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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 98-204

AN ORDER to repeal HFS 55.80 and 55.81; to renumber HFS 55.55 to 55.62; to amend DWD 55.02 (4) and (22), 55.03 (2) (c), 55.04 (2) (a) and (b), (3) (c), (d) 1. and 2., (5) (a) and (b), (7) (a) and (b) 1. and (8) and 55.08 (3); to repeal and recreate DWD 55.02 (1) and 55.05; and to create DWD 55.02 (3m), (4f), (4m), (5m), (12m) and (17m), 55.04 (9), 55.08 (2) (n) and (5) (i), 55.09 (5) (g) and (6) (f), 55.10 and 55.11, relating to criminal record background checks for certified day care operators, employees and contractors of certified day care operators and nonclient residents at certified day care locations.

Submitted by **DEPARTMENT OF WORKFORCE DEVELOPMENT**

12-14-98 RECEIVED BY LEGISLATIVE COUNCIL.

01-15-99 REPORT SENT TO AGENCY.

RNS:RJC:kjf;ksm

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CLEARINGHOUSE RULE 98-204

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.]

1. Statutory Authority

a. The provisions of the rule relating to criminal history background checks seem curiously placed. Section 48.685, Stats., places oversight of the criminal history and child abuse record search within the purview of the Department of Health and Family Services (DHFS). It is not clear why the Department of Workforce Development (DWD) is promulgating these rules as certification criteria. It appears that DHFS has the statutory authority to apply its rules on criminal history and child abuse records searches to certified day care providers. [See, e.g., s. 48.685 (2) (a), Stats.] In addition, it is clearly contemplated in the statutes that certified day care providers would have to meet the certification standard established by DWD and the criminal history and child abuse record search provisions within the purview of DHFS. [See s. 48.651 (1) (intro.), Stats.]

Promulgation of this rule will only unnecessarily duplicate the extensive rule being promulgated by DHFS. It is suggested that to avoid such duplication, the DHFS rule be expanded to cover certified day care providers and this rule be amended to simply cross-reference the DHFS rules as being applicable to certified day care providers and associated persons.

b. In light of the above comment, it is apparent that s. DWD 55.10 (4) is being promulgated without statutory authority. Section 48.685 (6) (c), Stats., provides that a person who provides false information may be subject to the statutory penalty or other sanctions

k. Because s. DWD 55.08 (3) contains a title, the title should be shown when the provision is amended. [See s. 1.05 (3) (c), Manual.]

l. Section DWD 55.10 (1) (intro.) should be changed to sub. (1) (a). Accordingly, pars. (a) and (b) should be renumbered pars. (b) and (c), respectively. Also, the references to "sub. (1) (intro.);" should be changed to refer to "par. (a)." This comment also applies to the provisions in sub. (2). A similar change is needed in s. DWD 55.05 (6) (intro.).

m. In s. DWD 55.10 (3) (a), "offense" is misspelled.

n. The creation of the "crimes table" in s. DWD 55.11 raises several issues. First, s. DWD 55.11 (1) indicates that the purpose of the table is to provide the list required by s. 48.685 (7) (a) and (b), Stats. However, that statutory section requires DHFS to promulgate the relevant lists, not DWD. Thus, the purpose statement lacks accuracy. Second, the section lacks a sub. (2). [See s. 1.03 (intro.), Manual.] Third, if the crimes list produced in s. DWD 55.11 is to be interpreted in a manner consistent with the crimes list established in Appendix A to s. HFS 12.11, which has not yet been promulgated as a permanent rule, why not just include a cross-reference to that list rather than repeat the whole list in this rule? This would avoid duplicating an existing rule and would eliminate the need to change the list whenever DHFS changes its list. Finally, if a table is going to be used, it should be clearly designated and created as Table 55.11 rather than folded in with a substantive provision of the rule. It may also be advisable, if it is deemed necessary to include a crimes list, to create the list as an appendix to the rule rather than a table.

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

a. Section DWD 55.02 (5m) refers to a provider certified under s. 48.65, Stats. That statutory section, however, relates to licensed providers. Perhaps the cross-reference should be to s. 48.651, Stats.

b. In s. DWD 55.04 (9) (a) 6., and elsewhere throughout the rule, reference is made to Table DWD 55. A more adequate and complete cross-reference is necessary. See comment 2. i.

c. In s. DWD 55.04 (9) (b), a county agency must "ensure appropriate precautionary measures" are taken. Are there examples somewhere in the rule of what these measures are? An appropriate cross-reference should be provided to better guide county agencies in taking this action. Also, the last sentence of par. (b) starts with the word "This." What is "This" referring to? Is the delay in issuance of a certification one of the appropriate precautionary measures or is it a result of the precautionary measures?

d. In s. DWD 55.05 (6) (e) (intro.), the rule refers to "the department's review procedures." What are these procedures? An appropriate cross-reference to these procedures should be provided.

e. The "statutory penalty" referred to in s. DWD 55.10 (4) (intro.) should to be identified with a cross-reference to the actual statutory provision. The note can explain the

j. In s. DWD 55.05 (6) (i), the first sentence should be clarified by adding at the end of the sentence the phrase "under this section." The second sentence should be written in the active voice to clarify who has the duty to report.

k. In the note to s. DWD 55.05 (6) (j) 1., the phrase "the other county" should be changed to "another county." For purposes of consistency, in subd. 2., the phrase "review application request" in the first sentence should be deleted.

l. In s. DWD 55.05 (6) (k), the phrase "review and inform the applicant" in the third sentence should be expanded to "review and shall inform the applicant of that fact."

m. In s. DWD 55.05 (8) (b) (intro.), the phrase "but not limited to" is unnecessary and should be deleted. In subd. 4., the comma after "psychiatrists" should be deleted.

n. In s. DWD 55.05 (9) (b), what is "other community information"? Is it defined somewhere? Perhaps a note could be provided explaining what types of information is included in this term.

o. In s. DWD 55.05 (9) (c), it appears that the phrase "children in care" could be replaced by the term "clients" which is defined in the definitions section of the rule.

p. In s. DWD 55.10 (1) (intro.), the phrase "prospective employe" should be better identified. For whom will the prospective employe work?

q. In s. DWD 55.10 (3) (a), what does the phrase "by the next working day" refer to? What day triggers this requirement?

r. Section DWD 55.10 (5) (d) could be clarified by rewriting the end of the provision as follows: "substantiated reports that the person committed acts of child abuse or neglect."

s. In s. DWD 55.10 (6), the rule refers to a person residing outside of this state within "the previous three years." What date is the trigger point for this time frame? The date of application? The date of the request for a background check? Some other date? The rule should be clarified. See, for example, s. 48.685 (2) (bm), Stats.

t. In s. DWD 55.10 (8) (c), what are the "applicable confidentiality requirements" referred to?

u. In s. DWD 55.10 (10) (intro.), it appears that the phrase "an entity" should be inserted before the phrase "need not bar." Also, what does the phrase "until and if" mean? If an entity may retain someone "until and if" a certain decision is reached, how long is this? Do the words "until" and "if" as used in this context not cancel each other out? Is the intent that an entity can retain someone until a decision is reached and if the decision is favorable, may continue to retain them? The rule should be clarified.

Tommy G. Thompson
Governor

Linda Stewart
Secretary



State of Wisconsin

Department of Workforce Development

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March 17, 1999

Senator Fred Risser
President of the Senate
220 South, State Capitol
Madison, Wisconsin 53702

Representative Scott Jensen
Speaker of the Assembly
211 West, State Capitol
Madison, Wisconsin 53702

Notice of Administrative Rules in Final Draft Form

Clearinghouse rule number: 98-204
Rule number: DWD 55
Relating to: Background Checks for Certified Day Care Providers

Dear Senator Risser and Representative Jensen:

I have enclosed proposed rules and a rule report for referral to the appropriate legislative standing committees. The report consists of a summary of the public hearing comments and the agency response, Legislative Council Rules Clearinghouse Report and the agency response, a fiscal estimate, and a regulatory flexibility analysis.

If you have any questions regarding this matter, please do not hesitate to contact us.

Respectfully submitted,

A handwritten signature in black ink that reads "Linda Stewart". The signature is written in a cursive, flowing style.

Linda Stewart, Ph.D.
Secretary

State of Wisconsin Department of Workforce Development

DAY CARE CERTIFICATION

The Wisconsin Department of Workforce Development proposes an order to: repeal HFS 55.80 and 55.81; renumber HFS 55.55 to 55.62; amend DWD 55.02(4) and (22), 55.03(2)(c), 55.04(2)(a) and (b), (3)(c), (d)1. and 2., (5)(a) and (b), (7)(a) and (b)1. and (8), 55.08(3), and 55.09(2)(e)1.; repeal and recreate DWD 55.02(1) and 55.05; and create DWD 55.04(9), 55.08(2)(n) and (5)(i), and 55.09(5)(g) and (6)(f), relating to criminal record background checks for certified day care operators, employes and contractors of certified day care operators, and nonclient residents at certified day care locations.

Analysis

Authority for rule. secs. 48.651 and 49.155(1d), Stats.

Statute interpreted. secs. 48.651, 48.685 and 49.155(1d), Stats.

In accordance with the statutes cited above and administrative rules under consideration by the Department of Health and Family Services under sec. 48.685, Stats., the Department of Workforce Development proposes this rule to provide guidance for county agencies and certified day care operators in complying with the background review requirements of sec. 48.685, Stats.

The proposed rule provides that county agencies shall follow the provisions of ch. HFS 12, Wis. Adm. Code, in obtaining background information and conducting background reviews under sec. 48.685, Stats. This includes following the same requirements for obtaining background information and for evaluating the information in accordance with the crimes list created as an attachment to ch. HFS 12. County agencies are required to apply the same standards to certified day care operators as ch. HFS 12 applies to licensed day care centers. The same standards may also apply to employes, contractors and nonclient residents.

In accordance with sec. 48.685, Stats., the background review requirements apply to new certified day care operators effective October 1, 1998, and to existing certified day care operators effective October 1, 1999. A county agency is not required to bar an certified day care operator or other affected person who meets the eligibility requirements and has submitted a rehabilitation review request that has not been decided by October 1, 1999, until the agency has completed its consideration of the rehabilitation review request.

Other standards. The proposed rule amends the standards for certified day care to provide that smoking shall be prohibited in any indoor or outdoor area in which children are present and to

require that the day care provider keep a written record of the daily hours of attendance of each child in care.

Other provisions. Obsolete rule provisions relating to child care start-up grants are repealed.

SECTION 1. HFS 55.55 to 55.62 are renumbered to DWD 55.01 to 55.09.

SECTION 2. HFS 55.80 and 55.81 are repealed.

SECTION 3. DWD 55.02(1) is repealed and recreated to read:

DWD 55.02(1) "Agency" has the same meaning as "county agency."

SECTION 4. DWD 55.02(4) is amended to read:

DWD 55.02(4) "County agency" means a county department of social services established under s. 46.215 or 46.22, Stats., or a county department of human services established under s. 46.23, Stats., and includes a tribal agency.

SECTION 5. DWD 55.02(22) is amended to read:

DWD 55.02(22) "Wisconsin works participant" or "W-2 participant" means an individual participating in the Wisconsin works program ~~for families with dependent children~~ administered under ss. 49.141 to 49.161, Stats.

SECTION 6. DWD 55.03(2)(c) is amended to read:

DWD 55.03(2)(c) The care permits a ~~Job Opportunities and Basic Skills (JOBS) program enrollee~~ Wisconsin works applicant to attend a ~~JOBS program~~ participate in job search, training or orientation under s. 49.147(2)(a), Stats., prior to the development of an employability plan ~~under s. 49.193 (4), Stats., approved by a JOBS administrative.~~

SECTION 7. DWD 55.04(2)(a) and (b), (3)(c), (d)1. and 2., (5)(a) and (b), (7)(a) and (b)1., and (8) are amended to read:

DWD 55.04(2)(a) Family day care and in-home providers are required to meet the standards under s. ~~HFS 55.61~~ DWD 55.08 and may care for preschool children or school-age children or a combination of preschool and school-age children consistent with Table ~~55.61(6)~~ 55.08(6).

(b) School-age day care programs are required to meet the standards under s. ~~HFS 55.62~~ DWD 55.09.

(3)(c) The applicant shall ~~submit a completed notarized background character verification form for each provider, employe, prospective employe, substitute or adult living in the provider's home~~ comply with the background information requirements of s. 48.685, Stats.

(3)(d)1. If the application is for certification under sub. (2)(a), the county or tribal agency shall review the application for compliance with standards under s. ~~HFS 55.61~~ DWD 55.08 prior to issuing a certificate.

2. If the application is for certification under sub. (2)(b), the county or tribal agency shall refer the application to a licensing representative in the department of health and family services regional office. The licensing representative shall determine whether the applicant is in compliance with all standards under s. ~~HFS 55.62~~ DWD 55.09 and report back to the county or tribal agency. The county or tribal agency may issue a certificate based on the licensing representative's report.

(5)(a) Level I (~~or regular~~), certification may be issued only after the provider has demonstrated compliance with all certification standards including training. Level I (~~or regular~~), certification shall be for a period of 2 years and shall be renewed upon application if the provider continues to comply with the certification standards under s. ~~HFS 55.61 or 55.62~~ DWD 55.08 or

55.09. A provider is not eligible to be issued Level I (~~, or regular,~~) certification if the provider is related to all the children in the provider's care.

(b) Level II (~~, or provisional,~~) certification may be issued only after the provider has demonstrated compliance with all certification standards under s. ~~HFS 55.61~~ DWD 55.08, except standards for training under s. ~~HFS 55.61 (1) (b)~~ DWD 55.08(1)(b). Level II (~~, or provisional,~~) certification shall be for a period of 2 years and shall be renewed upon application if the provider continues to comply with the certification standards, except standards for training under s. ~~HFS 55.61 (1) (b)~~ DWD 55.08(1)(b).

(7)(a) County and tribal agencies shall maintain records demonstrating provider compliance with s. ~~HFS 55.61(1)~~ DWD 55.08(1).

(b)1. County and tribal agencies shall help assure provider compliance with s. ~~HFS 55.61 (2) to (12)~~ DWD 55.08 (2) to (12) in accordance with this paragraph.

(8) A county or tribal agency may grant an exception to any standard in s. ~~HFS 55.61 or 55.62~~ DWD 55.08 or 55.09 if the county or tribal agency determines that an alternative means meets the intent of the requirement, except for rules related to criminal background investigation required under s. ~~48.651 (2)~~ 48.685, Stats.

SECTION 8. DWD 55.04(9) is created to read:

DWD 55.04(9) CERTIFICATION DECISION AFTER BACKGROUND REVIEW.

The county agency shall conduct background reviews in accordance with s. 48.685, Stats. For guidance in resolving issues that arise in particular cases, the county agency shall follow ch. HFS 12, Wis. Adm. Code, and the crimes table incorporated into CH. HFS 12, Wis. Adm. Code, and shall apply the standards which apply to licensed day care facilities.

SECTION 9. DWD 55.05 is repealed and recreated to read:

DWD 55.05 Criminal history and child abuse record search. (1) The county agency shall follow the requirements for criminal history and child abuse record search that are contained in s. 48.685, Stats., and ch. HFS 12, Wis. Adm. Code, and the crimes table incorporated into ch. HFS 12, Wis. Adm. Code, and shall apply the standards which apply to licensed day care facilities, except the county agency shall require any prospective or current employe, contractor under the control of the certified day care provider, or nonclient resident who has or is expected to have access to clients to submit the completed background information form to the county agency. In applying the provisions relating to rehabilitation decisions, all decisions and review procedures shall be made and conducted by the county agency.

NOTE: Detailed information on ch. HFS 12, Wis. Adm. Code, may be obtained by calling the Office of Child Care at (608) 266-9703 or by sending a written request to the Office of Child Care at P.O. Box 7935, Madison WI 53707. In addition, the DHFS requirements are posted by the Department of Health and Family Services at the following web site address: http://www.dhfs.state.wi.us/reg_licens/caregiver/cgindex.html.

(2) Each county agency shall maintain its records concerning each person who is denied a certificate due to the review of background information. The county shall immediately report the receipt of an application for rehabilitation review and the results of each rehabilitation review to the office of legal counsel of the department of health and family services.

(3) A county agency need not bar and may continue the regulatory approval of a certified day care operator, employe, contractor or nonclient resident beyond October 1, 1999, until a favorable rehabilitation review decision has been reached by the agency and all of the following are met:

(a) The certified day care operator or person has submitted a completed rehabilitation review request form prior to October 1, 1999, to the agency that must review the rehabilitation request.

(b) Except for any required waiting period, the certified day care operator or person must show that he or she is otherwise eligible for rehabilitation review.

(c) The certified day care operator or person must have been operating the day care, or have been working for or under contract in the same capacity with the day care, or residing at the day care prior to October 1, 1998.

(d) The person is awaiting rehabilitation review from a county agency and the county agency is unable to complete a rehabilitation review request for the person prior to October 1, 1999.

NOTE: The application for rehabilitation review and the results of the rehabilitation review should be sent to the following address: Office of Legal Counsel, Department of Health and Family Services, 1 W. Wilson St., Room 651, P.O. Box 7850, Madison, WI 53701-7850.

SECTION 10. DWD 55.08(2)(n) is created to read:

DWD 55.08(2)(n) Smoking shall be prohibited in any indoor or outdoor area in which children are present.

SECTION 11. DWD 55.08(3) is amended to read:

DWD 55.08(3) When a provider cares for children in the children's own home, the provider shall comply with requirements in sub. (2) (c), (e), (h), ~~and (L)~~, and (n), but the provider is not required to comply with requirements in sub. (2) (a), (b), (d), (f), (g), (i), (j), (k) and (m).

SECTION 12. DWD 55.08(5)(i) is created to read:

DWD 55.08(5)(i) The provider shall keep a written record of the daily hours of attendance of each child in care.

SECTION 13. DWD 55.08 (6)(d) is amended to read:

DWD 55.08 (6)(d) The maximum number of children that ~~one~~ the provider may care for is shown in Table ~~55.61~~ 55.08 (6) A and B.

SECTION 14. DWD 55.09(e)1. is amended to read:

DWD 55.09(e)1. The name, address, date of birth, education, position names and addresses of employers in previous work experience in child care, address and telephone number of a person to be notified in an emergency, ~~and a statement signed by the employe affirming that he or she has not been convicted or is not the subject of a pending criminal charge as specified under s. HFS 55.59 (1).~~

SECTION 15. DWD 55.09(5)(g) is created to read:

DWD 55.09(5)(g) Smoking shall be prohibited in any indoor or outdoor area in which children are present.

SECTION 16. DWD 55.09(6)(f) is created to read:

DWD 55.09(6)(f) The provider shall keep a written record of the daily hours of attendance of each child in care.

EFFECTIVE DATE. This rule shall take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s.227.22(2)(intro.), Stats.

RULE REPORT

Department of Workforce Development

Rule No.: DWD 55
Relating to: Criminal record background checks for certified day care operators

Agency contact person for substantive questions.

Name Dave Edie
Title Director, DWD Office of Child Care
Phone Number 266-6946

Agency contact person for internal processing.

Name Howard Bernstein
Title DWD Legal Counsel
Phone Number 266-9427

1. Agency statutory authority under which the agency intends to promulgate the rule(s).
Secs. 48.651 and 49.155(1d), Stats.
2. Citation of federal regulations which require adoption or which are relevant to the proposed rule(s).
N.A.
3. Citation of court decisions which are applicable to the proposed rule(s).
N.A.
4. Description of the proposed rule(s).
See the rule analysis included with the rule text.
5. Reason for the proposed rule(s).
See the rule analysis included with the rule text.

Tommy G. Thompson
Governor

Linda Stewart
Secretary



State of Wisconsin

Department of Workforce Development

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Response to Legislative Council and Public Hearing Comments

DWD 55 implements the criminal background check requirements of s. 48.685, Stats., as one of the certification standards for certified day care providers. The requirements of s. 48.685, Stats., are applied to a wide array of other caregivers, including licensed day care providers, in HFS 12. DWD's intention is to mirror the standards for criminal background checks that HFS will be applying to licensed day care providers. The hearing draft of DWD 55 was an extensive rule that essentially duplicated the provisions in HFS 12 and applied them to certified day care providers.

The current draft of DWD 55 has been shortened to cross-reference HFS 12 as a certification standard. This change was made in response to a Legislative Council question on DWD's statutory authority to promulgate its own extensive rule. Another concern was the inefficiency of DWD having to change its rule each time HFS changed its rule.

DWD received written hearing comments from Carol Medaris of the Wisconsin Council on Children and Families and David Pifer of Legal Action of Wisconsin (copies attached) that were similar to comments received by DHFS on HFS 12. DHFS has made numerous changes in HFS 12 in response to public comments, including many of the changes requested in the comments to DWD 55.

Most of the format comments made by the Legislative Council are obsolete since the rule has been rewritten. We did disagree with a Legislative Council format request to list the changes affecting the sections with a DWD prefix before the sections with an HFS prefix. We understand the rule and agree to follow it in the future, but it made more sense to list the sections with an HFS prefix first in this case because we renumber the HFS rules to DWD rules and then, as DWD rules, they are changed in various ways. If we listed the DWD sections first, we would be making changes to rules that don't exist yet.



"For these are all our children . . .
we will all profit by, or pay for,
whatever they become." James Baldwin

January 22, 1999

Elaine Pridgen
Office of Legal Counsel
State Department of Workforce Development
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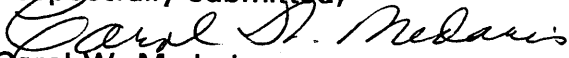
Re: Proposed rule relating to criminal background checks for day care operators, Ch. DWD 55, Wis. Adm. Code

Dear Ms. Pridgen,

This letter constitutes my comments on the proposed rule described above. In general, the rule goes far exceeds the authority granted the Department in sec. 48.685, stats. in the following ways.

1. DWD 55.04(9)(a) and DWD 55.05(5) should not include the words "or has committed" in their description of those subject to the day care provider prohibitions. The statute authorizes only the inclusion of those convicted of serious crimes or those with serious crimes pending against them.
2. In DWD 55.05(6)(c)1, "serious crimes" should be substituted for the phrase, "criminal or municipal ordinance offense," to bring the rehabilitation provisions into conformity with the rest of the statute. Otherwise, people may be prevented from day care work because of very minor infractions of the law which have no relationship to their ability to care for children. This is no where authorized by the statute.
3. DWD 55.11 should be substantially revised to remove offenses which are either not serious crimes or not related to providing care for children. I would concur with the list of crimes suggested for elimination by Legal Action of Wisconsin in their Comments submitted on this rule.

Respectfully submitted,


Carol W. Medaris
Project Attorney

RESEARCH • EDUCATION • ADVOCACY

LEGAL ACTION OF WISCONSIN, INC.

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January 22, 1999

STATE DEPARTMENT OF WORKFORCE DEVELOPMENT
OFFICE OF LEGAL COUNSEL
PO BOX 7946
MADISON WI 53707-7946

Dear Sir:

These comments are submitted in response to the proposed administrative rules governing the criminal background checks for certified day care operators. In critical aspects, the proposed rules go far beyond the authority granted by the statute. As written they appear to be open to challenge because many of the proposed crimes are not substantially related to the care of clients. The effect of the rules may be disproportionately harsh on minority citizens and open to challenge because of their disparate impact on minorities. Our concerns are detailed below.

1. DWD 55.04(9)(a) - the phrase, "or has committed" should be deleted from the second sentence.
 - a) the act of committing a crime, without conviction or adjudication, is not included in either \$48.685(2)(a)(1) or \$48.685(5)(b) as a basis for denying an entity its license or certification, or for denying employment to an individual.
 - b) without conviction or adjudication, the decision as to what constitutes the commission of a crime is vague and impossible to apply. Determinations of guilt are left to low level staff, applying their own personal opinions, and applicants have no way to challenge the determination.
 - c) the inclusion of the phrase, "or has committed" is not authorized by the statute and therefore the department has exceeded its authority by including it in the regulations.
2. DWD55.05(5) - delete the phrase, "or has committed" from the first sentence, for the same reasons stated above.

3. DWD 55.05(6)(c)(1.) - the phrase, "criminal or municipal ordinance offense" should be replaced with the phrase, "serious crime".
 - a) the inclusion of the phrase, "criminal or municipal ordinance offense" is not authorized by the statute and therefore the department has exceeded its authority by including it in the regulations. The proposed change brings the regulation into conformity with the letter and spirit of the statute.
 - b) as written, the regulation will mean that a pending municipal ordinance violation for loitering, failure to remedy building code violations, littering, or jaywalking would prevent a person from pursuing a rehabilitation review even though the violations are only civil infractions and bear no relationship what so ever to the purpose or intent of the statute.
 - c) the use of this provision will have a disproportionate effect on minorities and subject the regulations to a legal challenge because of disparate impact on minorities.
4. DWD 55.05(6)(c)(2.) & (3.) - delete both paragraphs.
 - a) both paragraphs cover violations already contained in the list of crimes that bar licensing, certification, or employment, absent a finding of rehabilitation.
 - b) the inclusion of the two paragraphs creates a circular situation in which a person can never have the opportunity to prove rehabilitation. In effect, the department has converted findings of abuse or neglect of a client, misappropriation of the property of a client, and abuse or neglect of a child into a permanent bar to licensing, certification, or employment. As such, the departments actions exceed their authority to promulgate regulations under the statute.
5. DWD 55.11 - eliminate the following crimes from the list of offenses because they do not constitute a serious crime as defined in §48.685(c) and §48.685(7): reckless driving; causing great bodily harm; hit and run: failure to perform duty upon striking a person or attended vehicle; battery (M-domestic); battery or threat to a judge; battery or threat to Department of Workforce Development, Revenue, or Commerce employee; law enforcement officer - failure to render aid (M); endangering safety; carrying a firearm in public

building; sale, possession, use or transport of machine guns or certain other weapons; possession of short barreled shotgun/rifle; possession of firearm; sale, delivery or possession of firearm silencer; possession of explosives; invasion of privacy; damage to property; arson of a building or damage of any property by explosives; arson of property other than a building; arson with intent to defraud; Molotov cocktails; possession of burglarious tools; operating motor vehicle without owner's consent - w/weapon & force; blackmail; threat to communicate derogatory information; retail theft; sexual gratification; lewd and lascivious behavior; photos or other representation showing nudity; obscene material or performance; making lewd, obscene or indecent drawings; prostitution; soliciting prostitutes; pandering; keeping a place of prostitution; failure to comply w/officer's attempt to take person into custody; escape from custody; assisting/permitting escape; harboring a felon; racketeering; failure to support; practitioner "self-prescribing" (M); manufacture, distribution or delivery of controlled substances; possession of controlled substances w/intent to manufacture, distribute or deliver; possession of controlled substances; possession or attempt to possess cocaine; keeping any store, warehouse, building, etc. for use manufacture or delivery of controlled substances; acquire or obtain possession of controlled substances by fraud, misrepresentation, forgery, deception or subterfuge; and to possess/make a counterfeit substance or to duplicate the appearance, packaging, form or label of a controlled substance.

- a) DWD has exceeded its authority in the development of the crimes table because the list is over-reaching, and many of the crimes cannot be defined as "serious crimes" because they are not substantially related to the care of a client.
- b) the crimes table is so broad that it catches both the sexual predator and the wayward prostitute. The over-reaching coverage of the list will snare large numbers of our citizens and force them to seek an administrative determination of rehabilitation. So many people will be caught by the regulations that the administrative process will either collapse of its own weight, or the state will spend millions staffing administrative tribunals, that could be avoided if the crimes table covered only those crimes that are substantially related to care of a client.
- c) the practical effect of the crime table will be to deny employment to many individuals who would successfully

prove rehabilitation. Employers will refuse to hire the person, and by the time the administrative process is complete the position will be filled and the applicant will still be unemployed.

- d) it is bad public policy to waste taxpayer money with an expensive administrative process made necessary by over-reaching regulations.
- e) the over-reaching nature of the list will have a disparate impact on minority and low-income citizens. Proportionally more minorities and low-income individuals are charged and convicted of crimes than are either non-minorities or affluent citizens, and the longer the crime table the greater the number of minorities who will be snared. They will be denied employment and forced to participate in expensive and time-consuming administrative hearings. Minorities will be forced into this situation at a much higher rate than others in the community. The disparate impact can be limited by including on the list only those crimes that really fit the definition of serious crimes under the statute.
- f) the crime table needs to be totally redone, and limited to only those crimes that are serious, as defined by state law.

Thank you for your consideration of these comments.

Sincerely,



David Pifer
Attorney at Law

Tommy G. Thompson
Governor

Linda Stewart
Secretary



State of Wisconsin

Department of Workforce Development

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Final Regulatory Flexibility Analysis

Clearinghouse rule number: 98-204

Rule number: DWD 55

Relating to: Background Checks for Certified Day Care Providers

Final regulatory flexibility analysis not required. (Statement of determination required.)

Certified day care operators will be affected by the rule change, but the rule will not have a significant economic impact because there is no material change from current procedures.

1. Reason for including or failing to include the following methods for reducing impact of the rule on small businesses: Less stringent compliance or reporting requirements; less stringent schedules or deadlines for compliance or reporting requirements; simplification of compliance or reporting requirements; establishment of performance standards to replace design or operational standards; exemption from any or all requirements.
2. Issues raised by small businesses during hearings, changes in proposed rules as a result of comments by small businesses and reasons for rejecting any alternatives suggested by small businesses.
3. Nature and estimated cost of preparation of any reports by small businesses.
4. Nature and estimated cost of other measures and investments required of small businesses.
5. Additional cost to agency of administering or enforcing a rule which includes any of the methods in 1. for reducing impact on small business.
6. Impact on public health, safety and welfare caused by including any of the methods in 1. for reducing impact on small businesses.

FISCAL ESTIMATE
DOA-2048 E (R 07/97)

- ORIGINAL
- CORRECTED
- UPDATED
- SUPPLEMENTAL

LRB or Bill No./Adm. Rule No.
DWD 55

Amendment No. if Applicable

Subject
Criminal record background checks for certified day care operators

Fiscal Effect

State: No State Fiscal Effect

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

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

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

Decrease Costs

Local: No local government costs

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

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

5. Types of Local Governmental Units Affected:

- Towns
- Villages
- Cities
- Counties
- Others _____
- School Districts
- WTCS Districts

Fund Sources Affected

- GPR
- FED
- PRO
- PRS
- SEG
- SEG-S

Affected Ch. 20 Appropriations

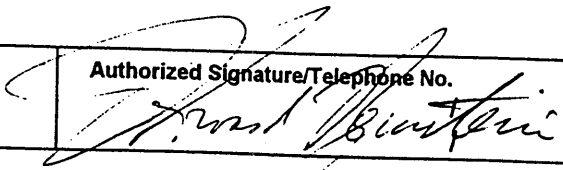
Assumptions Used in Arriving at Fiscal Estimate

All costs to the Department and local governments for the expanded background checks were included in the 1997-1999 biennial budget act, 1997 Wisconsin Act 27. There are no additional costs for state government or local governments as a result of the promulgation of these administrative rule changes.

Long-Range Fiscal Implications
None.

Agency/Prepared by: (Name & Phone No.)
DWD/ASD Howard Bernstein 266-9427

Authorized Signature/Telephone No.



Date
12/14/98

FISCAL ESTIMATE WORKSHEET

1997 Session

Detailed Estimate of Annual Fiscal Effect
DOA-2047 (R 07/97)

ORIGINAL UPDATED
 CORRECTED SUPPLEMENTAL

LRB or Bill No./Adm. Rule No. DWD 55	Amendment No.
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Subject
Criminal record background checks for certified day care operators and others

I. One-time Costs or Revenue Impacts for State and/or Local Government (do not include in annualized fiscal effect):
\$0

II. Annualized Costs:		Annualized Fiscal impact on State funds from:	
A. State Costs by Category		Increased Costs	Decreased Costs
State Operations - Salaries and Fringes		\$0	\$ -0
(FTE Position Changes)		(FTE)	(- FTE)
State Operations - Other Costs			-
Local Assistance			-
Aids to Individuals or Organizations			-
TOTAL State Costs by Category		\$0	\$ -0
B. State Costs by Source of Funds		Increased Costs	Decreased Costs
GPR		\$	\$ -
FED			-
PRO/PRS			-
SEG/SEG-S			-
III. State Revenues - Complete this only when proposal will increase or decrease state revenues (e.g., tax increase, decrease in license fee, etc.)		Increased Rev.	Decreased Rev.
GPR Taxes		\$	\$ -
GPR Earned			-
FED			-
PRO/PRS			-
SEG/SEG-S			-
TOTAL State Revenues		\$0	\$ -0

NET ANNUALIZED FISCAL IMPACT

	STATE	LOCAL
NET CHANGE IN COSTS	\$0	\$0
NET CHANGE IN REVENUES	\$0	\$0

Agency/Prepared by: (Name & Phone No.)
DWD/ASD Howard Bernstein 266-9427

Authorized Signature/Telephone No. *Howard Bernstein* 266-9427 Date *12/14/98*