

Background Check and
Abuse Reporting Reform
May 24, 1999
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non-client resident of the entity committed misappropriation of property or neglect or abuse, ~~which a reasonable and disinterested person would consider to be credible.~~

- (c) For purposes of this paragraph, "neglect or abuse" means conduct evidencing such disregard of a client's physical and mental needs and interests as is found in deliberate violations or disregard of client rights, or in carelessness or negligence of such degree or frequency as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the person's duties and obligations to the client. Mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertency or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not deemed to be reportable neglect or abuse.
- (d) For purposes of this paragraph, "contractor" shall have the meaning set forth in s. 50.065(1)(c).

Nonstatutory provisions

The Department of Corrections, in conjunction with the University of Wisconsin, shall prepare a report based upon peer-reviewed and published research that details any crimes, the conviction for which are empirically correlated to an individual's propensity to commit future acts of abuse, or neglect of a client, or misappropriation of a client's property. If the report indicates that there are additional crimes which are reasonably predictive of an individual's propensity to commit future acts of abuse, neglect or misappropriation of client property, the report shall indicate such crimes, as well as the methodology utilized and the data which supports the findings. The Department of Corrections shall submit the report to the legislature in the manner provided under section 13.172(2) of the statutes no later than July 1, 2000.



WISCONSIN STATE SENATE
RODNEY C. MOEN
SENATOR – 31ST DISTRICT

Senator Judy Robson, Member
Senate Committee on Health, Utilities
and Veterans and Military Affairs
Room 15 South, State Capitol

State Capitol, P.O. Box 7882, Madison, Wisconsin 53707-7882 Phone: (608) 266-8546 Toll-free Hotline: 1-800-362-9472

To: Members, Senate Committee on Health, Utilities and Veterans and Military Affairs

From: Senator Rod Moen, Chair

Re: Clearinghouse Rules Relating to Caregiver Background Checks

Date: May 14, 1999

Attached please find modified versions of Clearinghouse Rules 98-191 and 98-188, relating to caregiver background checks and reporting and investigation of caregiver misconduct, which were recently submitted by the Department of Health and Family Services. Also attached is a letter from Secretary Joe Leean outlining the Department's modifications to the rules.

Because standing committees have 10 working days to consider modified rules, the committee's review period over CR 98-191 and CR 98-188 ends May 26, 1999. Given this timeline, the earliest date the rules could go into effect is July 1, 1999. Unfortunately, the emergency rules will expire on June 20, 1999, meaning that there will be a lag time between the promulgation of the permanent rules and the expiration of the emergency rules.

Many people expressed concerns about caregiver background checks during the committee's public hearing on CR 98-191 and CR 98-188. However, it appears that most of the concerns relate to the statutory language passed in the budget adjustment bill last session, and cannot be addressed through the rule making process.

I believe we must move ahead with the promulgation of these rules to keep the lag time between the emergency rules and permanent rules, and the confusion that may result from it, as short as possible. If you wish to discuss this matter further, please do not hesitate to contact me.



State of Wisconsin
Department of Health and Family Services

Tommy G. Thompson, Governor
Joe Lekan, Secretary



May 12, 1999

The Honorable Rodney C. Moen, Chairperson
Senate Committee on Health, Utilities and Veterans and Military Affairs
Room 8 South, State Capitol
Madison, WI

The Honorable Gregg Underheim, Chairperson
Assembly Committee on Health
Room 11 North, State Capitol
Madison, WI

Dear Senator Moen and Representative Underheim:

The Department on March 9 and 10, 1999, submitted Clearinghouse Rules 98-191 (HFS 12) and 98-188 (HFS 13), relating to caregiver background checks and reporting and investigation of caregiver misconduct, to the presiding officers of the Legislature for review by standing committees. Subsequently, the proposed rules were referred to your committees. Following public hearings held by the Assembly Committee on April 13, 1999, and the Senate Committee on April 28, 1999, both committees asked the Department to consider making modifications in the proposed rules. This letter is the Department's response to those requests.

The Department has carefully reviewed the comments of persons who testified on the proposed rules at the legislative public hearings, and has noted the concerns about the proposed rules expressed at those hearings by committee members.

In its letter of April 14, 1999, the Assembly Committee stated that among modifications the Department should consider is whether to continue with inclusion of persons convicted of murder, sexual assault or sexual exploitation in the bar with rehabilitation list and whether stricter limitations should be imposed on those persons. The Department's list of crimes for which conviction results in permanent bar for all programs was pared to nine crimes, five of them statutory, in amendments to the emergency rules published on February 27, 1999, which have been carried over to the proposed permanent rules. The Department looks to the Legislature to provide guidance through statute change for further modification of the Crimes List.

In its letter of May 6, 1999, the Senate Committee pointed out that at its public hearing on the proposed rules a number of health care providers and other interested parties expressed concerns about the scope of the rules. The Department through its

amendments published on February 27, 1999, to the emergency rules, which have been carried over to the proposed permanent rules, made several changes to limit the scope of the rules as much as possible within the framework of the statutes being implemented. These changes included modifications of the Crimes List, addition of a definition for "access," and significant revision of definitions for "caregiver" and "under the entity's control." Some of the new germane modifications described in this letter further clarify and refine the intended scope of the rules.

Attached are copies of amended Clearinghouse Rules 98-191 (HFS 12) and 98-188 (HFS 13) showing germane modifications the Department has made in the rules in response to the requests of the Assembly and Senate Committees and on the Department's own initiative under the authority of s. 227.19 (4) (b) 3., Stats. In this letter I will summarize the germane modifications. These are the following:

(1) **Definitions of "abuse" and "neglect."** In s. HFS 13.03, there are now separate definitions for "abuse" and "neglect" rather than a definition for "abuse" that includes "neglect." The abuse definition is amended so that it is focused on actions taken purposely with intent to harm, while the neglect definition is focused on actions done purposely without intent to harm but that are sufficiently negligent or reckless. The definition of "neglect" includes the phrase, "including but not limited to restraint, isolation or confinement," that is also part of the separate definition of "abuse."

(2) **Definition of "caregiver."** In s. HFS 12.03 (6) (b) 1., "solely" has been inserted in the "caregiver" definition. It is already in the caregiver definition under ch. HFS 13. It had been mistakenly omitted from the definition of that term in ch HFS 12. The definition part now reads: "Caregiver" does not include...a person who performs solely clerical, administrative, maintenance or other support functions for the entity ~~but~~ and who is not expected to have regular, direct contact with clients or the personal property of clients.

(3) **Permanent prohibition of some nurse aides from being employed by federally-certified nursing homes.** In s. HFS 12.10 (2) (c) Note, a clarification is added that a person listed in the misconduct registry under ch. HFS 13 as having a substantiated finding of abuse or neglect of a client or misappropriation of a client's property is permanently barred from working in a federally-certified nursing home only if the finding is for an action of the person done while he or she worked as a nurse aide in a federally certified nursing home.

(4) **Consideration of substantially related criteria.** In s. HFS 12.11 (3) (b) (intro.), the requirement has been modified that an agency or entity, in determining whether a crime or delinquency adjudication not listed in the Department's Crimes List is substantially related to the care of clients, "may" rather than "shall" consider all of the substantially related criteria set out in par. (b). The amended introduction now reads: ~~In determining~~ To determine whether a crime or delinquency adjudication under

par. (a) is substantially related to the care of a client, the agency or entity ~~shall~~ may consider all of the following:

(5) **Continuing a person, including a student, under a service contract pending final rehab review decision.** In s. HFS 12.12 (2) (c) (intro.), a clarification is made that students are included where it states that an entity need not bar and may continue to contract for services with persons beyond October 1, 1999, pending a rehabilitation review decision, and a correction is made that what is meant is the "final" rehabilitation decision, not a "favorable" rehabilitation decision.

(6) **Nonclient resident of a foster home.** In s. HFS 12.12 (2) (d) (intro.) and 5., language is added to permit an agency to continue the regulatory approval of a nonclient resident of a foster home, just as it is permitted to let a licensed foster parent continue as a foster parent, if a new crime committed is found to be not substantially related or the person is otherwise eligible for rehabilitation review and specified conditions are met.

(7) **Retention of completed forms.** At four places in ss. HFS 12.20 and 12.21, the requirement to maintain forms on file has been changed to a requirement to retain forms so that they can be promptly retrieved for inspection.

(8) **Background screening of temporary employes and students.** Under s. HFS 12.21 (1) (b) 3. b., a new sentence is added to state that the letter than an entity must obtain from any temporary employment agency, college or university with which it has an agreement for the agency, college or university to retain background information forms for certain students and temporary employes must, in addition to listing the names of the temporary employes or students and stating that they have been screened and have no backgrounds that would bar them from the entity, is also to inform the entity of any other crime a temporary employe or student has been convicted of so that the entity can make a decision about how substantially related the conviction is to the duties the person would be performing.

(9) **Crimes List - preface.** Three modifications are made to the first page of the Crimes List appended to ch. HFS 12: in the heading, "May 1999" is substituted for "February 1999;" the capitalized sentence beginning on the first line, "THE LIST IS NOT EXHAUSTIVE," is deleted; and a phrase, "as being in the 'substantially related' category," is replaced by "but no longer requires rehabilitation review."

(10) **Crimes List - applicability to EMTs.** The applicability of the Crimes List to emergency medical technicians (EMTs) has been modified for purposes of the permanent rules so that it is the same as it is now for the emergency rules as amended on February 27, 1999. This is accomplished by reinserting a box in the Crimes List, after the Preface but before the Key, which states that permanent bar crimes apply to EMTs; that EMTs must demonstrate rehabilitation only where there has been a finding by an agency of abuse or neglect of a client or child or misappropriation of a client's

Senator Moen and Representative Underheim

May 12, 1999

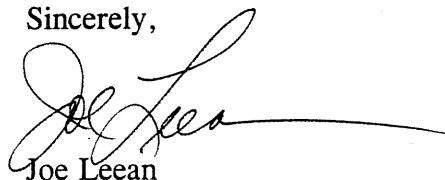
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property; and that all other criminal convictions are subject to the "substantially related" test by the agency or employer.

I am aware that the effect of making these changes to CR 98-188 (HFS 13) and CR 98-191 (HFS 12) is to extend the review periods of both committees by 10 working days, through May 26, 1999.

If you have any questions about these germane modifications to CR 98-188 and CR 98-191, you may contact Linda Dawson of the Department's Office of Legal Counsel at 266-0355.

Sincerely,

A handwritten signature in black ink, appearing to read "Joe Leean", with a long horizontal flourish extending to the right.

Joe Leean
Secretary

Attachments

5-12-99

PROPOSED ORDER OF THE
DEPARTMENT OF HEALTH AND FAMILY SERVICES
CREATING RULES

To create chapter HFS 12, relating to uniform procedures for checking the backgrounds of persons who apply to provide or are providing care or treatment to people who need that care or treatment, and for barring persons because of specified convictions, charges or findings substantially related to the care of clients from operating a service provider organization, providing care or treatment to the clients of a service provider or otherwise having contact with the clients of a service provider.

Analysis Prepared by the Department of Health and Family Services

Sections 48.685 and 50.065, Stats., apply to the Department in its functions of licensing, certifying, registering or approving some persons to provide care or treatment to other persons; to county social service and human service departments that license foster homes and treatment foster homes for children and carry out requested adoption home studies; to private child-placing agencies licensed to do the same; and to school boards that contract for day care programs under s. 120.13 (14), Stats. Sections 48.685 and 50.065, Stats., apply also to the regulated entities, that is, to the entities that are licensed, registered, certified or approved, as they hire persons to be employes, enter into contracts with persons to provide services to clients or permit nonclients to reside at the facilities.

The new statutes prohibit a regulatory agency from licensing, certifying, registering or approving a person to be a service provider or to reside as a nonclient at an entity if the agency knows or should know that the person has been convicted of, or has a pending charge for, a serious crime; is found to have abused or neglected a client or child or to have misappropriated a client's property; or is required to be credentialed by the Department of Regulation and Licensing (DRL) but is not credentialed or the credential is not current or is so limited as to prevent the provision of adequate client care. Similarly, regulated entities planning to hire or contract with a person expected to have access to clients may not hire or contract with the person if the entity knows or should know of the existence of a prohibited criminal conviction or charge, or a finding, or the absence or inadequacy of a required credential.

An agency or entity is expected to know of a person's prohibited criminal conviction or charge or a finding or the absence or inadequacy of a required credential by (1) having the person complete a Department-developed background information disclosure form, and (2) conducting a search for information about any prohibited conviction, charge or finding against the person or any credential inadequacy.

The new statutes direct the Department to develop a background information form, and the Department and the other regulatory agencies to require, beginning October 1, 1998, that all persons applying for a license, certification, registration or approval, or for approval to reside as nonclients at an entity complete that form and

return it to the agency and, by October 1, 1999, that all persons who were licensed, certified, registered or approved or given permission to reside at an entity as nonclients prior to October 1, 1998, are to have completed and returned that form to the agency. Beginning October 1, 1998, all regulated entities are to have applicants for employment who will be in contact with clients complete and return the same form as well as all persons who propose to enter into a contract with an entity to provide services to the entity's clients. By October 1, 1999, this is to be done by all persons who were hired by or under contract to the entity before October 1, 1998.

The Department is expected to have any person who applies for continuation of a license, certification, approval or registration to update the background information form at that time, and an entity is to require this every 4 years for a person employed by or under contract to the entity who has access to clients and any nonclient who lives at the entity.

The new statutes direct a regulatory agency, on receipt of an application for regulatory approval or for approval of a nonclient to reside at an entity, to also undertake a search for any of the following information relating to the applicant's background: any criminal history information, from records maintained by the Department of Justice; any substantiated allegations of abuse or neglect of a client or misappropriation of a client's property, from the Department's caregiver misconduct registry under ch. HFS 13; any information maintained by the Department about substantiated reports of child abuse or neglect against the person; any information maintained by the Department of Regulation and Licensing regarding the status of the person's required credentials; and any information maintained by the Department about a previous denial to the applicant of regulatory approval, residence at an entity, employment by an entity or a contract with an entity. Entities are to undertake the same search for background information about applicants for employment and persons who propose to provide services under contract to the entity's clients.

At least every 4 years the Department is to undertake repeat searches, in the same manner as before, for background information on persons holding regulatory approvals from the Department and on persons who are nonclient residents of entities, and at least every 4 years an entity is to undertake repeat searches, in the same manner as before, for background information on persons employed by or under contract to the entity and having access to clients.

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

These are the Department's rules for administration of ss. 48.685 and 50.065, Stats., as created by Act 27 and amended by 1997 Wisconsin Act 237. The rules repeat the statutory requirements and add more detail for administering them, add

procedures for handling rehabilitation review requests, add definitions for "serious crime" and "under the entity's control" and other pertinent definitions and add a crimes list as Appendix A which includes 114 crimes, 9 of which are permanent bar crimes for all programs, that is, a conviction for the crime or commission of the offense means that the individual is permanently barred from receiving approval to operate an entity or to be hired by or have a contract with or reside at an entity.

The new background check statutes and rules were effective beginning October 1, 1998 for entities initially approved on or after that date, persons that entities hire or contract with on or after that date and nonclients who began to reside at an entity on or after that date. The statutes and rules apply beginning October 1, 1999 to operating entities that were initially approved prior to October 1, 1998, persons employed by entities or under contract with entities who were initially hired or contracted with prior to October 1, 1998 and nonclients living at an entity who began living there prior to October 1, 1998.

The Department's authority to create these rules is found in ss. 48.685 (4), (5), (6) (b) and (c) and (7) (a) and (b), 50.065 (1) (d) and (f), (4), (5), (6) (b) and (c) and (7) (a) and (b) and s. 227.11 (2), Stats. The rules interpret ss. 48.685, 50.065 and 120.13 (14), Stats.

SECTION 1. Chapter HFS 12 is created to read:

Chapter HFS 12

CAREGIVER BACKGROUND CHECKS

Subchapter I - General Provisions

HFS 12.01 Authority and Purpose
HFS 12.02 Applicability
HFS 12.03 Definitions
HFS 12.04 Sanctions

Subchapter II - Personal Care Services Qualifications Assessment

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

Subchapter III - Background Information Collection

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

Note: The two principal forms used in administration of this chapter are HFS-64, Background Information Disclosure Form, referenced in s. HFS 12.20, and EXS-263, Rehabilitation Review Request Form, referenced in s. HFS 12.12. To obtain master copies of these forms in order to reproduce them, either download the forms from the Department's internet website at: www.dhfs.state.wi.us/caregiver/forms/index.htm, or an entity may request a copy of the Background Information Disclosure Form from the agency that regulates the entity and a person who wants to request rehabilitation review may request a copy of the Rehabilitation Review Request Form from, as appropriate, the agency that regulates the entity or the entity.

SUBCHAPTER 1 - GENERAL PROVISIONS

HFS 12.01 AUTHORITY AND PURPOSE. This chapter is promulgated under the authority of ss. 48.685 (4), (5) (6) (b) and (c) and (7) (a) and (b), 50.065 (1) (d) and (f), (4), (5), (6) (b) and (c) and (7) (a) and (b) and 227.11 (2), Stats., to protect from harm clients served by department-regulated programs, children placed in foster homes licensed by county departments of social or human services or private child-placing agencies or children who are being adopted and children served in day care programs contracted by local school boards under s. 120.13 (14), Stats., by requiring uniform background information screening of persons regulated and persons who are employees of or under contract to regulated entities or who are nonclient residents of regulated entities.

HFS 12.02 APPLICABILITY. (1) **SCOPE.** (a) **Persons, facilities, agencies and organizations affected.** This chapter applies to the department; to applicants for regulatory approval from the department; to all persons, facilities, agencies and organizations that have received regulatory approval from the department; to county department and child-placing agencies that license foster homes and approve applications for adoption home studies; to foster home license applicants and licensees and applicants for an adoption home study; to school boards that establish or contract for day care programs under s. 120.13 (14), Stats., and to applicants and persons under contract to a school board to operate a day care program under s. 120.13 (14), Stats.

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

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

(b) **Existing entities.** This chapter applies beginning October 1, 1999, to all entities that received initial regulatory approval prior to October 1, 1998, all employes of those entities or persons under contract with those entities prior to and since October 1, 1998, and to all nonclients living at an entity having access to entity clients prior to and since October 1, 1998.

HFS 12.03 DEFINITIONS. In this chapter:

(1) "Access to a client" means that in the course of performing the person's expected duties for or functions with the entity, or as a non-client resident of the entity, the person has or may have direct, regular contact with clients served by the entity.

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

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

(4) "Background information form" means the department's form, DHFS 64, on which a person provides certain information concerning the person's background.

(5) "Bar" means, as a noun, that a person is not permitted to receive regulatory approval or to be employed by or under contract with an entity or to reside as a nonclient at an entity.

(6) (a) "Caregiver" means a person who is all of the following:

1. A person who has received regulatory approval from an agency or who is employed by or under contract with an entity.
2. A person who has access to the entity's clients.
3. A person who is under the entity's control.

(b) "Caregiver" does not include any of the following:

1. A person who performs solely clerical, administrative, maintenance or other support functions for the entity ~~but~~ and who is not expected to have regular, direct contact with clients or the personal property of clients.

2. A person who is employed by or under contract with an entity to provide infrequent or occasional services, such as delivering items to the facility, equipment maintenance, groundskeeping, construction, or other similar services that are not directly related to the care of a client.

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

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

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

(10) "Contracted services" means services contracted by an entity as part of the entity's service program.

(11) "County department" 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 ss. 46.21 (2m) or 46.23, Stats.

(12) "Crimes list" means the list of statutory crimes in appendix A.

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

(14) "Department-designated tribe" means a federally recognized tribe designated by the department as having the authority to conduct rehabilitation reviews for persons having a bar with rehabilitation crime listed in appendix A.

(15) "Entity" means:

(a) For purposes of s. 48.685, Stats., any of the following:

1. A child welfare agency licensed as a child-placing agency under s. 48.60, Stats., and ch. HFS 54 to provide care and maintenance for children, to place children for adoption or to license foster homes.

2. A child caring institution licensed under ch. HFS 52 to provide residential care and treatment.

3. A group home licensed under s. 48.625, Stats.

4. A shelter care facility licensed under s. 938.22, Stats.

5. A day care center licensed under s. 48.65, Stats., or established or contracted for under s. 120.13 (14), Stats.

6. A foster home, including a home licensed for placement of children for adoption under s. 48.833, Stats., for whom adoption assistance will be provided under s. 48.975, Stats.

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

(16) "Foster home" means a home licensed under s. 48.62 or 48.75, Stats., in which care and maintenance are provided for no more than 4 children placed in the home, unless all are siblings, and includes a treatment foster home that also provides structured professional treatment by trained individuals, and a home licensed for placement of children for adoption under s. 48.833, Stats., for whom adoption assistance will be provided under s. 49.975, Stats.

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

(18) "Nonclient resident" means a person 12 years of age or older who is not a client of an entity but who resides at the entity and is expected to have access to entity clients.

(19) "Permanent bar crime" means a serious crime for which conviction results in the individual being permanently ineligible to receive regulatory approval from an

agency, to be hired by or have a contract with an entity to provide services to clients or to reside at an entity.

Note: Permanent bar crimes are identified in the crimes list in appendix A.

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

(21) "Regulatory approval" means:

(a) For purposes of s. 48.685, Stats., any of the following:

1. Issuance by the department of a license or certification or the continuation or renewal of a license or certification, or approval of a prospective adoptive parent application for a home study.

2. Issuance or renewal by a county department or child-placing agency of a foster home or treatment foster home license under s. 48.62 or 48.75, Stats., including a home licensed for placement of children for adoption under s. 48.833, Stats., for whom adoption assistance will be provided under s. 48.975, Stats., and includes pre-adoptive applicants who contract for a home study with a licensed private child placing agency for approval of a placement of a child for adoption.

3. Approval by a school board under s. 120.13 (14), Stats., of day care services established or contracted with a day care provider to provide day care services.

(b) For purposes of s. 50.065, Stats., issuance by the department of an entity license, certification, certificate of approval or registration, or approval by the department of the continuation of an entity license, certification, certificate of approval or registration.

(22) "Rehabilitation review" refers to an agency or tribe process where a person who is eligible under s. HFS 12.12 (1) may seek removal of a bar with rehabilitation crime for purposes of regulatory approval, employment, contracting or residency with an entity.

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

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

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

(26) "Under the entity's control" means that other than as provided under s. HFS 12.21 (1) (b) 2., an entity does both of the following:

(a) Determines whether a person employed by or under contract with the entity who has access to clients served by the entity may provide care, treatment, or other similar support service functions to clients.

(b) Directs or oversees one or more of the following:

1. The policies or procedures the person must follow in performing his or her duties as a caregiver.

2. The conditions under which the person performs his or her duties.

3. The tasks performed by the person.

4. The person's work schedule.

5. The supervision or evaluation of the person's work or job performance, including imposing discipline or awarding performance awards.

6. The compensation the person receives for performing his or her duties as a caregiver.

HFS 12.04 SANCTIONS. An entity that hires, employs or permits to reside as a nonclient at the entity a person who has access to clients and who the entity knew or should have known is barred under this chapter or an entity that violates background information form requirements in s. HFS 12.20 (2) (a) 2. a. to c. or who violates any provision of background information gathering under s. HFS 12.21, may be required to forfeit not more than \$1,000 and may be subject to any of the following additional sanctions:

(1) A requirement that the entity submit to the agency a written corrective action plan specifying corrections that will be made to identified personnel screening practices and implement that plan.

(2) A corrective action plan imposed by the agency that specifies corrections that need to be made in personnel screening practices.

(3) At entity expense, attendance at agency-designated personnel screening training or other appropriate training.

(4) Specific conditions or limitations placed on the license, certification or registration or on the school board-issued contract.

(5) For a person licensed to operate a child welfare agency, shelter care facility, group foster home or day care facility, any sanction or penalty described under s. 48.715, Stats.

(6) Utilization by the entity, at entity expense, of a temporary employment agency for screening and hiring personnel.

(7) Denial, revocation or suspension of a license, certification, registration or other approval issued by the department, a county department or a child-placing agency.

(8) Denial, nonrenewal or termination by a school board of a contract with a day care provider under s. 120.13 (14), Stats.

SUBCHAPTER II - PERSONAL CARE SERVICES QUALIFICATIONS ASSESSMENT

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

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

(1m) **LIFTING OF BAR.** An agency may give regulatory approval to the operator of an entity otherwise barred under sub. (1) (a) and an entity may employ or contract with a person or may allow a person to reside at the entity who is otherwise barred under sub. (1) (b), if that person makes a sufficient showing of rehabilitation as evidenced by a rehabilitation approval received from as applicable, an agency or department-designated tribe under s. HFS 12.12.

(2) **REASONS FOR BARRING A PERSON.** An agency shall comply with sub. (1) (a) and an entity shall comply with sub. (1) (b) for any person whose background records indicate any of the following:

(a) The person has been convicted of a serious crime or, if for a day care program licensed under s. 48.65, Stats., or under s. 120.13 (14), Stats., has been convicted or was adjudicated delinquent for a serious crime on or after his or her 12th birthday.

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

(c) A unit of government or a state agency has made a finding that the person has abused or neglected a client or misappropriated the property of a client.

Note: Any person who is listed in the Department's caregiver misconduct registry under ch. HFS 13 as having a substantiated finding of abuse or neglect of a client or misappropriation of a client's property as the result of an action the person took while working as a nurse aide in a federally certified nursing home or intermediate care facility for persons with mental retardation (ICF/MR) is permanently prohibited from being employed in a federally-certified nursing home or a federally-certified ~~intermediate care facility for persons with mental retardation~~ ICF/MR. See 42 CFR 483.13 and 483.400.

(d) A determination has been made under s. 48.981 (3) (c) 4., Stats., or under the laws of any other jurisdiction that the person has abused or neglected a child.

(e) In the case of a position for which the person must be credentialed by the department of regulation and licensing, the person's credential involves direct client care or treatment services and is not current or is limited so as to restrict the person from providing adequate care to a client.

HFS 12.11 EFFECT OF CRIMINAL AND ABUSE HISTORY ON REGULATORY APPROVAL AND CLIENT ACCESS. (1) **SERIOUS CRIMES.** (a) **Certain statute-specified serious crimes.** As provided in ss. 48.685 (5) (b) and 50.065 (5), Stats., no person may be granted regulatory approval to operate an entity or may be permitted to be employed or contracted with or reside at an entity if that person has been convicted of any of the following crimes or, if a day care program licensed under s. 48.65, Stats., or under s. 120.13 (14), Stats., the person was convicted of a crime or adjudicated delinquent on or after his or her 12th birthday for any of the following crimes:

1. First degree intentional homicide under s. 940.01, Stats.
2. First degree sexual assault under s. 940.225 (1), Stats.
3. First degree sexual assault of a child under s. 948.02 (1), Stats.
4. Second degree sexual assault of a child under s. 948.02 (2), Stats., if the person was, at the time of the sexual contact or sexual intercourse, more than 4 years older than the child with whom the person had the sexual contact or sexual intercourse.
5. Repeated acts of sexual assault of the same child under s. 948.025, Stats., if the child had not attained the age of 13, or if the child had attained the age of 13 and had not attained the age of 16 and the person was, at the time of the sexual contact or

sexual intercourse, more than 4 years older than the child with whom the person had the sexual contact or sexual intercourse.

(b) Other serious crimes. 1. No person may be granted regulatory approval to operate an entity or may be permitted to be employed by, contracted with or reside at an entity if that person was convicted of a crime identified in appendix A as a permanent bar crime or, if for a day care program licensed under s. 48.65, Stats., or under s. 120.13 (14), Stats., the person was convicted of or adjudicated delinquent on or after his or her 12th birthday for a crime identified in appendix A as a permanent bar crime.

2. Except as provided under sub. (2), no person may be granted regulatory approval to operate an entity or may be permitted to be employed by, contracted with or reside at an entity if that person was convicted of a crime identified in appendix A as a bar with rehabilitation crime or, if for a day care program licensed under s. 48.65, Stats., or under s. 120.13 (14), Stats., the person was convicted of or adjudicated delinquent on or after his or her 12th birthday for a crime identified in appendix A as a bar with rehabilitation crime.

Note: For internet access to a statutory definition of a crime, log on to the Department's website at: www.dhfs.state.wi.us and select "Caregiver Background Checks" and then select "Regulations" and then click on the word "Statute" in the sentence which reads, "To search for a specific statute relating to caregiver background checks and criminal history law, visit the Wisconsin Statute website." Then put the statute number of the crime you wish to search for in the search box and hit enter and it will take you to the statutory cite for that crime.

(2) **SERIOUS CRIMES AND DEMONSTRATION OF REHABILITATION.** (a) Rehabilitation review and agency regulatory approval. The department may give regulatory approval to operate an entity or give approval for an adoption home study, a county department or a child-placing agency may license a foster home or give approval for an adoption home study and a school board may contract under s. 120.13 (14), Stats., with a person who otherwise may not receive regulatory approval for a reason set out in s. HFS 12.10 (2), if the person has not committed a crime specified under sub. (1) (a) or (b) 1. and can demonstrate to the appropriate agency by clear and convincing evidence and in accordance with procedures established under s. HFS 12.12, that he or she has been rehabilitated and is eligible for regulatory approval.

(b) Rehabilitation review and entity action. An entity may employ or contract with a person or permit a nonclient to reside at the entity who otherwise may not be employed, contracted with or permitted to reside at the entity for a reason set out in s. HFS 12.10 (2) if the person has not committed a crime specified under sub. (1) (a) or (b) 1. and can demonstrate to as, applicable, the appropriate agency or department-designated tribe by clear and convincing evidence and in accordance with procedures established under s. HFS 12.12 that he or she has been rehabilitated and is eligible to be employed by or contracted with or to reside at the entity.

(3) **OTHER CRIMES, ACTS OR OFFENSES SUBSTANTIALLY RELATED TO THE CARE OF A CLIENT.** (a) Refusals. 1. Notwithstanding s. 111.335, Stats., the

department may refuse to give regulatory approval to a person, a county department or a child-placing agency may refuse to license a foster home or refuse to approve an adoption home study, a school board may refuse to contract with a person to provide day care services under s. 120.13 (14), Stats., and an entity may refuse to employ, contract with or permit to reside at an entity a person specified under s. HFS 12.10 (1) (a) or (b), when the agency or entity determines the person has been convicted for a crime or, if for a day care program licensed under s. 48.65, Stats., or under s. 120.13 (14), Stats., the person was convicted of a crime or adjudicated delinquent on or after his or her 12th birthday for a crime not otherwise identified under sub. (1) or (2) which is substantially related to the care of a client.

2. Notwithstanding s. 111.335, Stats., the department may refuse to license a person to operate a day care center or a school board may refuse to contract with a person under s. 120.13 (14), Stats., a day care center that is licensed under s. 48.65, Stats., or established under s. 120.13 (14), Stats., may refuse to employ, contract with or permit to reside at the day care center at any time the department, a school board or a day care provider determines the person has been convicted for a crime or, if for a day care program licensed under s. 48.65, Stats., or under s. 120.13 (14), Stats., the person was convicted or adjudicated delinquent on or after his or her 12th birthday for a crime otherwise not identified under sub. (1) or (2) which is substantially related to the care of a client.

Note: Required juvenile record checks under s. HFS 12.21 only apply to persons in child day care programs licensed under s. 48.65, Stats., or contracted for under s. 120.13 (14), Stats.

(b) Substantially related criteria. ~~In determining~~ To determine whether a crime or delinquency adjudication under par. (a) is substantially related to the care of a client, the agency or entity ~~shall~~ may consider all of the following:

1. In relation to the job:
 - a. The nature and scope of the job's client contact.
 - b. The nature and scope of the job's discretionary authority and degree of independence in judgment relating to decisions or actions which affect the care of clients.
 - c. The opportunity the job presents for the commission of similar offenses.
 - d. The extent to which acceptable job performance requires the trust and confidence of clients and their parent or guardian.
 - e. The amount and type of supervision received in the job.
2. In relation to the offense:
 - a. Whether intent is an element of the offense.

b. Whether the elements or circumstances of the offense are substantially related to the job duties.

c. The pattern of offenses.

d. The extent to which the offense relates to vulnerable clients.

f. Whether the crime involves violence or threat or harm.

g. Whether the crime is of a sexual nature.

3. In relation to the individual:

a. The number and type of offenses for which the individual has been convicted.

b. The length of time between the conviction or convictions and the employment decision.

c. The individual's employment history, including references, if available.

d. The individual's participation in or completion of pertinent programs of a rehabilitative nature.

e. The individual's probation or parole status.

f. The individual's ability to perform or to continue to perform the job consistent with the safe and efficient operation of the program and the confidence of the clients served including, as applicable, their parents or guardians.

g. The age of the individual on the date of conviction or dates of conviction.

Note: A person refused employment or who has had his or her employment terminated and believes he or she may have been discriminated against, may file a complaint under s. 111.335, Stats., with the Equal Rights Division, Department of Workforce Development.

(4) REPORTING. (a) Child-placing agencies and county departments shall provide the department with written information about each person who is denied a license or adoption home study approval for a reason specified in s. HFS 12.10 (2).

(b) The information required under par. (a) shall include the complete name and address of the individual, the reason for denial or revocation of license or denial of adoption application as specified under s. HFS 12.10 (2) and the date of license denial or revocation or adoption application denial.

Note: Send the required information to: Bureau of Regulation and Licensing, Division of Children and Family Services, P.O. Box 8916, 1 West Wilson St., Madison, WI 53708-8916.

(5) **CRIMES OF LESSER SIGNIFICANCE REQUIRING SPECIAL PRECAUTIONARY MEASURES.** (a) Nothing within this subsection shall preclude an agency or entity from determining under sub. (3) that a lesser crime, act or offense as listed under this subsection is substantially related and a cause for a refusal.

(b) Crimes of lesser significance. 1. An agency or entity shall impose, where warranted, less stringent measures than a bar on regulatory approval by an agency, a bar on entering into a contract for a day care program by a school board under s. 120.13 (14), Stats., or a bar of a person by an entity from employment by or contracting with an entity or permitting residency as a nonclient at an entity, if the person has been convicted of a crime of lesser significance than a serious crime and that is substantially related to the care of clients.

2. In determining whether conviction for a crime of lesser significance than a serious crime is substantially related to the care of clients, an agency or entity shall apply the criteria under sub. (3) (b).

(c) Less stringent measures. 1. An agency shall impose special precautionary measures identified under subd. 2., on persons seeking regulatory approval or to provide contracted day care services under s. 120.13 (14), Stats., or by the entity on persons having contact with clients who are either employed or contracted by the entity or are nonclient residents or have any other similar type of association with the entity if that person has committed a less serious crime, act or offense as described under par. (a).

2. Precautionary measures may include but are not limited to any of the following:

a. For licensure, certification or other similar regulatory function, conditions as appropriate, imposed on the regulatory applicant or regulated entity as part of regulatory approval or continued approval such as: prohibitions on certain activities or functions, no repeat of crimes, acts or offenses, submission of necessary and relevant statements from therapists or counselors on the person being fit and qualified for regulatory function or job task where appropriate, prescribed limited contact or supervised contact with clients.

b. Closer supervision or special supervision arrangements such as partnering with another person who does not have background history problems.

c. Medication monitoring.

d. Prior evaluation and recommendations from an appropriate professional such as a psychiatrist or psychologist.

e. Restrictions to certain on-premises activities, locations or time periods.

- f. No transporting of clients.
- g. Periodic alcohol or drug testing.

HFS 12.12 REHABILITATION REVIEW. (1) REHABILITATION REVIEW AUTHORITY. (a) Agency rehabilitation review authority. Except as provided under par. (b), an agency shall conduct rehabilitation reviews as described in this section for the entities the agency regulates and for persons employed by, contracted with and who reside at those entities who have a bar with rehabilitation crime as indicated in appendix A and who meet the eligibility requirements under sub. (2).

(b) Tribal rehabilitative review authority. 1 Upon written request of a federally recognized American Indian tribe, the department may permit and if so, designate a tribal agency to conduct rehabilitation reviews on prospective or current employees or contractees and on prospective or current nonclient residents of department licensed tribal operated entities who are eligible under sub. (2) for rehabilitation review of any bar with rehabilitation crime as indicated in appendix A.

2. The letter of request under subd. 1, shall identify a tribal social services or human services department, or a tribal human resources or personnel department or other tribal authority to be responsible for conducting the rehabilitation reviews and provide an explanation or description of the procedures for the tribe's rehabilitation review process.

3. The department shall review and approve the tribe's procedures for rehabilitation review before a tribe may implement their rehabilitation review process.

Note: Send the tribe's letter of request to: Office of Legal Counsel, Department of Health and Family Services, P.O. Box 7850, 1 West Wilson St., Rm 651, Madison, WI 53701-7850.

(c) Conduct of reviews. Rehabilitation reviews under this subsection shall be done in accordance with provisions of this section and as may be provided in department guidelines.

(2) ELIGIBILITY. (a) Request. A person barred under s. HFS 12.10 (2) for any of the following may request a rehabilitation review under par. (e) if he or she meets the criteria applicable to the situation, as provided under par. (b), (c) or (d) for requesting a review:

1. The person has been convicted of a serious crime identified by the department under s. HFS 12.11 (2) or s. 48.685 (5) (bm) 4., Stats., for which rehabilitation review is required.

2. A unit of government or a state agency or other similar authority has made a finding that the person has abused or neglected a client or misappropriated the property of a client.

3. A determination has been made under s. 48.981 (3) (c) 4., Stats., or other similar authority that the person has abused or neglected a child.

4. In the case of a position for which the person must be credentialed by the department of regulation and licensing or other similar authority, the person's credential is not current or is limited so as to restrict the person from providing adequate care to a client.

(b) Requester status criteria. A person under par. (a) may request a rehabilitation review if that person meets all of the following conditions or, as applicable, conditions under par. (c) or (d):

1. The person has not been convicted of a serious crime that prohibits rehabilitation under s. HFS 12.11 (1).

2. The person does not have a charge pending for a serious crime under s. HFS 12.11 (1) and (2).

3. If the person is a foster home license applicant under s. 48.62, Stats., or an applicant for an adoption home study, the person has not been convicted of a serious crime under s. 48.685 (5) (bm), Stats., or a similar serious crime in another jurisdiction or, if the person was convicted of a crime under s. 48.685 (5) (bm) 4., Stats., the crime was committed more than 5 years before the background check was requested.

4. The person has not requested a rehabilitation review for a similar type of regulatory approval or job function or activity or nonclient resident status within the last year.

Note: "Similar" in the previous paragraph means regulatory approval, job function or activity that could be categorized in a general way, such as: a review involving the question of direct client contact or that would involve a similar job function or activity that allows unsupervised client access or the review involved a family day care and now the applicant seeks a group day care license or the applicant sought a group home license and now seeks a child caring institution license.

(c) Eligibility criteria for existing entities, employes, contracted persons or persons residing at an entity. An agency need not bar and may continue the regulatory approval of an entity and an entity need not bar and may retain a person on staff or continue a contract for services with a person, including a student, or permit a person to continue to reside at an entity beyond October 1, 1999, until a ~~favorable~~ final rehabilitation review decision has been reached by the agency or department-designated tribe and all of the following are met:

1. The entity or person has submitted a completed rehabilitation review request form prior to October 1, 1999 to ~~as applicable,~~ the agency or department-designated tribe that must review the rehabilitation request.

2. The person shall show that he or she is otherwise eligible for rehabilitation review under ~~par.~~ pars. (a) and (b).

3. The person shall have been operating the regulated or approved entity or been working for or under contract in the same capacity with the entity or residing at the entity prior to October 1, 1998 and the crime, act or offense which is the basis for a rehabilitation request was committed prior to October 1, 1998.

4. If the person is awaiting rehabilitation review from ~~as applicable~~ an agency or department-designated tribe and the agency or tribe is unable to complete a rehabilitation review request for the person prior to October 1, 1999.

(d) Foster homes. An agency may allow a foster parent licensed under s. 48.62 or 48.75, Stats., to continue as a foster parent or may continue the regulatory approval of a nonclient resident of the foster home if a new crime, act or offense committed is found to be not substantially related or, if that person is otherwise eligible for a rehabilitation review under pars. (a) and (b) 1., 3., and 4. and all of the following conditions are met:

1. None of the children in foster home placement was a witness to or the victim of the underlying crime or act for which the ~~foster parent~~ person was charged or convicted and is seeking a rehabilitation review.

2. The ~~foster parent~~ person has submitted to the agency a completed rehabilitation review request form for agency rehabilitation review, and the agency is persuaded by clear and convincing information that removing the children would be contrary to the best interests of the children currently in foster home placement.

3. The agency has shown that the circumstances for waiver of immediate rehabilitation review does not pose any jeopardy to, and will not adversely impact the care of any foster child in placement and would not be contrary to the best interests of any foster child placed in the foster home.

4. The agency determined that continued licensure of the foster parent or continued regulatory approval of the nonclient resident is appropriate and within 3 working days of this determination submitted to the department for its consideration and approval the information that forms the basis for this conclusion.

Note: Send agency approved determinations for Department review and approval to: Bureau of Programs and Policies, Division of Children and Family Services, P.O. Box 8916, Madison, WI 53708-8916

5. The department, after reviewing the information under subd. 4., issued a written approval to the agency for continued licensure of the foster parent or regulatory approval of the nonclient resident. If the department does not agree with the agency's findings and conclusions, the agency shall immediately request the foster parent to surrender the license or, as applicable and as necessary, shall deny or revoke the license of the foster parent, or withdraw approval of the nonclient resident.

Note: Send information on a denial or revocation (including voluntary surrender) of a foster home license or denial of an adoptive home study application for a reason specified in s. HFS 12.10 (2) to: Bureau of Regulation and Licensing, Division of Children and Family Services, P.O. Box 8916, 1 West Wilson St., Madison, WI 53708-8916.

(e) Rehabilitation request. 1. a. If the person is otherwise eligible, the agency shall provide information on eligibility criteria for a rehabilitation review to any person who is barred from regulatory approval under this chapter and to any non-client resident who is barred from residing at an entity. If the person is eligible to request a rehabilitation review, the agency shall provide to the person information on how to obtain the rehabilitation review request form.

Note: To obtain a master copy of the Rehabilitation Review Request Form (EXS-263) in order to reproduce it, either download the form from the Department's internet website at: www.dhfs.state.wi.us/caregiver/forms/index.htm, or request a copy of the Rehabilitation Review Request Form from, as appropriate, the agency that regulates the entity or the entity.

b. If an entity wishes to employ a person or be able to contract for the person's services, but the person is barred under this chapter from being employed by or contracting with the entity, the entity shall provide information on eligibility criteria for a rehabilitation review to the person. If the person is eligible to request a rehabilitation review, the agency or entity shall provide to the person information on how to obtain the rehabilitation review request form.

2. a. To initiate a rehabilitation review, an eligible person must obtain a rehabilitation review request form developed by the department and submit the completed form, including the requested supporting documents and information, to the agency which regulates the entity or as appropriate, the department-designated tribe or, for day care programs established under s. 120.13 (14), Stats., to the school board.

b. A person requesting rehabilitation review shall provide to the agency or department-designated tribe all information requested on the rehabilitation request review form. The agency or tribe shall not review a request until all information necessary for the review is provided.

(3) REVIEW PROCEDURES. (a) Processing rehabilitation review requests. Upon receipt of a person's completed rehabilitation review request, including supporting documentation and other requested information, the agency or tribe shall appoint a review panel of at least 2 persons to review the information submitted.

(b) Rehabilitation request information review. 1. The review panel shall review the rehabilitation review request form and accompanying documents. The panel may request additional information from the person or from other agencies or persons familiar with the person requesting the review.

2. The review panel shall give the person an opportunity to appear before the review panel to answer any questions the review panel may have.

(c) Rehabilitation decision. Upon review of the information obtained, the review panel shall decide whether the information provided establishes by clear and convincing evidence that the person has demonstrated rehabilitation so that the bar to regulatory approval, employment, contracting or residency may be lifted and the person may be eligible for the position or functions indicated in the rehabilitation review request form. The panel shall consider at least the following factors, as applicable:

1. Favorable personal reference checks and comments from employers, persons, and agencies familiar with the applicant and statements from therapists, counselors and other professionals.

2. Evidence of successful adjustment to, compliance with or proof of successful completion of parole, probation, incarceration or work release privileges.

3. Proof that the person has not had subsequent contacts with law enforcement agencies leading to probable cause to arrest or evidence of noncompliance leading to investigations by other regulatory enforcement agencies.

4. Whether the person has any pending or existing criminal or civil arrest warrants, civil judgments or other legal enforcement actions or injunctions.

5. Any aggravating or mitigating circumstances surrounding the crime, act or offense.

6. Evidence of rehabilitation, such as public or community service, volunteer work, recognition by other public or private authorities for accomplishments or efforts or attempts at restitution, and demonstrated ability to develop positive social interaction and increased independence or autonomy of daily living.

7. The amount of time between the crime, act or offense and the request for rehabilitation review, and the age of the person at the time of the offense.

8. Whether the person is on the sexual offender registry under s. 301.45, Stats., or under a similar authority.

9. Victim's impact statement, if appropriate.

10. Employment history, including evidence of acceptable performance or competency in position and dedication to profession.

11. The nature and scope of the person's contact with clients in the position..

12. The degree to which the person would be directly supervised or working independently in the position.

13. The opportunity presented for someone in the position to commit similar offenses.

14. The number, type and pattern of offenses committed by the person.

15. The nature of the person's offense or offenses.

16. Successful participation in or completion of recommended rehabilitation, treatment or programs.

17. Unmet treatment needs.

(d) Rehabilitation review decision response. 1. 'Decision.' a. The review panel shall meet to review and issue a written decision within 90 working days of the receipt of the requester's complete written request for rehabilitation review.

b. The review panel's decision shall be in writing and sent to the requester with a copy provided, if appropriate, to the entity and if the entity is a department-designated tribe, a copy shall also be sent to the department along with a copy of the requesters's submitted application materials.

Note: A department-designated tribe shall send its rehabilitation decision and accompanying copy of rehabilitation requester application materials to: Office of Legal Counsel, Department of Health and Family Services, P.O. Box 7850, 1 West Wilson St., Rm 651, Madison, WI 53701-7850.

2. 'Approval.' If the review panel finds sufficient evidence to support rehabilitation approval, the decision shall indicate, as applicable, whether the person is eligible for regulatory approval, employment, contracting or residency at an entity. The decision shall describe the scope of the rehabilitation approval with any conditions or limitations that may be prescribed, that is, whether the approval is only for certain job functions, activities or arrangements and for what type of entity or, if a regulatory approval, for what type of entity, and any conditions or limitations that may be prescribed for regulatory approval.

3. 'Denial.' If the review panel's decision is to deny approval for the rehabilitation request, the written response shall explain the reasons for denial and inform the requester that he or she may appeal the decision as follows:

a. Any person who is permitted but fails under subd. 1., to demonstrate to the department, the department-designated tribe or the child-placing agency that he or she has been rehabilitated and should be considered eligible for regulatory approval or for employment at or contracting with or residency as a nonclient at an entity, may appeal to the secretary of the department or his or her designee by submitting a written request for review of the decision to the secretary or his or her designee within 10 days

of the date of the decision. Any person adversely affected by a decision of the secretary or his or her designee under this subdivision paragraph has a right to a ch. 227, Stats., contested case hearing under par. (e).

b. Any person who is permitted but fails under subd. 1., to demonstrate to the county department that he or she has been rehabilitated and should be considered eligible for regulatory approval or for employment at or contracting with or residency as a nonclient at an entity, may appeal to the director of the county department or his or her designee by submitting a written request for review of the decision to the director or his or her designee within 10 days of the date of the decision. Any person who is adversely affected by a decision of the director or his or her designee under this subdivision paragraph has a right to appeal the decision under ch. 68, Stats.

c. Any person who is permitted but fails under subd. 1., to demonstrate to the school board that he or she has been rehabilitated and should be considered eligible for regulatory approval or for employment at or contracting with or residency as a nonclient at an entity, may appeal to the superintendent of public instruction or his or her designee by submitting a written request for review of the decision to the superintendent of public instruction or his or her designee within 10 days of the date of the decision. Any person who is adversely affected by a decision of the superintendent or his or her designee under this subdivision paragraph has a right to a ch. 227, Stats., contested case hearing under par. (e).

4. 'Deferral.' If the review panel's decision is to defer a rehabilitation decision, the decision shall indicate the reason or reasons for the deferral. Unless otherwise agreed to by the applicant, the deferral may not be for a period that extends beyond 6 months from the date of the decision to defer.

5. 'Send reporting form to department.' Within 10 days after issuance of its decision under subd. 1., the review panel shall send a completed copy of the department's required reporting form regarding any rehabilitation approval or denial decision to the subunit of the department responsible for collecting that information.

Note: Send a written rehabilitation decision to: Office of Legal Counsel, Department of Health and Family Services, P.O. Box 7850, 1 West Wilson St., Rm 651, Madison, WI 53701-7850.

6. 'Maintain documents on file.' The review panel shall maintain on file a copy of the written decision under this paragraph along with any decisions from filed appeals that may result. The agency or tribe shall maintain on file the rehabilitation review request and all materials requested in that request and any other materials or information or notes obtained as a part of the rehabilitation review decision.

(e) Appeal. 1. a. A person aggrieved by the decision of the department secretary under par. (d) 3. a. or the superintendent of public instruction under par. (d) 3. c. that the person did not produce sufficient evidence to support rehabilitation approval may request a ch. 227, Stats., hearing on that decision by filing a written request for a hearing with the department of administration's division of hearings and appeals within

10 days after the date of the notice received from the secretary of the department or the superintendent of public instruction under par. (d) 3. a. or c.

b. A person aggrieved by the decision of the county director under par. (d) 3. b. that the person did not produce sufficient evidence to support rehabilitation approval may request a ch. 68, Stats., hearing on that decision by filing a written request for a hearing with the appropriate county government agency within 10 days after the date of the notice received from the county director under par. (d) 3. b.

2. The appellant shall bear the burden of proving by a preponderance of the evidence that the agency or tribe abused its discretion in deciding that the person did not show sufficient evidence to support rehabilitation approval.

Note: Submit a request for a ch. 227, Stats., hearing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

(4) REHABILITATION APPROVAL COMPLIANCE. (a) Approval status. A person under sub. (2) (a) who has had his or her rehabilitation review request approved under sub. (3) (d), and subsequently was given regulatory approval or approval to be employed at or to contract with or reside at an entity, shall comply with all conditions and limitations as may be imposed with that approval. A person who has received rehabilitation approval and fails to comply with the conditions for rehabilitation approval or who subsequently commits a crime, act or offense that is cause for a bar under s. HFS 12.10 (2) shall, as provided under par. (b), have his or her rehabilitation approval withdrawn by the approving agency or tribe.

(b) Violation of rehabilitation approval. An agency, entity or tribe aware of any person who has violated his or her rehabilitation approval for a reason under par. (a) shall inform the agency or department-designated tribe that approved the person's rehabilitation. The applicable approving agency or tribe or the department may immediately temporarily deny or rescind a rehabilitation approval of a person when the agency or tribe has knowledge that the person has done any of the following:

1. The person fails to comply with or abide by the conditions or limitations of an approval granted under sub. (3) (d).

2. The person has committed a new crime, act or offense and is no longer eligible for regulatory approval or employment at, contracting with or residency at an entity under s. HFS 12.10 (2).

3. The person knowingly submitted false information or withheld pertinent information relevant to the rehabilitation request that otherwise would or could have affected the review panel's decision under sub. (3) (d) to approve the person's rehabilitation.

(c) Review. 1. The approving agency or department-designated tribe shall consider whether the new information received is valid and represents a risk of harm to the client

and, if so, shall rescind rehabilitation approval, thereby reimposing as applicable the person's bar to regulatory approval, employment or contracting with an entity or residency at an entity.

Note: If the new information does not represent a risk of harm to a client, the agency should work in concert with the entity and consider as necessary, any measures to ameliorate or mitigate the situation such as a change in job function or position or change in regulatory status of the entity regulated.

2. As applicable, an agency, entity, or tribe that believes the new information on a person under subd. 1., represents a risk of harm to a client shall immediately take appropriate measures for the protection of clients. These measures may include a repeal of a regulatory approval, employment or contract termination, temporarily reassigning the person away from direct client duties, placing the person on leave or imposing a temporary regulatory condition limiting the person from having access to clients until any appeal filed under par. (d) is exhausted.

(d) Appeal rights. Any person who has had his or her rehabilitation approval withdrawn under par. (b) 1. or 3. may file an appeal of this decision as provided under sub. (3) (d) 3.

e) Reporting. Any rehabilitation approval withdrawn by the approving agency or tribe which results in a bar under s. HFS 12.10 (2) shall be immediately reported to the subunit of the department responsible for collecting this information.

Note: Send reports of withdrawal of rehabilitation approval to: Office of Legal Counsel, Department of Health and Family Services, P.O. Box 7850, 1 West Wilson St., Rm 651, Madison, WI 53701-7850.

(5) SCOPE OF AGENCY OR DEPARTMENT-DESIGNATED TRIBE REHABILITATION APPROVAL. (a) Approval limit. 1. a. An agency may only grant rehabilitation approval within the scope of its regulatory authority and, unless specified otherwise by the agency in the form of limitations or conditions expressed in the written rehabilitation approval decision, the approval may apply to all types of entities, job activities, or functions which come under that agency's regulatory authority.

b. A department-designated tribe may only grant rehabilitation approval within the scope of its own employment or contracting authority. A department-designated tribe does not have the authority to transfer rehabilitation approval outside of its employment or contracting authority.

c. An agency or tribe may accept upon review the rehabilitation approval granted to a person by another agency or tribe, if the receiving agency or tribe determines that the crime, act or offense is not substantially related to the job, functions or activities of the person and any limitations or conditions as may be imposed in the rehabilitation approval are able to be met.

2. An entity, within the scope of a rehabilitation approval, may accept for employment or contracting, a person who received rehabilitation approval from an

agency or department-designated tribe and whose crimes, acts or offenses are not substantially related to the person's new job, functions or activities and as applicable, limitations or conditions as may have been imposed in the rehabilitation approval are able to be met. An entity that receives from a person an agency or department-designated tribe rehabilitation approval shall keep a current copy of the approval on file.

Note: Examples of the above may include but are not limited to: An approval to be a foster parent by one county or child-placing agency is not, unless approved by the other county or child-placing agency, transferable to the other county or child-placing agency, or an approval by the Department for a person to work as a shipping clerk in a hospital or nursing home would be transferable to another entity or job function or activity regulated under ch. 50, Stats., as long as any limitations or conditions if any in the department's rehabilitation review approval are able to be met. A rehabilitation approval for employment at a childrens day care or a child caring institution is not transferable to a hospital or nursing home or vice versa. A rehabilitation approval is not transferable from a group day care center to a family day care center if limits or conditions are placed in the Department's rehabilitation approval. A rehabilitation approval is transferable from one Department regulated child care residential setting to another as long as any limitations or conditions can be met.

(b) Applicant request to transfer rehabilitation approval. 1. Upon receiving notification on the department's background information form that an applicant for regulatory approval, employment or a contract or a prospective nonclient resident has had a rehabilitation review under sub. (3), the agency, tribe or entity shall request from the rehabilitation review agency or designated tribe a copy of the rehabilitation decision. If the decision of the rehabilitation review agency or tribe was an approval, the agency, tribe or entity shall determine whether the approval is acceptable for transferring the rehabilitation approval to a new or different regulatory approval, job function or activity or nonclient residency for which the applicant is now applying.

2. Before transferring a rehabilitation approval under subd. 1., an agency, tribe or entity shall verify with the department whether a prospective entity, job or contract applicant or nonclient resident has ever had a rehabilitation review and, if so, the date and status of that review and shall establish whether any new reason exists under sub. (2) (a) to request a rehabilitation review, or as if applicable under s. HFS 12.12 (1) (b) 3.

3. If the decision of the rehabilitation review agency or department-designated tribe was to deny rehabilitation transfer approval under subd. 1., the agency, entity or tribe shall determine whether the applicant for regulatory approval, job or contract or the prospective nonclient resident is eligible under sub. (2) (a) to seek another rehabilitation review and shall so inform the applicant or nonclient resident.

SUBCHAPTER III - BACKGROUND INFORMATION COLLECTION

HFS 12.20 BACKGROUND INFORMATION GATHERING AND SCREENING.

(1) **BACKGROUND INFORMATION FORM.** (a) Agency responsibilities. 1. The department shall require a person who applies for regulatory approval to operate or continue the operation of an entity to complete the department's background information form.

2. A county department or child-placing agency shall require a person who applies for issuance or renewal of a license to operate a foster home or who seeks adoption home study approval to complete the department's background information form.

3. A school board shall require a person who proposes to contract with or renew a contract with the school board under s. 120.13 (14), Stats., to provide a day care program to complete the department's background information.

Note: To obtain a master copy of HFS - 64 Background Information Disclosure Form, in order to reproduce it, either download the form from the Department's internet website at: www.dhfs.state.wi.us/caregiver/forms/index.htm, or you may request a copy of the form from the agency that regulates your entity.

(b) Entity responsibilities. 1. 'Require completion of a background information form.' An entity shall require a person who applies for employment with the entity or who proposes to contract with the entity or to reside at the entity, and who will have access to the entity's clients, to complete the department's background information form, as well as all current employees of the entity, persons under contract with the entity and nonclients residing at the entity. This does not include a person whom the entity employs or with whom the entity contracts to perform infrequent or sporadic services, including maintenance services or other services not directly related to the care of clients.

2. ~~Maintain~~ Retain background information forms ~~on file.~~ a. An entity shall ~~maintain~~ retain, except as provided under s. HFS 12.21 (1) (b) 3., ~~on file~~ a completed background information form, and one updated every 4 years, for all persons who are employees of the entity or contractors with the entity, who are under the entity's control and who have or are expected to have access to the entity's clients. The entity shall retain completed background information forms so that they may be promptly retrieved for inspection by the agency.

b. The requirement under subd. 2. a. for the entity to maintain completed background information forms on file does not apply as provided under sub. (2) (b) 1. and 4., to background information forms for persons under age 18 who work for a day care program licensed under ss. 48.65, or contracted for or established under s. 120.13 (14), Stats.

(c) Penalties for false information or failure to report. 1. Any person who knowingly and intentionally provides false information or omits information on the department's background information form under par. (a) or (b) or who subsequently fails to report any information about a pending charge or conviction for a crime or other act or offense requested on the background information form may be required to forfeit not more than \$1,000 and may as appropriate be subject to additional sanctions as determined by the agency, including one or more of the following:

- a. Denial or revocation of regulatory approval or the termination of a contract by an agency.
- b. Denial of employment or a contract by an entity.
- c. Termination of employment or a contractual relationship by an entity.
- d. Special conditions or limitations placed upon the person by an agency, including restriction to an off-premises location during business hours or otherwise restricting access to clients.
- e. Assessment by a health care professional of whether the person is fit and qualified before allowing the person to be on the premises.

2. A person under par. (a) shall report to the agency and under par. (b) to the entity by the next working day information about any pending charge or conviction for a crime or investigation by any governmental agency of any other act or offense.

3. a. An entity shall, as soon as possible, report to the agency which gave regulatory approval or to the school board which the day care entity contracts with under s. 120.13 (14), Stats., when a signatory or other legal party to the entity application for regulatory approval or under which a contract under s. 120.13 (14), Stats., is signed or who is a nonclient who resides at the entity has been charged with or convicted of a crime or has been or is being investigated by any governmental agency for an act or offense under s. HFS 12.10 (2).

b. An entity shall, as soon as possible, report to the agency which gave regulatory approval or to the school board which the day care entity contracts with under s. 120.13 (14), Stats., when a new nonclient resides or is expected to reside at the entity.

4. An entity shall include in its personnel or operational policies a provision that requires employed staff or contracted persons or persons residing at the entity to notify the entity as soon as possible when the person has been charged with or has been convicted of any crime or has been or is being investigated by any governmental agency for any act or offense specified under s. HFS 12.10 (2).

(2) **BACKGROUND INFORMATION FORM PROCESSING AND FILING.** (a) Background information evaluation. 1. An agency or an entity, upon review of the information provided on a completed background information form, shall comply as applicable with s. HFS 12.10 (1) (a) or (b) and with s. HFS 12.11 (1), (2), (3) and (5).

2. a. If, upon review of a person's completed background information form and any other information that may be available, an entity, except as provided under s. HFS 12.21 (1) (b) 3., finds that none of the items under s. HFS 12.10 (2) for barring the person apply and that there is no finding under s. HFS 12.11 (3) that the person

committed some other crime, act or offense that is substantially related to the care of clients, the entity may employ or contract with the person for not more than 60 days pending receipt and review of the information obtained as required under s. HFS 12.21 (1) (b) 1.a.

b. If, upon review of a person's completed background information form and any other information that may be available, an agency under this subd. 2.e. finds that none of the reasons under s. HFS 12.10 (2) for barring the person apply and that there is no finding under s. HFS 12.11 (3) that the person committed some other crime, act or offense that is substantially related to the care of clients, the department, county department or child-placing agency may conditionally license the applicant as a foster home provider or approve an adoption home study for not more than 60 days pending receipt and satisfactory review of the information obtained as required under s. HFS 12.21 (1) (a) 1., and a school board may conditionally contract for a day care program for not more than 60 days pending receipt and satisfactory review of the information required to be obtained as applicable by either the department or a school board under s. HFS 12.21 (1) (a) 1. and 3.

c. If the background information form completed by a person under sub. (1) (b) indicates that the person as a nonclient resident is not ineligible to be permitted to reside at an entity for a reason specified in s. HFS 12.10 (2) or 12.11 (1) or (2) or as otherwise may apply under s. HFS 12.11 (3), and if an entity otherwise has no reason to believe that the person is ineligible to be permitted to reside as a nonclient resident at an entity, the entity may permit the person to reside at the entity for not more than 60 days pending receipt and satisfactory review of the information required under s. HFS 12.21 (1) (a) 1.

d. Pending receipt and review of the information from the search required under s. HFS 12.21, an entity shall provide supervision for a person who under this subd. 2.a. or c. is employed, contracted with or as a nonclient permitted to reside at the entity. Supervision shall include at minimum periodic direct observation of the person.

e. The department, a county department or a child placing agency may license a foster home or approve an adoption home study, and a school board may contract with a person under s. 120.13 (14), Stats., conditioned on the receipt of the information specified in s. HFS 12.21 in order to determine that the person is not ineligible to be licensed, approved or contracted with for a reason specified under s. HFS 12.10 (2).

3. If a crime of lesser significance under s. HFS 12.11 (5) is indicated on the person's background information form, the agency or entity shall ensure that appropriate precautionary measures are taken to protect clients.

Note: For the Department and for county departments and child-placing agencies that license foster or treatment foster homes under s. 48.62 and 48.75, Stats., or that approve adoptive parent applicant home studies, this may mean delaying issuance of a license or an adoption approval or placing conditions on a license or adoption approval as provided under s. HFS 12.11 (5) (b).

(b) Filing of background information form. 1. 'Send to department.' An entity shall send completed background information forms to the department for persons specified under sub. (1) (a) who are regulated by the department, persons specified under sub. (1) (b) 2., who are nonclient residents or prospective nonclient residents of an entity that is regulated by the department and persons who are under 18 years of age, but not under 12 years of age, who are employes, prospective employes, contractors or prospective contractors of a day care center licensed under s. 48.65, Stats., or contracted by a school board under s. 120.13 (14), Stats., and other persons as the department may identify.

2. 'Send to county department.' An entity shall send completed background information forms to the county department for persons specified under sub. (1) (a) who are licensed or adoptive parent applicants studied by a county department, persons specified under sub. (1) (b) 2. who are nonclient residents or prospective nonclient residents of an entity that is licensed or in a home studied for adoptive parent applicant approval by the county department, and other persons as the department may identify.

3. 'Send to child-placing agency.' An entity shall send completed background information forms to the child-placing agency for persons specified under sub. (1) (a) who are licensed by a licensed child-placing agency or who are in a home studied for adoptive parent applicant approval, persons specified under sub. (1) (b) 2. who are nonclient residents or prospective nonclient residents of an entity that is licensed by a licensed child-placing agency or in a home studied for adoptive parent applicant approval, and other persons as the department may identify.

4. 'Send to school board.' An entity shall send completed background information forms to the school board for persons specified under sub. (1) (a) who are employes or prospective employes of a day care program established by the school board, persons specified under sub. (1) (b) 2. who are nonclient residents or prospective nonclient residents of a day care program established by the school board, persons who are under 18 years of age but not under 12 years of age and who are employes or prospective employes of a day care program established under s. 120.13 (14), Stats., and other persons as the department may identify.

5. ~~'Maintain on file~~ Retain for prompt retrieval.' An entity shall ~~maintain~~ retain the background information forms for persons identified under sub. (1) (b) 1. ~~on file~~ so that they may be promptly retrieved for inspection by the agency.

(c) Confidentiality. Agencies and entities shall ~~maintain on file~~ retain all completed department background information forms required under this section in such a manner that they may be promptly retrieved for inspection and shall comply with applicable federal and state confidentiality laws.

HFS 12.21 SEARCH FOR CRIMINAL AND OTHER BACKGROUND HISTORY INFORMATION. (1) INITIAL SEARCHES. (a) Agency responsibilities. 1. Subject to subs. 2. and 3. and par. (c), the department, a county department, a child-placing

agency or a school board shall obtain all of the following information with respect to a person specified under s. HFS 12.10 (1) (a) or a nonclient resident or prospective nonclient resident specified under s. HFS 12.10 (1) (b):

- a. A criminal history search from the records maintained by the department of justice and, if applicable, from records maintained by a native American tribal court.
- b. Any finding of misconduct included in the caregiver misconduct registry under ch. HFS 13.
- c. Information maintained by the department of regulation and licensing regarding the status of the person's credentials, as applicable.
- d. Any information maintained by the department regarding a substantiated report of child abuse or neglect against the person.

Note: The department or a county department should meet the provision of s. HFS 12.21 (1) (a) 1. d., by checking with the appropriate county department of social or human services for any substantiated child abuse or neglect report as provided under s. 49.981 (7) (a) 9. and 13., Stats.

e. Any information maintained by the department under ss. 48.685 (2) (am) 5., 48.651 (2m), 48.75 (1m), 50.065 (2) (am) 5., Stats., or under s. 120.13 (14), Stats., regarding any denial to the person of a license, continuation or renewal of a license, certification or a contract, or approval to operate an entity for a reason specified in s. HFS 12.10 (2), along with any condition imposed for any regulatory approval and regarding any denial to the person of employment at , a contract with or permission to reside at an entity for a reason specified in s. HFS 12.10 (2).

2. If the information obtained under subd. 1.e. indicates that the person has been denied a license, continuation or renewal of a license, certification, a contract, employment or permission to reside at an entity, the agency need not obtain the information specified in subd. 1. a. to d.

3. The department or school board, as applicable, shall obtain the information specified under subd. 1. with respect to a person who is under 18 years of age but not under 12 years of age and who is an employe, prospective employe, contractor, prospective contractor or otherwise a nonclient resident or prospective nonclient resident of a day care center licensed under s. 48.65, Stats., or a day care program established under s. 120.13 (14), Stats.

(b) Entity responsibilities. 1. a. Subject to par. (a) 2. and 3., an entity shall obtain all of the information under par. (a) 1. with respect to a person who is an employe, prospective employe, contractor or prospective contractor of the entity and who has or is expected to have access to the entity's clients.

b. This subd. 1. a. does not apply with respect to a person the entity employs or contracts with to perform infrequent or sporadic services, including maintenance

services and other services that are not directly related to the care or treatment of a client.

2. a. If an entity wants to hire or contract with a person for whom, within the last 4 years, the information required under par. (a) 1. a. to c. and e. has been obtained either by another entity or by a temporary employment agency, the entity may request the information required under par. (a) 1. a. to c. and e. from that other entity or temporary employment agency. Information under par (a) 1. d. shall be obtained from the department.

b. If an entity cannot obtain the information required under par. (a) 1. a. to c. and e. from another entity or from a temporary employment agency or if an entity has reasonable grounds to believe that the information obtained from another entity or from a temporary employment agency is no longer accurate, the entity shall obtain that information from the sources under par. (a) 1. a. to c. and e. and from the department under par. (a) 1. d.

3. a. An entity may enter into and shall retain on file an agreement or contract with any temporary employment agency identified under subd. 2.a. or with any college or university, including any vocational or technical college or school, to have the temporary employment agency or college, university or school retain background information forms under s. HFS 12.20 (1) (b), completed by students or temporary employes and background checks completed under par. (a) on students or temporary employes, who as part of their curriculum must participate in clinical or practicum experiences at an entity.

b. The entity shall obtain from the temporary employment agency, university, college or technical school or college, and shall retain ~~on file~~ so that it may be promptly retrieved for inspection by the agency, a letter from the agency or school indicating the name or names of the temporary employes or students and stating that these individuals have been screened and have no backgrounds which would bar them from the entity in accordance with the provisions of this chapter. The letter shall also inform the entity of any crime of which the temporary employe or student has been convicted that does not bar the person from working at the entity or from completing a clinical experience at the entity, in order for the entity to make a decision about how substantially related the conviction is to the duties the person would be performing.

(c) Person under age 18. 1. Notwithstanding par. (a) 1. and (b) 1. a., an agency is not required to obtain the information specified under par. (a) 1. and an entity is not required to obtain the information specified in par. (b) 1. a., for a person under 18 years of age whose background information form indicates that the person is not ineligible to be employed, contracted with or permitted to reside at an entity for a reason specified in s. HFS 12.10 (2), and for whom the department, county department, child-placing agency, school board or entity otherwise has no reason to believe the person is ineligible to be employed, contracted with or permitted to reside at an entity.

2. Subdivision 1. does not apply with respect to a person under 18 years of age but not under 12 years of age who is an employe, prospective employe, contractor, prospective contractor, nonclient resident or prospective nonclient resident of a day care center licensed under s. 48.65, Stats., or contracted for or established under s. 120.13 (14), Stats., and for whom the department or school board is required under par. (a) (intro.) to obtain the information specified in par. (a) 1. or 3.

3. Subdivision 1. does not preclude an agency from obtaining at its discretion the information specified in par. (a) 1. with respect to a person described under this paragraph who is a nonclient resident or a prospective nonclient resident of an entity.

(d) Out-of-state records search. If a person who is the subject of a search under par. (a) 1. or (b) 1. is not a resident of this state, or if at any time within the last 3 years preceding the date of the search that person has not been a resident of this state, the agency or entity shall make a good faith effort to obtain from the state in which the person is or was a resident within the past 3 years preceding the date of the search information that is equivalent to the criminal history information specified in par. (a) 1. a.

(e) Armed forces records search. If a person who is the subject of a search under par. (a) 1. or (b) 1. was in a branch of the U.S. armed forces, including any reserve component, within the last 3 years, the agency or entity shall make a good faith effort to obtain the discharge status of that person, either from the discharge papers issued to the person or from the armed forces branch in which the person served. If the discharge status is other than honorable, the agency or entity shall obtain information on the nature and circumstances of the discharge.

(2) SEARCHES EVERY 4 YEARS. (a) Agency responsibilities. 1. At least every 4 years an agency shall request the information specified in sub. (1) (a) 1. for all persons who are approved to operate an entity and for all persons specified in s. HFS 12.10 (1) (b) who are nonclient residents at an entity, and the department and school board shall request the information specified in sub. (1) (a) 1. for all persons under 18 years of age but not under 12 years of age who are employes, contractors or nonclient residents of a day care center licensed under s. 48.65, Stats., or a day care program contracted with or established under s. 120.13 (14), Stats.

2. a. Except as provided in this subd. 2. b., an agency may charge an entity a fee for obtaining the information required under subd. 1. The fee may not exceed the reasonable cost of obtaining the information.

b. No fee may be charged to a nurse's assistant, as defined in s. 146.40 (1) (d), Stats., for obtaining or maintaining information if to do so would be inconsistent with federal law.

(b) Entity responsibilities. 1. At least every 4 years an entity shall request the information specified in sub. (1) (a) 1. for all persons who are employes or contractors of the entity and who have access to clients of the entity, other than for persons under 18

years of age but not under 12 years of age who are employes or contractors, or otherwise are nonclient residents of a day care center licensed under s. 48.65, Stats., or a day care program contracted for or established under s. 120.13 (14), Stats.

2. Notwithstanding subd.1., if an agency has obtained the information required under par. (a) with respect to a person who is also an employe, contractor or nonclient resident of an entity, the entity is not required to obtain that information for that person.

(3) RETENTION OF CRIMINAL BACKGROUND AND OTHER INFORMATION FILING. Agencies and entities shall ~~maintain on file~~ retain the most recent information ~~under sub. (1) (a) 1.~~ gathered as required under this section so that it may be promptly retrieved for inspection and shall comply with applicable federal and state confidentiality laws.

**APPENDIX A
CRIMES LIST
May 1999**

This document contains a list of Wisconsin crimes current as of Sept. 16, 1998. ~~THE LIST IS NOT EXHAUSTIVE.~~ The statute numbers have been provided on this table for ease in identifying crimes. Unless otherwise indicated, the crimes listed have been determined by the Department of Health and Family Services to be "substantially related" to positions covered by the Caregiver Law, secs. 48.685 and 50.065, Stats.

Crimes also charged under Ch. 939, Wis. Stats., are to be treated as provided for the companion crime, unless otherwise indicated. For example, secs. 939.05, 943.10(2) (Party to the crime, Burglary while armed) would be in the "bar with rehab" category because the list provides that "Burglary while Armed" is in that category. However, secs. 939.32, 940.01 (Attempted 1st Degree Intentional Homicide) would be in the "bar with rehab" category rather than in the "permanent bar" category because there is a special condition or comment that so indicates.

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

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

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

CRIMES LIST AS APPLIED TO EMTs

Emergency medical technicians (EMTs) are covered as follows:

- "Permanent bar" crimes apply to licensed EMTs.
- An EMT must demonstrate rehabilitation (see, s. HFS 12.12, Wisconsin Administrative Code) when there has been a finding by a governmental agency of abuse or neglect of a client or child, or misappropriation of a client's property.
- All other criminal convictions are subject to the "substantially related" analysis by the licensing agency and the employer.

KEY

- (F) = Applies if conviction was for Felony
- (M) = Applies if conviction was for Misdemeanor
- F = Conviction acts as bar (as indicated) for Foster Homes / Treatment Foster Homes
- sp = Bar applies when spouse was the victim in the offense
 - 5 yrs = Bar is for 5 years from time crime committed, then must show rehabilitation

Shaded cell = Bar or limitation applies to all programs (unless otherwise indicated)

* = Special condition applies:

1. "Bar w/ rehab" if duties of position involve transporting clients and if date of conviction is within 5 years of request for review.
 2. "Bar w/ rehab" if conviction is for attempted crime (s. 939.32, Stats.).
 3. "Bar w/ rehab" if offense was "domestic" or if date of conviction is within 5 years of request for review.
 4. "Bar w/ rehab" if date of conviction is within 5 years of request for review.
 5. "Bar w/ rehab" if offense was "domestic" or if date of conviction is within 10 years of request for review.
 6. "Bar w/ rehab" if person has access to children served by the entity.
 7. "Bar w/ rehab" if date of conviction is within 10 years of request for review.
 8. "Bar w/ rehab" if the person's duties bring person into contact with a client's property or funds and if date of conviction is within 5 years of the request for review.
 9. "Bar w/ rehab" if the person's duties bring person into contact with a client's property or funds and if date of conviction is within 10 years of the request for review.
 10. "Bar w/ rehab" if the person's duties bring person into contact with a client's property or funds or if date of conviction is within 5 years of the request for review.
 11. "Bar w/ rehab" unless person has access to children served by the entity or for Foster Care (then Permanent Bar).
 12. "Bar w/ rehab" if person has access to children served by the entity or if date of conviction is within 10 years of request for review.
 13. "Bar w/ rehab" if person has access to children served by entity or if date of conviction is within 5 years of request for review.
 14. "Bar w/ rehab" if date of conviction is within 10 years of request for review unless person has access to children served by the entity or for Foster Care (then Permanent Bar).
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**Chapter 346
Rules of the Road**

Wis. Stats.	Crime	Category I	Category II	Comment or Conditions
		Permanent Bar	Bar w/ rehab.	
346.63	Operating under influence of intoxicant or other drug (OWI or DWI)		*	*1.
	• (F) If w/ passenger < 16		*	*1.
	• (F) If 3rd or greater offense		*	*1.
346.62(4)	Reckless Driving – cause great bodily harm. (F)	F		
346.67	Hit & Run - causing great bodily harm or death. (F)		*	*1
346.67	Hit & Run - bodily harm or property damage. (M)		*	*1.

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

Wis. Stats.	Crime	Category I	Category II	Comments or Conditions
		Permanent Bar	Bar w/ rehab.	
940.01	1st° Intentional homicide		*	*2.
940.02	1st° Reckless Homicide	F		
940.03	Felony Murder	F		
940.05	2nd° Intentional homicide	F		
940.06	2nd° Reckless Homicide	F		
940.07	Homicide by negligent control of a vicious animal.			
940.08	Homicide by negligent handling of dangerous weapon, explosives or fire.	F		
940.09	Homicide by intoxicated use of vehicle or firearm.			
940.12	Assisting suicide.			
940.19 (1)	Battery. (M)		*	*3.
940.19 (2) - (6)	Battery. (F)	F- sp / 5yrs		
940.195	Battery to an unborn child.		*	*3.
940.20	Battery – Special Circumstances.	F - sp	*	*3.

940.201	Battery or threat to witnesses.		*	*3.
940.203	Battery or threat to judge.	F – 5 years	*	*4.
940.205	Battery or threat to a Dept. of Revenue Employee.	F – 5 years	*	*4.
940.207	Battery or threat to a Dept. of Commerce or DIHLR employee.	F – 5 years	*	*4.
940.21	Mayhem	F	*	*5.
940.22(2)	Sexual exploitation by therapist – sexual contact.			
940.22(3)	Sexual exploitation by therapist – duty to report.			
940.225(1)	1st° sexual assault		*	*2.
940.225(2)	2nd° sexual assault	F		
940.225(3)	3rd° sexual assault	F		
940.225 (3m)	4th° sexual assault			
940.23	Reckless Injury	F	*	*4.
940.25	Injury by intoxicated use of a vehicle		*	*1.
940.285 (2)(b)1 or 2	Abuse of vulnerable adults (F)		*	*2.
940.285 (2)(b)3, 4, or 5	Abuse of vulnerable adults (F or M)			
940.29	Abuse of residents of a penal facility.			
940.291	Law enforcement officer – failure to render aid. (M)		*	*4.
940.295	Abuse/neglect of patients & residents. (F)		*	*2.
940.295	Abuse/neglect of patients & residents. (M)			
940.30	False imprisonment.		*	*5.
940.305	Taking hostages.	F		
940.31	Kidnapping.	F		
940.32	Stalking.			
940.43	Intimidation of witnesses		*	*3.
940.45	Intimidation of victims (F or M)		*	*3.

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

Wis. Stats.	Crime	Category I	Category II	Comments or Conditions
		Permanent Bar	Bar w/ rehab.	
941.20(1)	Endangering safety - dangerous weapon. (M)		*	*3.
941.20(2) or (3)	Endangers safety - dangerous weapon	F	*	*3.
941.21	Disarming a peace officer.	F		
941.30	Recklessly endangering safety.		*	*4.
941.32	Administering dangerous or stupefying drug.		*	*4.
941.38	Criminal gang member solicitation and contact		*	*6.

**Chapter 942
Crimes Against Reputation and Civil Liberty**

Wis. Stats.	Crime	Category I	Category II	Comments or Conditions
		Permanent Bar	Bar w/ rehab.	
942.08	Invasion of privacy		*	*4.

**Chapter 943
Crimes Against Property**

Wis. Stats.	Crime	Category I	Category II	Comments or Conditions
		Permanent Bar	Bar w/ rehab.	
943.10 (1)	Burglary		*	*4.
943.10 (2)	Burglary while armed.	F	*	*7.
943.20	Theft (M)		*	*8.
943.20	Theft (F)		*	*9.
943.201	Misappropriation of personal identifying information or documents.		*	*10.
943.23(1g), (1m) or (1r)	OMVWOC	F	*	*7.
943.32 (1)	Robbery (F)		*	*4.

943.32 (2)	Robbery w/ dangerous weapon.	F	*	*7.
943.50	Retail theft		*	*8.

**Chapter 944
Crimes Against Sexual Morality**

Wis. Stats.	Crime	Category I	Category II	Comments or Conditions
		Permanent Bar	Bar w/ rehab.	
944.20	Lewd & lascivious behavior		*	*7.
944.205	Photographs, motion pictures, videotapes, or other visual representations showing nudity.		*	*4.

**Chapter 946
Crimes Against Government and Its Administration**

Wis. Stats.	Crime	Category I	Category II	Comments or Conditions
		Permanent Bar	Bar w/ rehab.	
946.43	Assaults by prisoners		*	*4.
946.74(1)	Aiding escape from mental institution. (M)		*	*4.
946.74(2)	Aid escape from mental institution (F)		*	*4.

**Chapter 947
Crimes Against Public Peace, Order and Other Interests**

Wis. Stats.	Crime	Category I	Category II	Comments or Conditions
		Permanent Bar	Bar w/ rehab.	
947.013	Harassment (M or F).		*	*3.

**Chapter 948
Crimes Against Children**

Wis. Stats.	Crime	Category I	Category II	Comments or Conditions
		Permanent Bar	Bar w/ rehab.	
948.02(1)	1st° sexual assault of a child.		*	*2.
948.02(2)	2nd° sexual assault of a child.	F		

	<ul style="list-style-type: none"> if person was, at the time of assault, more than 4 years older than the child. 		*	*2.
948.02(3)	Sexual Assault of a Child - Failure to Act	F		
948.02(3m)	Sexual Assault of a Child - Penalty enhancement; sexual assault by certain persons	F		
948.025	Repeated acts of sexual assault of same child.	F		
	<ul style="list-style-type: none"> if child has not attained the age of 13 		*	*2.
	<ul style="list-style-type: none"> if child was over 13 but under 16 and the person was more than 4 years older. 		*	*2.
948.03 (2)(a)	Physical Abuse of a child – Intentional - Cause Great Bodily Harm		*	*2.
948.03 (2)(b) or (c)	Physical Abuse of a child – Intentional - Cause Bodily Harm	F		
948.03(3)	Physical abuse of a child – reckless	F		
948.03(4)	Physical abuse of a child – failure to act.	F		
948.04	Causing mental harm to a child	F		
948.05	Sexual exploitation of a child.	F*	*	*11.
948.055	Causing a child to view or listen to sexual activity.	F*	*	*11.
948.06	Incest with a child.	F*	*	*11.
948.07	Child enticement	F*	*	*11.
948.08	Soliciting a child for prostitution.	F*	*	*11.
948.09	Sexual intercourse with a child age 16 or older.		*	*12.
948.095	Sexual assault of student by school staff.	F	*	*12.
948.10	Exposing genitals or pubic area.			
948.11 (2)(a) or (am)	Exposing child to harmful material or harmful descriptions or narrations. (F)	F*	*	*11.
948.11 (2)(b)	Exposing child to harmful material or harmful descriptions or narrations. (M)		*	*13.
948.12	Possession of child pornography.	F*	*	*14.
948.13	Child sex offender working with children.	F*	*	*14.
948.20	Abandonment of a child.	F	*	*4.
948.21(1)	Neglect a child – result in death. (F)	F		
948.21(1)	Neglecting a child. (M)			

948.22	Failure to support. (F)	F		
948.23	Concealing death of child.	F		
948.24	Unauthorized placement for adoption.	F		
948.30	Abduction of another's child; constructive custody.	F*	*	*11.
948.31	Interference with custody by parent or others.	F		
948.35	Solicitation of a child to commit a felony.	F	*	*13.
948.36	Use of a child to commit a class A felony.	F	*	*13.
948.40	Contributing to the delinquency of a minor. (F)	F	*	*13.
948.40	Contributing to the delinquency of a minor. (M)		*	*13.
948.51	Hazing (F)	F	*	*13.
948.60	Possession of a dangerous weapon by a person under 18. (F)	F		
948.605(3)	Gun-free school zones; Discharge of firearm in a school zone. (F)	F		
948.61	Dangerous weapons other than firearms on school premises. (F).	F		
948.62	Receiving stolen property from a child. (F)	F		
All other ch. 948 Crimes that are felonies		F		

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

Wis. Stats.	Crime	Category I	Category II	Comments or Conditions
		Permanent Bar	Bar w/ rehab.	
961.41(1)	Manufacture, distribution or delivery. (F)	F- 5yrs		
961.41 (1m)	Possession with intent to manufacture, distribute, or deliver. (F)	F- 5yrs		
961.41 (3g)	Possession (F)	F- 5yrs		
961.43 (1)(a)	Acquire or obtain possession of controlled substances by fraud, misrepresentation, or forgery, deception, or subterfuge. (F)	F- 5yrs		
961.43 (1)(b)	To possess/make a counterfeit substance or to duplicate the appearance, packaging, form or label of a controlled substance. (F)	F- 5yrs		
961.455	Using a child for illegal drug distribution or manufacturing purposes. (F)	F- 5yrs	*	*6.
961.46	Distribution to persons under 18. (F)	F- 5yrs	*	*6.

961.46	Distribution to persons under 18. (M)		*	*6.
961.465	Distribution to prisoners.	F- 5yrs		
961.49	Distribution of or possession with intent to deliver at or near certain places.	F- 5yrs		
961.492	Distribution of or possession with intent to deliver on public transit. (F)	F- 5yrs		
961.575	Delivery of drug paraphernalia to a minor. (M)		*	*6.
All other 961 offenses that are Felonies		F- 5 yrs		

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 Lcean
Secretary

SEAL:

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

To repeal HSS 129.03(1), 129.10(2)(b) and 129.11; to renumber HSS 129.10(2)(a); to amend HSS 129.06, 129.03(10) and (11m), 129.07(2)(f)2.g. and 129.12(2) and Note; 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.