounds checked. The definitions of “client” and “entity” are substantially unchanged from the current statute except as noted below. The scope of the background check information is unchanged from the current statute. Students fulfilling educational requirements will not be included.
- All “entities” (i.e. providers licensed or certified by DHFS) will continue to have their backgrounds checked. EMTs were added to the list of DHFS licensees who are excluded from the background check requirement.
- The proposal also imposes an employment and licensing bar for “serious crimes” on “caregivers”. Caregivers include all DHFS licensees and some but not all employees and contractors.
- The definition of a “caregiver” who may be barred from employment is based on “significant, regular patient or client care responsibilities,” with clerical, maintenance, dietary, and support workers excluded.
- The “serious crimes” triggering the employment and licensing bar are the five crimes now listed in the statute, together with substantiated reports of abuse, neglect, or misappropriation of property.
- Rehabilitation review by DHFS will be available for caregivers convicted of serious crimes. Employment or contracting may continue while DHFS conducts its review.
- For employees or contractors who are not caregivers, and for caregivers who have not been convicted of a serious crime, the employer will exercise its fully informed discretion on whether to hire, subject to current fair employment laws.

This proposal requires background check rulemaking by DHFS only to establish the rehabilitation review process for serious crimes.

The abuse reporting statute should be amended to better integrate it with the background check statute and to provide clear definitions of the key terms “allegation” and “abuse”. The definition of “abuse” will be based on the leading Wisconsin Supreme Court case in this area.



**Proposed Background Check and  
Abuse Reporting Reform Language**

---

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

Section 50.065

(1) In this section:

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

(b) “Caregiver” means:

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

(c) “Contractor” or prospective contractor, means, with respect to an entity, a person who has a contract with the entity and who can reasonably be said to be a surrogate for an employe of the entity who is a caregiver. A caregiver with admitting privileges at an entity shall be deemed a contractor of that entity for purposes of this definition. Students fulfilling educational requirements are not contractors for purposes of this definition.

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

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

3. A person certified as a medical assistance provider, as defined in s. 49.43 (10), who is not otherwise approved by the Department of Health and Family Services as a hospital under s. 50.35 or licensed or certified by or registered with the Department of Health and Family Services.
  4. An entity, as defined in s. 48.685(1) (b).
  5. A public health dispensary established under s. 252.10
  6. A person certified as an emergency medical technician under s. 146.50.
- (e) "Serious crime" means the following crimes, or the equivalent crime in another state:
1. First-degree intentional homicide under s. 940.01.
  2. First degree sexual assault under s. 940.225 (1).
  3. First degree sexual assault of a child under s. 948.02 (1).
  4. Second degree sexual assault of a child under s. 948.02 (2) if the person was, at the time of the sexual contact or sexual intercourse, more than 4 years older than the child with whom the person had the sexual contact or sexual intercourse.
  5. Repeated acts of sexual assault of the same child under s. 948.025 if the child had not attained the age of 13, or if the child had attained the age of 13 and had not attained the age of 16 and the person was, at the time of the sexual contact or sexual intercourse, more than 4 years older than the child with whom the person had the sexual contact or sexual intercourse.
  6. A substantiated report of neglect, abuse, or misappropriation of property based on information maintained by the Department of Health and Family Services.
- (2) (a) An entity shall obtain the information specified under para. (2)(c) for all contractors and prospective contractors who are caregivers specified under para. 1(b)(1) and for all employees and prospective employees. No prospective employee or contractor may perform client care responsibilities until the entity has received and reviewed this information. An entity shall provide this information to another entity that is a prospective or existing employer or contractor upon request.
- (b) The Department of Health and Family Services shall obtain a criminal history search from the records maintained by the Department of Justice with respect to a person specified under para. 1(b)(2). The Department of Health and Family Services shall provide this information to an entity that is a prospective or existing employer or contractor upon request.

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

1. A criminal history search from the records maintained by the Department of Justice.
2. Information that is contained in the registry under s. 146.40 (4g) regarding any findings against the person.
3. Information maintained by the Department of Regulation and Licensing regarding the status of the person's credentials, if applicable.

(3) (a) For caregivers convicted of a serious crime:

1. Notwithstanding s. 111.335, the Department of Health and Family Services shall refuse to license, certify or register, or continue to license, certify or register any such caregiver to operate an entity.
2. Notwithstanding s. 111.335, an entity shall refuse to employ or contract with or continue to employ or contract with any such caregiver.
3. Notwithstanding the provisions of (1) and (2) above, the Department of Health and Family Services may license a person to operate an entity who otherwise would not be so licensed because of para. 3(a)(1), and an entity may employ or contract with a person who otherwise would not be employed or contracted because of para. 3(a)(2), if the person demonstrates that he or she has been rehabilitated to the Department of Health and Family Services by clear and convincing evidence and in accordance with the procedures established by the Department of Health and Family Services by rule. An entity may continue to employ or contract with a person undergoing rehabilitation review while the rehabilitation review is pending, provided that such person has not been imprisoned or convicted of a felony within the past five years.

(4) If the person who is the subject of the criminal history search under para. (2)(a) or (b) is not a resident of this state, or if at any time within the 3 years preceding the date of the search that person has not been a resident of this state, the department or entity shall make a good faith effort to obtain from any state in which the person is a resident or was a resident within the 3 years preceding the date of the search information that is equivalent of the information obtained in a criminal history search from the records maintained by the Department of Justice.

(5) These requirements shall apply to:

- (a) all license applications or renewals submitted to DHFS on or after \_\_\_\_\_.

(b) all prospective contractors who meet the definition of a caregiver and all prospective employees on or after \_\_\_\_\_.

(c) all existing contractors who meet the definition of a caregiver and all existing employees on or after October 1, 2000.

---

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

Except as provided in subd. 2, an entity shall report to the department any allegation of misappropriation of property or of neglect or abuse of a client by ~~a person employed by or under contract with the entity if the person is under the control~~ an employee or contractor of the entity.

(a) For purposes of this paragraph, "allegation" means an accusation of abuse and neglect, made orally or in writing by a person with direct knowledge of the alleged acts of neglect, abuse or misappropriation of property.

(b) For purposes of this paragraph, "neglect or abuse" means conduct evidencing such disregard of a client's physical and mental needs and interests as is found in deliberate violations or disregard of client rights, or in carelessness or negligence of such degree or frequency as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the person's duties and obligations to the client. Mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertency or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not deemed to be reportable neglect or abuse.

(c) For purposes of this paragraph, "contractor" shall have the meaning set forth in s. 50.065(1)(c).

#### Nonstatutory provisions

Before November 1, 2000, the Department of Health and Family Services shall prepare and submit to the legislature a report describing any peer-reviewed research concerning whether persons who have been convicted of certain crimes or types of crimes are more likely to commit abuse or neglect in health care settings, or are more likely to continue committing crimes after their release into the community.

Chair

George L. Johnson  
Reedsburg

Chair-Elect

William D. Petasnick  
Milwaukee

Immediate Past Chair

Mark A. Knight  
Milwaukee

President/CEO

Robert C. Taylor



April 28, 1999

TO: Senate Health 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.

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**

<sup>11</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.

EMTS  
STUDENTS

Wisconsin Health &  
Hospital Association, Inc.

5721 Odana Road  
Madison, WI  
53719-1289

608/274-1820

FAX: 608/274-8554

<http://www.wha.org>

**“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 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

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

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

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

*5 plan - submit to the local governing*

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.





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

---

Tommy G. Thompson, Governor  
Joe Lean, Secretary

May 5, 1999

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

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

Dear Senator Robson and Representative Grothman:

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

Sincerely,

John Kiesow  
Executive Assistant

Attachments

<b>I. WHA PROPOSAL: NEW OR CHANGED CHAPTER 50 PROVISIONS (5/5/99)</b>		
<b>WHA PROPOSAL</b>	<b>CONCERN</b>	<b>DHFS RECOMMENDATION</b>
1. No longer requires background checks of persons who live at a covered entity but who are not clients of the entity ("non-client residents").	Access to clients by non-client residents on a regular basis provides the opportunity for a person with whom DHFS has no regulatory relationship to commit misconduct.	<b>Non-client residents</b> should have their backgrounds checked.
2. Defines "caregivers" as employees or contractors who have "significant, regular client care responsibilities."	"Significant...care responsibilities" is an unclear term; even if clarified, direct access to clients rather than some degree of "significance" of caregiving responsibilities supplies the opportunity for committing misconduct. Current rule covers employees or contractors who have "access" to clients, and "access" is defined as "direct, regular contact" with clients.	Stay with current rule language: "Caregiver" includes all <b>employees or contractors who have access; i.e., direct, regular contact</b> with clients.  Statute should grant rule making authority to DHFS to develop details of the process, including rehabilitation reviews, granting exemptions for persons who were not intended to be covered under the law, etc.
3. WHA proposal covers anyone "licensed, certified, or registered by DHFS to operate an entity."	Proposal is too broad / includes restaurant and other public health workers who have no access to vulnerable populations. Current statute covers the same entities if the entity provides " <b>direct care or treatment services to clients.</b> "	Stay with current statutory language: " <b>direct care or treatment services to clients.</b> "
5. Defines "contractor" as a caregiver "who can reasonably be said to be a surrogate for an employee, and excludes students."	"Surrogate for an employee" is undefined, and exemption for all students is too broad.  HFS 12 covers contractors who are "caregivers" who are "under the entity's control," and who have "access" to clients.	Exclude persons whose <b>sole duties are non-direct care</b> , but include persons, including students, who have both non-direct care and regular direct care duties, regardless of how "significant" those duties are.  Allow students to continue clinical experience while rehabilitation review is pending.
6. Includes " <b>personal care worker agencies</b> " and " <b>supportive home care agencies,</b> " but excludes EMT's.	DHFS has no regulatory authority over PCW and SHC agencies unless they are licensed as home health agencies.  In the past EMT's were asked to self-disclose criminal	Need statutory change to <b>include personal care workers and supportive home care workers</b> who are employed somewhere other than by a licensed home health agency.

I. WHA PROPOSAL: NEW OR CHANGED CHAPTER 50 PROVISIONS (5/5/99)		
WHA PROPOSAL	CONCERN	DHFS RECOMMENDATION
	<p>histories; under the caregiver law, DHFS has found several EMT's with license-prohibitive convictions who did not disclose their backgrounds.</p> <p>HFS 12 limits PCW and SHC agencies to those also licensed as home health agencies.</p>	
7. Defines "serious crime" as the crimes expressly written in current statute plus findings made by DHFS.	<p>A "finding" is not a crime.</p> <p>At a minimum, offenses that prohibit employment or licensure should include serious misconduct committed against vulnerable adults and children.</p>	Change "serious crime" to "serious offense." Expand prohibitive list to include offenses defined in HFS 12 as permanent bars, including abuse of vulnerable adults and crimes against children. (See attached list.)
8. Permits an employee to work pending receipt of the checks as long as the person is supervised.	<p>Proposal has no time frame for submitting or completing checks; persons with prohibitive backgrounds could work indefinitely.</p> <p>A person's criminal history, abuse history, and license limitation history can change often; changes that would prohibit employment should affect access to clients.</p> <p>HFS 12 allows a <b>60 day provisional employment period</b> pending receipt of the checks, as long as the employee is <b>supervised</b> and the <b>disclosure form indicates eligibility</b> for work, and also requires checks to be repeated at least every four years.</p>	Maintain <b>60 day provisional employment period</b> based on a "clean" disclosure form and supervision.
9. Eliminates as one of the background checks a check of previous license denials, revocations, or suspensions imposed by BQA.	Information about previous licensee performance that was poor enough to cause action against a license directly relates to protecting vulnerable clients and should be checked.	Continue to require and <b>report</b> via the automated Integrated Background Information System (IBIS) previous <b>licensure actions taken against licensees.</b>
10. Allows all employees with an offense in their background requiring	Persons who commit an offense serious enough to require rehabilitation approval	Continue requiring rehabilitation approval <b>before a new applicant</b> for work or licensure <b>can begin work</b>

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

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

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

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

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

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

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

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

May 5, 1999

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

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

(a) An act, or repeated acts by a caregiver or nonclient resident, including but not limited to restraint, isolation or confinement, that, when contrary to the entity's policies and procedures or when not a part of the client's treatment plan, and **when done intentionally to cause harm**, does any of the following:

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

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

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

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

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

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

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

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

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

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

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

(c) Causes or could reasonably be expected to cause mental or emotional damage to a client, including harm to the client's psychological or intellectual functioning that is exhibited by anxiety,

depression, withdrawal, regression, outward behavior, agitation, fear of harm or death, or a combination of these behaviors. This subdivision paragraph does not apply to permissible restraint, isolation, or confinement implemented by order of a court or other lawful authority.

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



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

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



State Representative

**GREGG UNDERHEIM**

Chair: Assembly Committee on Health

Chair: Assembly Committee on State & Federal Relations

April 14, 1999

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

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

Rep.Underheim@legis.state.wi.us

Message Hotline:

1 (800) 362-9472

TDD: 1 (800) 228-2115

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

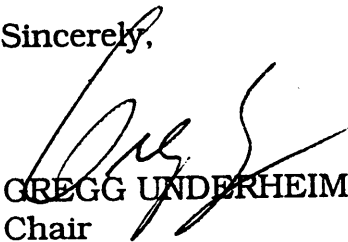
Dear Secretary Leean:

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

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

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

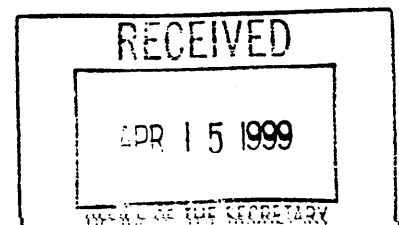
Sincerely,



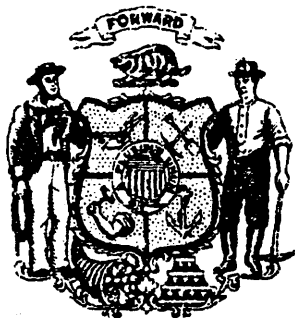
GREGG UNDERHEIM  
Chair  
Assembly Committee on Health

GU/sjl

cc: Members of the Assembly Committee on Health



WISCONSIN  
STATE  
ASSEMBLY



**SHELDON  
WASSERMAN**  
STATE REPRESENTATIVE

April 7, 1999

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

Dear Gregg:

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

Chapter 940 Crimes Against Life and Bodily Security

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

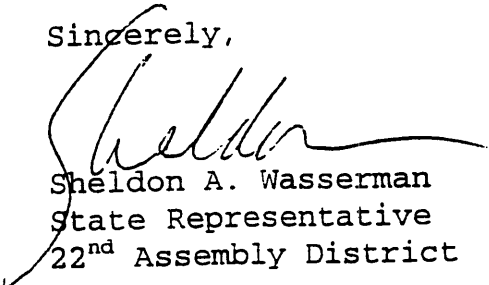
Chapter 948 Crimes Against Children

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

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

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

Sincerely,

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

SW/so

MADISON:  
POST OFFICE BOX 8953  
MADISON, WISCONSIN 53708  
(608) 266-7671  
TOLL-FREE NUMBER: 1-888-534-0022  
FAX: (608) 266-7038  
E-MAIL: rep.wasserman@legis.state.wi.us  
WEB PAGE: [http://www.legis.state.wi.us/  
assembly/asm22/news/](http://www.legis.state.wi.us/assembly/asm22/news/)

HOME:  
3487 NORTH LAKE DRIVE  
MILWAUKEE, WISCONSIN 53211  
(414) 964-0663

  
PRINTED ON RECYCLED PAPER

## BACKGROUND INFORMATION DISCLOSURE INSTRUCTIONS

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

### CAREGIVER BACKGROUND CHECK LAW

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

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

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

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

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

### THE NEW LAW COVERS THE FOLLOWING PERSONS

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

### FAIR EMPLOYMENT ACT

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

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

## BACKGROUND INFORMATION DISCLOSURE

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

**Please print your answers.**

Check the box that applies to you.

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

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

**Section A - ACTS, CRIMES AND OFFENSES THAT MAY ACT AS A BAR OR RESTRICTION**

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

(Continued on next page)

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

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

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

YOUR SIGNATURE	Date Signed
----------------	-------------