

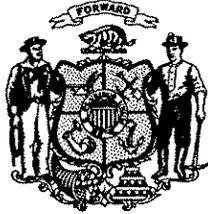
HSS 129 - CAREGIVER MISCONDUCT
98-198 REISTRY

WISCONSIN LEGISLATIVE COUNCIL STAFF



RULES CLEARINGHOUSE

Ronald Sklansky
Director
(608) 266-1946



David J. Stute, Director
Legislative Council Staff
(608) 266-1304

Richard Sweet
Assistant Director
(608) 266-2982

One E. Main St., Ste. 401
P.O. Box 2536
Madison, WI 53701-2536
FAX: (608) 266-3830

CLEARINGHOUSE REPORT TO AGENCY

[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

CLEARINGHOUSE RULE 98-188

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

Submitted by **DEPARTMENT OF HEALTH AND FAMILY SERVICES**

11-16-98 RECEIVED BY LEGISLATIVE COUNCIL.
12-11-98 REPORT SENT TO AGENCY.

RNS:AS:jal;wu

LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]

Comment Attached YES NO

2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]

Comment Attached YES NO

3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]

Comment Attached YES NO

4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS
[s. 227.15 (2) (e)]

Comment Attached YES NO

5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]

Comment Attached YES NO

6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL
REGULATIONS [s. 227.15 (2) (g)]

Comment Attached YES NO

7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]

Comment Attached YES NO

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CLEARINGHOUSE RULE 98-188

Comments

[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated September 1998.]

2. Form, Style and Placement in Administrative Code

- a. Please review the rule to ensure that titles are written in the proper format. Section titles should be written with an initial capital letter and in bold print. [s. 1.05 (2) (b), Manual.] Paragraph titles should be written with an initial capital letter and be italicized. [s. 1.05 (2) (d), Manual.]
- b. In s. HFS 13.03 (12) (c), "the" should replace "such."
- c. In s. HFS 13.05 (6) (a), "subs." should replace "sub."
- d. In s. HSS 129.07 (2) (f) 2. g., "of a client" should be inserted after "neglect" to reflect the text of the current rule.
- e. In s. HSS 129.10 (2), because s. HSS 129.10 (2) (b) is being repealed, par. (a) should be renumbered sub. (2) (intro.) and the subdivisions should be renumbered as paragraphs.
- f. The treatment clause for SECTION 11 should indicate that the note is being amended.

4. Adequacy of References to Related Statutes, Rules and Forms

a. In s. HFS 13.04 (1) (a) 1. and (b) 1., it appears that the reference to s. HFS 13.05 (6) (c) should be to s. HFS 13.05 (7) (b).

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

c. In s. HSS 129.07 (2) (f) 2. g., the new material should refer to the specific provisions of ch. HFS 13 that define "abuse" and "neglect."

d. In the note to s. HSS 129.10 (1), the reference to s. 146.40 (4) (g), Stats., should be to s. 146.40 (4g), Stats.

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. In s. HFS 13.03 (1) (a) 3., "either" should be deleted.

b. In s. HFS 13.03 (1) (b), "under" should be replaced with "in violation of" or "Sexual intercourse or sexual contact" should be replaced with "Sexual assault."

c. In s. HFS 13.03 (1) (c), "by order of a court or other lawful authority" is confusing. Since restraint is permitted under current law under certain circumstances, it would be clearer to replace "other lawful authority" with "as permitted by statute."

d. Section HFS 13.03 (1) (e) should be deleted or expressed in another way. Any act could be an act that does not constitute self-defense.

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

f. In s. HFS 13.03 (12) (b), "In this paragraph," should be inserted at the beginning of the second sentence.

g. In s. HFS 13.04 (2) (e), "brief" should be deleted.

h. In s. HFS 13.04 (3), "the person's social security number" should be inserted after "With the exception of."

i. In s. HFS 13.05 (3) (e), "be required to" should be inserted before "forfeit."

j. In s. HFS 13.05 (7) (b) 2., "within" should be deleted so that the date by which an appeal must be filed is clear.

k. In s. HFS 13.05 (8) (b) 2. e., should "persons" replace "parties"? This subdivision paragraph is presumably not limited to parties to an action.

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

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

Analysis Prepared by the Department of Health and Family Services

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

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

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

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

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

SECTION 1. Chapter HFS 13 is created to read:

CHAPTER HFS 13

REPORTING AND INVESTIGATION OF CAREGIVER MISCONDUCT

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



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

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

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

HFS 13.03 DEFINITIONS. In this chapter:

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

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

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

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

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

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

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

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

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

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

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

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

(5) "Caregiver registry" means the registry required under s. 146.40(4g), Stats., which consists of 2 lists: the list under s. HSS 129.10 of nurse aides qualified by training and testing

to work in a hospital or nursing home or for a home health agency or hospice program, and the caregiver misconduct registry, which includes nurse aides, under this chapter.

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

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

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

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

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

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

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

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

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

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

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

In this par.

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

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

Consent in on 06
(e) ~~Violating~~ s. 943.38, Stats., involving the property of a client, or *violation of* s. 943.41, Stats., involving fraudulent use of a client's financial transaction card. *(S)*

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

(14) "Neglect" means an act, omission or course of conduct by a caregiver that results in failure to provide adequate food, shelter, clothing, medical care or dental care to a client, and that is due to such substantial carelessness or negligence of the caregiver's duties and obligations to the client as to create a significant danger to the physical or mental health of the client.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

subra.

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

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

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

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

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

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

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

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

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

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

2. 'Reasonable cause to substantiate the allegation.' If the department determines there is reasonable cause to substantiate the allegation, the department's written decision

shall be provided to the subject of the report, the involved entity or staffing agency, if known, and to the reporter. The decision shall contain all of the following:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

e. Other parties as required by law. *persons?*

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

1. The division of hearings and appeals' decision is reversed by a court of law.
2. The department is notified of the death of the person listed on the caregiver misconduct registry.
3. The information is required to be altered by law.

SECTION 2. HSS 129.03(1) is repealed. *repealed*

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

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

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

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

- (a) A convent or facility owned or operated exclusively by and for members of a religious order that provides reception and care or treatment of an individual.
- (b) A hospice that directly provides inpatient care.
- (c) A residential care apartment complex, as defined under s. 50.01(1d), Stats.
- (d) A nursing home.

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

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

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

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

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

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

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

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

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

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

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

SECTION 10. HSS 129.11 is repealed.

SECTION 11. HSS 129.12(2) *and the note to it* is amended to read:

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

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

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

Wisconsin Department of Health and
Family Services

Date:

By: _____
Joe Leean
Secretary

SEAL: