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EmR1427

**State of Wisconsin
Department of Children and Families**

EMERGENCY RULE

Review of a Determination of Child Abuse or Neglect

Chapter DCF 40

The Wisconsin Department of Children and Families orders the creation of ch. DCF 40, relating to the review of a determination of child abuse or neglect.

This emergency rule was approved by the governor on December 2, 2014.

The statement of scope for this rule, SS 0008-14, was approved by the governor on January 30, 2014, published in Register 698, on February 15, 2014, and approved by Secretary Eloise Anderson on March 12, 2014.

Finding of Emergency

Section 48.981 (3) (c), Stats., as affected by 2013 Wisconsin Act 20, creates a new statewide process for appeals of determinations by a county department, the department, or a licensed child welfare agency that a specific person has abused or neglected a child. The statutory changes creating the new appeal process will be effective January 1, 2015. Act 20 directs the department to promulgate rules to specify the procedures for the initial stage of the appeal process. An emergency rule is necessary for these rules to be effective January 1, 2015.

Analysis Prepared by the Department of Children and Families

Statutory authority: Sections 48.981 (3) (c) 5m. and 227.11 (2) (a), Stats.

Statutes interpreted: Sections 48.981 (3) (c) and 48.685, Stats.

Related statute or rule: Section 50.065, Stats., and ch. HA 1

Explanation of Agency Authority

Section 48.981 (3) (c) 5m., Stats., as affected by 2013 Wisconsin Act 20, provides that if the county department, department, or licensed child welfare agency makes an initial determination that a specific person has abused or neglected a child, the county department, department, or licensed child welfare agency shall provide that person with an opportunity for a review of that initial determination in accordance with rules promulgated by the department before the county department, department, or licensed child welfare agency may make a final determination that the person has abused or neglected a child.

Section 227.11 (2) (a), Stats., expressly confers rule-making authority on each agency to promulgate rules interpreting the provisions of any statute enforced or administered by the agency.

Summary of the Emergency Rule

Section 48.981 (3) (c) 5m. and 5p., Stats., as affected by 2013 Wisconsin Act 20, creates a new statewide process for appeals of determinations by a county department or the Bureau of Milwaukee Child Welfare that a specific person has abused or neglected a child. The statutory changes creating the new appeal process will be effective January 1, 2015. The emergency rule specifies the appeal notice requirements, procedures for review of an initial determination that a specific person has abused or neglected a child, and other policies necessary to implement the new appeal process.

Review of an Initial Determination

The emergency rule provides that if an agency makes an initial determination that a specific person has abused or neglected a child, the agency shall send by first class mail all of the following information to the person by the next working day:

- A summary of the initial determination that includes the name of the child involved in the alleged incident and the reasons for the agency's determination that the person has abused or neglected the child.
- Information on the administrative appeal process, including the procedures for review of an initial determination and a contested case hearing before the division of hearings and appeals if the final determination upholds the initial determination.
- Information on the effect of a final determination on record checks under ss. 48.685 and 50.065, Stats.

The person may request a review of the initial determination by submitting a request for review to the agency within 15 days after the date of the notice of initial determination. Within 15 days after receiving the review request, the agency shall send a written notice to the person with the review date, time, and place. The notice shall be sent at least 7 days before the review. If the person does not request a review within 15 days after the date of the notice of initial determination, the agency shall send the person a notice of final determination within 5 days.

The review of the initial determination may be by an individual or panel. If a panel is used, the panel shall be comprised of at least 3 members, and the final determination shall be the decision of the majority of the panel. The individual or panel conducting the review of the initial determination shall have authority to make the final determination.

The emergency rule also provides that any person who conducts the review of the initial determination shall have knowledge of child protective services in Wisconsin, and no person who conducts the review of the initial determination may have had any prior involvement in the investigation or determination for the case that is being reviewed.

The review of the initial determination shall be held within 45 days after the person's request for review. The person may request one rescheduling of the review date or time, and the agency shall grant the request if the review of the initial determination can be rescheduled within 45 days after the person's initial request for review. The notice of the rescheduled review date may be sent less than 7 days before the review if that is necessary to complete the review within 45 days after the person's request for review.

An agency may not hold the review of the initial determination in abeyance pending the outcome of any criminal proceedings or any proceedings under s. 48.13 or 938.12, Stats., based on the alleged abuse or neglect or the outcome of any investigation that may lead to the filing of a criminal complaint or petition under s. 48.13 or 938.12, Stats., based on the alleged abuse or neglect.

The review of the initial determination shall be scheduled for at least one hour. When the review is scheduled, the agency shall provide the reviewing individual or panel with information related to the initial determination. The person may be represented by an attorney. The person may present information that is relevant to whether the person has abused or neglected a child as specified in the initial determination. The person may not present witnesses and may not question any agency staff who may be present. The agency is not required to present evidence or witnesses to support the determination beyond the materials provided under par. (j).

Final Determination

Under the emergency rule, the individual or panel conducting the review of the initial determination shall make a final determination on whether the specific person has abused or neglected a child within 10 days after the date of the review of the initial determination. The agency shall send a written notice of final determination to the person within 5 days after the date of the final determination. If the final determination upholds the initial determination or the person did not request a review of the initial determination, the notice shall include a summary of the reasons for the final determination and information on appealing the final determination.

Sections 48.685 and 50.065, Stats., require that information regarding a final determination that a person has abused or neglected a child be obtained for caregiver record checks. The agency shall ensure that authorized information regarding a final determination is available for caregiver record checks within 15 days after the agency's final determination.

Division of Hearings and Appeals Contested Case Hearing

Under s. 48.891 (3) (c) 5p., Stats., a person who is a subject of a final determination that the person has abused or neglected a child has the right to a contested case hearing before the Division of Hearings and Appeals (DHA) on that determination. To receive the hearing, the person must send a written request to DHA within 10 days after the date of the notice of the final determination.

DHA shall commence the contested case hearing within 90 days after the receipt of the request unless the hearing is rescheduled by the person requesting it or DHA holds the case proceeding in abeyance. DHA can hold the case proceeding in abeyance pending the outcome of any criminal proceedings or any proceedings under s. 48.13, Stats., based on the alleged abuse or neglect or the outcome of any investigation that may lead to the filing of a criminal complaint or a petition under s. 48.13, Stats., based on the alleged abuse or neglect. DHA shall issue a final decision within 60 days after the close of the hearing.

The emergency rule provides that a person may request that the division of hearings and appeals expedite his or her appeal if any of the following apply:

- The person currently has, or has applied for, a license or certification that may be revoked or denied as provided in s. 48.685 or 50.065, Stats.
- The person is currently employed by or contracts with, or the person is actively engaged in seeking employment or a contract with, an entity for duties subject to the record check requirements under s. 48.685 or 50.065, Stats.
- The person is enrolled in an academic program that leads to license, certification, or employment or contract position that will be subject to the record check requirements under s. 48.685 or 50.065, Stats., and the person can be expected to complete the academic program within 150 days after the date of his or her request for a hearing with the division of hearings and appeals.

A person who requests that the division of hearings and appeals expedite his or her appeal shall indicate the request on his or her request for hearing and provide documentation that he or she qualifies for an expedited appeal. The division of hearings and appeals shall provide an expedited hearing and decision for a qualified person as soon as practicable.

If the contested case hearing or judicial review overturns the agency determination that a specific person has abused or neglected a child, the agency shall update the authorized information available for record checks within 15 days after the decision.

Summary of Factual Data and Analytical Methodologies

The rule was developed with an advisory group of representatives from the Wisconsin County Human Services Association.

The framework for the rule is based on the appellate opinion *Dupuy v. Samuels*, 397 F.3d 493 (7th Cir. 2005) and the district court opinions *Dupuy v. McDonald*, 141 F. Supp. 2d 1090 (N.D. Ill. 2001); *Dupuy v. McDonald*, 2003 Westlaw 2155791 (N.D. Ill. July 10, 2003); and *Dupuy v.*

Samuels, 2005 Westlaw 1498468 (N.D. Ill. June 10, 2005). The 7th Circuit is a federal court with appellate jurisdiction over courts in Illinois, Wisconsin, and Indiana.

Dupuy is a class action case that found that specified workers subject to a background check that presumes disqualification based on a determination of child abuse or neglect have a constitutionally protected property interest in pursuing employment in their chosen occupation and are entitled to due process before being deprived of that interest. The series of opinions set forth decision-making, notice and hearing, and disclosure policies that were acceptable to the 7th Circuit of the U.S. Court of Appeals.

Summary of Related Federal Requirements

The Child Abuse Prevention and Treatment and Adoption Reform Act provides that the federal Department of Health and Human Services shall provide grants to states for the purpose of assisting states in improving their child protective services system. A state plan describing the activities that the state will carry out using funds received under the grant must include an assurance that the state has provisions, procedures, and mechanisms by which individuals who disagree with an official finding of child abuse or neglect can appeal the finding. 42 USC 5106a (b) (2) (B) (xv) (II).

Comparison to Rules in Adjacent States

Illinois

Illinois has a 2-track process. Persons with an employment interest may request a pre-disclosure conference and a post-disclosure contested case hearing based on the procedures developed in the *Dupuy* opinions. Persons without an employment interest may request a contested case hearing.

Minnesota

Both persons with an employment interest and persons with no employment interest may request a reconsideration of the agency's determination. A person with an employment interest has more time to request a reconsideration of the agency's determination than a person without an employment interest. For a person with an employment interest, the reconsideration may be based on whether the information that the agency relied on to disqualify is incorrect or on whether the individual poses a risk of harm to persons served by the program, or both. The agency has more time to respond if more issues are involved. Following the reconsideration, a person may request a contested case hearing.

Iowa

Following the conclusion of an assessment, a subject of a child abuse report has the right to examine the report and provide additional information and request that the department revise the report. At the time the report is issued, the department shall provide notice of the right to a contested case hearing to the person named as having abused a child.

Michigan

After a person's name is placed on the Central Registry, the person may write a letter requesting that his or her name be removed from the Central Registry. If that request is denied, the person may request an administrative hearing.

Agency Contact Person

John Elliott, Deputy Division Administrator, Division of Safety and Permanence, john.elliott@wisconsin.gov, (608) 266-8988.

Place Where Comments are to be Submitted and Deadline for Submission

Comments may be submitted to Elaine Pridgen, Office of the Secretary, Department of Children and Families, 201 E. Washington Avenue, P.O. Box 8916, Madison, WI, 53708-8916 or dcfpublichearing@wisconsin.gov. The comment deadline is January 28, 2015.

SECTION 1. Chapter DCF 40 is created to read:

Chapter DCF 40

REVIEW OF A DETERMINATION OF CHILD ABUSE OR NEGLECT

DCF 40.01 Purpose. This chapter specifies the procedures for review of a determination that a specific person has abused or neglected a child under ss. 48.981 (3) (c) 5m., and 5p., Stats., and for ensuring that authorized information is available for record checks as provided in s. 48.981 (3) (c) 5r, Stats.

DCF 40.02 Definitions. In this chapter:

(1) “Abuse” has the meaning given in s. 48.02 (1), Stats., and as further defined in the standards established by the department for conducting child abuse and neglect investigations under s. 48.981 (3) (c) 1. a., Stats.

Note: The department’s *Child Protective Services Access and Initial Assessment Standards* are available on the department’s website, <http://dcf.wisconsin.gov>, by clicking on Child and Family Safety/Wisconsin’s Statewide Automated Child Welfare Information System (WiSACWIS)/Frequently Used Links/CPS, Safety, Ongoing Standards.

(2) “Administrative law judge” means an administrative hearing examiner employed by the division of hearings and appeals.

(3) “Agency” means a county department under s. 46.22 or 46.23, Stats., or in a county having a population of 500,000 or more, the department or a licensed child welfare agency that is under contract with the department to fulfill the department’s duties specified under s. 48.981 (3) (c) 5m., Stats.

(4) “Department” means the department of children and families.

(5) “Division of hearings and appeals” means the division of hearings and appeals within the department of administration.

(6) “Final determination” means an agency’s determination under s. 48.981 (3) (c) 5m., Stats., that a specific person has abused or neglected a child.

(7) “Initial determination” means an agency’s determination under s. 48.981 (3) (c) 4., Stats., that a specific person has abused or neglected a child.

(8) “Licensed child welfare agency” means a person licensed as required under s. 48.60, Stats.

(9) “Neglect” has the meaning given in s. 48.02 (12g), Stats. and as further defined in the standards established by the department for conducting child abuse and neglect investigations or unborn child abuse investigations under s. 49.981 (3) (c) 1. a., Stats.

Note: The department’s *Child Protective Services Access and Initial Assessment Standards* are available on the department’s website, <http://dcf.wisconsin.gov>, by clicking on Child and Family Safety/Wisconsin’s Statewide Automated Child Welfare Information System (WiSACWIS)/Frequently Used Links/CPS, Safety, Ongoing Standards.

DCF 40.03 Review of an initial determination. (1) NOTICE. If an agency makes an initial determination that a specific person has abused or neglected a child, the agency shall send by first class mail all of the following information to the person by the next working day:

(a) A summary of the initial determination that includes the name of the child involved in the alleged incident and the reasons for the agency’s determination that the person has abused or neglected the child.

(b) Information on the administrative appeal process, including the procedures for review of an initial determination and a contested case hearing before the division of hearings and appeals if the final determination upholds the initial determination.

(c) Information on the effect of a final determination on record checks under ss. 48.685 and 50.065, Stats.

(2) PROCEDURES FOR REVIEW OF AN INITIAL DETERMINATION. (a) A person who is the subject of an initial determination may request a review of the initial determination by submitting a request for review to the agency within 15 days after the date of the notice of initial determination.

(b) Within 15 days after receiving the review request, the agency shall send a written notice to the person with the review date, time, and place. The notice shall be sent at least 7 days before the review.

(c) If the person does not request a review within 15 days after the date of the notice of initial determination, the agency shall send the person a notice of final determination under s. DCF 40.04 within 5 days.

(d) The review of the initial determination may be by an individual or panel. A panel shall be comprised of at least 3 members, and the final determination shall be the decision of the majority of the panel. The individual or panel conducting the review of the initial determination shall have authority to make the final determination.

(e) Any person who conducts the review of the initial determination shall have knowledge of child protective services in Wisconsin.

(f) No person who conducts the review of the initial determination may have had any prior involvement in the investigation or determination for the case that is being reviewed.

(g) The review of the initial determination shall be held within 45 days after the person's request for review.

(h) An agency may not hold the review of the initial determination in abeyance pending the outcome of any criminal proceedings or any proceedings under s. 48.13 or 938.12, Stats., based on the alleged abuse or neglect or the outcome of any investigation that may lead to the filing of a criminal complaint or petition under s. 48.13 or 938.12, Stats., based on the alleged abuse or neglect.

(i) The person that is the subject of the initial determination may request one rescheduling of the review date or time, and the agency shall grant the request if the review of the initial determination can be rescheduled within 45 days after the person's initial request for review. The notice of the rescheduled review date may be sent less than 7 days before the review if that is necessary to complete the review within 45 days after the person's request for review.

(j) The review of the initial determination shall be scheduled for at least one hour. When the review is scheduled, the agency shall provide the reviewing individual or panel with information related to the initial determination.

(k) The person may be represented by an attorney at the review of the initial determination.

(L) The person may present information that is relevant to whether the person has abused or neglected a child as specified in the initial determination. The person may not present witnesses and does not have the right to question agency staff who may be present. Agency staff may allow questioning and respond to questions to facilitate the review. The agency is not required to present evidence or witnesses to support the determination beyond the materials provided under par. (j).

DCF 40.04 Notice of final determination and right to hearing. (1) The individual or panel conducting the review of the initial determination under s. DCF 40.03 shall make a final determination on whether the specific person has abused or neglected a child within 10 days after

the date of the review of the initial determination. Within 5 days after the date of the final determination, the agency shall send a written notice of final determination to the person by first class mail.

(2) If the final determination upholds the initial determination or the person did not request a review of the initial determination, the notice of final determination shall include information relating to all of the following:

(a) A summary of the final determination that includes the name of the child involved in the alleged incident and the reasons for the agency's determination that the person has abused or neglected the child.

(b) Information on appealing the final determination, including information relating to all of the following:

1. To receive a contested case hearing under ch. 227, Stats., the person shall file a request for hearing with the division of hearings and appeals within 10 days after the date of the notice.

2. Materials may be submitted to the division of hearings and appeals by mail, personal service, inter-departmental mail, or fax. The date of filing shall be the following:

a. Materials mailed to the division of hearings and appeals shall be considered filed on the date of the postmark. If the postmark date is illegible or absent, the filing date shall be the date of receipt by the division of hearings and appeals.

b. Materials submitted by personal service or by inter-departmental mail shall be considered filed on the date they are received by the division of hearings and appeals.

c. Materials transmitted to the division of hearings and appeals by facsimile shall be considered filed or served on the division or the administrative law judge on the date and at the time that is imprinted by the division's facsimile machine on the transaction report that

accompanies the document. Documents received after midnight local time shall be deemed filed on the first following business day.

Note: The mailing address of the division is Division of Hearings and Appeals, 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 fax number of the division is (608) 264-9885.

3. A person may request that the division of hearings and appeals expedite the person's appeal if any of the following apply:

a. The person currently has, or has applied for, a license, certification, certificate of approval, or registration that may be revoked or denied as provided in s. 48.685 or 50.065, Stats.

b. The person is currently employed by or contracts with, or the person is actively engaged in seeking employment or a contract with, an entity for duties subject to the record check requirements under s. 48.685 or 50.065, Stats.

c. The person is enrolled in an academic program that leads to license, certification, or employment or contract position that will be subject to the record check requirements under s. 48.685 or 50.065, Stats., and the person can be expected to complete the academic program within 150 days after the date of his or her request for a hearing with the division of hearings and appeals.

4. A person who requests that the division of hearings and appeals expedite his or her appeal shall indicate the request on his or her request for hearing and provide documentation that he or she qualifies under subd. 2. The division of hearings and appeals shall provide an expedited hearing and decision for a qualified person as soon as practicable.

5. The division of hearings and appeals shall commence the hearing within 90 days after receipt of the request for hearing, unless the hearing is rescheduled on the request of the person requesting the hearing or the contested case proceeding is held in abeyance pending the outcome

of any criminal proceedings or any proceedings under s. 48.13, Stats., based on the alleged abuse or neglect or the outcome of any investigation that may lead to the filing of a criminal complaint or a petition under s. 48.13, Stats., based on the alleged abuse or neglect.

6. The division of hearings and appeals shall issue a final decision within 60 days after the close of the hearing.

7. Judicial review of the final decision following the hearing may be had by any party to the contested case proceeding as provided in ch. 227, Stats.

(c) Information on record checks under ss. 48.685 and 50.065, Stats., including all of the following:

1. A final determination that the person abused or neglected a child is a bar to certain licenses, employment, residence, and other specified actions involving an entity or person that is covered by the record check requirements in s. 48.685 or 50.065, Stats.

2. The person may request a review to demonstrate that he or she has been rehabilitated.

3. Rehabilitation may be denied, approved for all actions that would otherwise be barred by the final determination under s. 48.685 or 50.065, Stats., or limited to approval for specified actions only.

Note: Information on the rehabilitation review process is in ch. DHS 12.

DCF 40.05 Other requirements. (1) The agency records related to an initial determination and the subsequent review and hearing shall be governed by the confidentiality provisions of s. 48.981 (7), Stats.

(2) An initial or final determination that a specific person has abused or neglected a child shall be based on a preponderance of the evidence.

(3) Any review or appeal of an initial or final determination shall be governed by the standards established by the department for conducting child abuse and neglect investigations under s. 49.981 (3) (c) 1. a., Stats.

Note: The department's *Child Protective Services Access and Initial Assessment Standards* are available on the department's website, <http://dcf.wisconsin.gov>, by clicking on Child and Family Safety/Wisconsin's Statewide Automated Child Welfare Information System (WiSACWIS)/Frequently Used Links/CPS, Safety, Ongoing Standards.

DCF 40.06 Record checks. The agency shall ensure that authorized information regarding the final determination that a specific person has abused or neglected a child is available for record checks under ss. 48.685 and 50.065, Stats., within 15 days after the agency's final determination. If a contested case hearing under ch. 227, Stats., or judicial review overturns the agency determination that a specific person has abused or neglected a child, the agency shall update the authorized information available for record checks within 15 days after the decision.

SECTION 2. EFFECTIVE DATE. This rule shall take effect on January 1, 2015, as provided in s. 227.24 (1) (c), Stats.